

Contemporary Law Review



NATIONAL LAW UNIVERSITY
NAGPUR

Vijender Kumar & Vidhi Singh - *Divorce by Mutual Consent among Hindus: Law, Practice and Procedure*

Sreenivasulu NS & E.Vijaya Kumar - *Law Relating to Biotechnology: Issues and Challenges*

Anand Pawar & Deepti Singla - *DNA Fingerprinting: An Analysis of Prevailing Scenario*

Naresh Kumar Vats & Urmil - *Environmental Justice in India and role of National Green Tribunal*

Manish Yadav - *Regulation in Electricity Sector and Protection of Consumer Rights: A Critical Analysis*

Shaik Nazim Ahmed Shafi - *Public-Private Partnership: A focus on the development of stadiums in India*

Anindhya Tiwari - *International Tax Treaties and Developing Indian Economy: An Analysis*

Shane Jessee Ralston - *Can Pragmatists be Constitutionalists? Dewey, Jefferson and the Experimental Constitution*

Shreya Mishra - *The rising failure of State Sovereignty in contemporary International Law*

Madhukar Sharma & Sopan B Sindhe - *Rhetoric and Poetics in Politics and Justice*

Debasree Debnath - *Contemporary approaches towards restitution of conjugal rights : A Socio-legal study*

Rashmi Patowary - *Tribal Customary Laws vis-à-vis women's status in Northeast India: Combating climate change*

Saptarishi Dash & Megha Purohit - *International Criminal Court and United Nations Security Council : Deciphering the power politics*

STUDENT SECTION

Niharika Behl & Gargi Singh - *Obscenity and freedom of speech and expression*

CASE COMMENT

V.P. Tiwari - *State of Tamil Nadu v. K. Balu*

Ragni P. Khubalkar - *The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services*

Contemporary Law Review

Volume 1, Number I

2017

Hon'ble Shri Justice S.A. Bobde
Judge, Supreme Court of India &
Chancellor, MNLU, Nagpur
Chief Patron

Prof. (Dr.) Vijender Kumar
Vice-Chancellor
MNLU, Nagpur
Patron

Editorial Advisory Board

Hon'ble Dr. Justice D.Y. Chandrachud
Judge, Supreme Court of India
Shri P. S. Narsimha
Additional Solicitor General
Prof. (Dr.) Ranbir Singh
Vice-Chancellor, NLU, Delhi
Prof. (Dr.) R. Venkata Rao
Vice-Chancellor, NLSIU, Bangalore
Prof. (Dr.) John Phillips
King's College London, UK
Prof. (Dr.) Manoj Kumar Sinha
Director-ILL, New Delhi
Prof. (Dr.) Sital Kalantry
Cornell Law School, NY, USA

Editorial Board

Editor
Prof. (Dr.) Naresh Kumar Vats
Professor of Law

Co-Editors

Prof. Ramesh Kumar Chamarti
OSD (Academics)
Dr. Anirban Chakraborty
Associate Professor of Law
Dr. Manish Yadav
Assistant Professor of Law
Dr. Ragini P. Khubalkar
Assistant Professor of Law

Note to Contributors: Manuscripts, Editorial correspondence and Style-sheet requisitions should be addressed to the Editor, Contemporary Law Review (CLR), The Maharashtra National Law University Nagpur, Judicial Officers' Training Institute (JOTI), Civil Lines, C.P. Club Road, Nagpur-440001, Maharashtra, India, for soft material use E-mail : mnlunagpur17clr@gmail.com.

Price Rs. 300/- (Rupees three hundred) or US \$ 50 (Fifty)

Mode of Citation : 1CLR2017<Page No.>

Copyright © 2017 Contemporary Law Review (CLR). Any reproduction and publication of the material from the text without the prior permission of the publisher is punishable under the Copyright Law.

Disclaimer: The views expressed by the contributors are personal and do not in any way represent the opinion of the University.

Contemporary Law Review

Volume 1, Number I

2017



NATIONAL LAW UNIVERSITY
===== **NAGPUR** =====

TABLE OF CONTENTS

Message from Chief Patron		iii
Message from Patron		v
Editorial		vii
Divorce by Mutual Consent among Hindus : Law, Practice and Procedure	<i>Vijender Kumar & Vidhi Singh</i>	01
Law Relating to Biotechnology: Issues and Challenges	<i>Sreenivasulu NS & E.Vijaya Kumar</i>	18
DNA Fingerprinting : An Analysis of Prevailing Scenario	<i>Anand Pawar & Deepti Singla</i>	28
Environmental Justice in India and Role of National Green Tribunal	<i>Naresh Kumar Vats & Urmil</i>	34
Regulation in Electricity Sector and Protection of Consumer Rights : A Critical Analysis	<i>Manish Yadav</i>	51
Public-Private Partnership : A focus on the Development of Stadiums in India	<i>Shaik Nazim Ahmed Shafi</i>	69
International Tax Treaties and Developing Indian Economy : An Analysis	<i>Anindhya Tiwari</i>	78
Can Pragmatists be Constitutionalists? Dewey, Jefferson and the Experimental Constitution	<i>Shane Jessee Ralston</i>	93
The Rising Failure of State Sovereignty in Contemporary International Law	<i>Shreya Mishra</i>	114
Rhetoric and Poetics in Politics and Justice	<i>Madhukar Sharma & Sopan B. Sindhe</i>	127
Contemporary Approaches Towards Restitution of Conjugal Rights : A Socio-legal study	<i>Debasree Debnath</i>	136
Tribal Customary Laws vis-à-vis Women's status in Northeast India : Combating Climate Change	<i>Rashmi Patowary</i>	156

International Criminal Court and United Nations Security Council : Deciphering the Power Politics *Saptarishi Dash & Megha Purohit* 164

STUDENT SECTION

Obscenity and Freedom of Speech and Expression *Niharika Behl & Gargi Singh* 177

CASE COMMENT

State of Tamil Nadu v. K. Balu *V.P. Tiwari* 186

The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services *Ragni P.Khubalkar* 195

MESSAGE FROM THE CHIEF PATRON

Justice S. A. Bobde
Judge
Supreme Court of India



7, Krishna Menon Marg,
New Delhi-110011
Tel. : 23017448

September 4, 2017

MESSAGE

It gives me a sense of pride and pleasure on the publishing of its flagship faculty journal by the Maharashtra National Law University, Nagpur.

The maiden issue of Contemporary Law Review- CLR 2017 is a remarkable initiative by the Institution towards diversifying legal academic literature. The contributors have lent their expertise to a broad spectrum of topics ranging from international law to customary law. A scholarly exposition, CLR 2017 encapsulates an impressive range of subjects in law and brings new insights into the existing academic scenario.

I congratulate Prof. Vijender Kumar and his research team for their commendable efforts and extend my best wishes to them in this endeavor. I hope CLR 2017 cultivates fresh scholarly dialogues amongst scholars and becomes a handbook for the future proving valuable to all stakeholders in the academia.



[S.A. Bobde]

MESSAGE FROM THE PATRON

It gives me immense pleasure in bringing to you the maiden issue of the **Contemporary Law Review (CLR)**, a peer reviewed Journal of the University. The Journal is harbinger to promote and to advocate for critical and quality research under the aegis of Maharashtra National Law University, Nagpur.

The first volume containing first issue of the faculty run peer reviewed Journal is in the hands of its readers, which is the outcome of a competent and committed team of faculty colleagues who worked tirelessly and brought this Journal within a short span of time. The quality of research papers published in the Journal bears testimony to the commitment of the Journal to explore new horizons of research and learning. The present issue contains the contribution of research papers from faculty members from within the country and abroad, advocates, research scholars and law students from all parts of the country.

Recently, the University Grants Commission, New Delhi has taken the initiative to provide a comprehensive list of Journals. To get academic benefit of qualitative publication, one must published his/her research paper in the Journal enlisted in the list of Journals approved and provided by the UGC. Further, any educational institution is known by its professionally competent, technically sound and socially sensitive graduating students, amount of qualitative research done by its faculty members and publication of journals, books and periodicals. Therefore, it has become necessary for the MNLU, Nagpur to produce qualitative publications. As qualitative and critical legal research constitute as one of the most important mandates of the leading Law Schools throughout the globe. Research findings enhance the proficiency and provide an environment which is conducive for teaching and learning. Far reaching changes are taking place in the fields of legal profession which includes techno-legal education, socio-legal education, justice education and policy reforms. The publication of the Contemporary Law Review (CLR) shall make a definite impact on academic review of government policy, legislative enactments and judicial pronouncements and shall provide a lot of information to the prospective research scholars for their further socio-legal research. Therefore, the Journal is an attempt to provide an intellectual platform for contemporary and philosophical fraternity across the globe. I hope the readers would find the present issue of Contemporary Law Review

(CLR) interesting and a good basis of information. Our reader's response will always be a source of inspiration for the editorial team of the Contemporary Law Review to improve further the quality of our research publications.

I wish to put on record the professional advice and guidance provided by Hon'ble Members of the Editorial Advisory Board of the Journal to the Editorial Team. I also wish to thank each and every member of the Editorial Team of Faculty colleagues for advertising, consolidation and editing all the research papers published in the maiden issue of the Journal. I feel indebted to all the contributors of Contemporary Law Review (CLR) for their valuable and intellectual contribution. I am sure they would be continuing their support in regular running of the Journal in future as well.

I hope the Journal would be a valuable addition to the contemporary research world in a variety of ways. The information published in the Journal would be significant source of future research and it would be useful for teachers, advocates, judicial officers, research scholars and the law students. I wish to convey my best wishes to editorial team, contributors, faculty members and students of MNLU, Nagpur for their finest academic endeavours and hope to see success of the Journal in the hands of its readers.



(Vijender Kumar)

EDITORIAL

The Maiden Issue of Volume 1 Number I, 2017 of **Contemporary Law Review** is a thoroughly erudite compilation of scholarly research covering the broad range of ideas in the domain of Family Law, Intellectual Property Law, Environmental Law, Energy Law, Constitutional Law, Business Law, International Law, Human Rights, Information Technology and Socio-legal issues. All these research articles deal with issues with far-reaching socio-legal implications.

Prof. (Dr.) Vijender Kumar and *Ms. Vidhi Singh* through their research discussed on divorce by mutual consent and use of ICT keeping in mind the peaceful resolution and to maintain the privacy of the parties under Hindu law asserting certain objectives to be accomplished. The paper provides with the insight of provisions of divorce by mutual consent under various other matrimonial laws in India. They also highlighted that the divorce by mutual consent which came into existence after the fault theory. Now, it seems that the society has civilised and lawmakers feel that the married couple not to be kept together in dead wedlock just by using the law as a tool and their happiness, comfort and well-being must be respected by law otherwise marriage institution per se may lose its own sanctity.

Prof. (Dr.) Sreenivasulu N.S. and *Prof. (Dr.) E.Vijaya Kumar* have drawn the inference through their research paper titled “*Law relating to Biotechnology: Issues and Challenges*” that the biotechnology sector is facing the large number of legal issues and challenges. The regulation of biotechnology is done from different perspectives and the law in this regard will have multiple dimensions while addressing number of concerns. The law relating to biotechnology have to address a wide range of issues concerning trade, environmental, intellectual property, consumer protection, and human rights, ethical, social and religious issues both at international and national level.

Prof. (Dr.) Anand Pawar and *Ms. Deepti Singla* has drawn conclusion in their research paper that it is necessary to incorporate DNA technology in an Indian legislation or to draft an exclusive independent enactment on the use of DNA technology in Indian Courts, so that this technique could be effectively used as valuable in the administration of Justice.

Prof. (Dr.) Naresh Kumar Vats and *Ms. Urmil* have drawn the inference from various provision of National Green Tribunal Act, 2010 through their research paper in critical manner and considered that The NGT is the most consistent and progressive environmental authority in India. They have also suggested to create more zonal branches of sitting of NGT and continue to play its proactive roles where the act are detrimental to the environment. They have also support to extend the five year limit for adjudication of disputes under Section 14(3) of NGT Act for claim of damages in addition to inclusion

of academician and senior advocates as member thereof, having ground root experience and conversent with practical difficulties.

Dr. Manish Yadav through his research paper discussed the various provisions for consumer protection provided under the existing electricity laws and The Consumer Protection Act 1986 with the help of various cases. He also reviewed the various regulations of State Regulators and Electricity Policy in a critical manner. *Dr. Shaik Nazim Ahmed Shafi* has drawn the inference through his research paper that a National Policy on Infrastructure on Stadiums is the need of the hour. Greenfield and Brownfield Infrastructure Policies on Stadiums must be initiated in at par with other existing Infrastructure Policies of various sectors in India.

Mr. Anindhya Tiwari highlighted the various aspects of double taxation avoidance agreements and its benefit to the national economy in his research paper. It provides the conceptual framework of transfer pricing, Treaty shopping Permanent Establishment and comprehensive international corporate and individual taxation. *Dr. Shane Jesse Ralston* in research paper concluded with a final evaluation of the extent to which Deweyan experimentalism can accommodate constitutionalism in its various forms.

Ms. Shreya Mishra has discussed about the emergence of ‘Fragile States’ and ‘Failed States’ and their impact on the sovereignty of the States. She also discussed the present geopolitical situation in Iraq, Ukraine, Somalia, Nigeria and similar States in order to gauge whether the four characteristic features elucidated in the Montevideo Convention of 1933 are sufficient to identify a State.

Dr. Madhukar Sharma and *Mr. Sopane Sindhe* have discussed about the concept of Rhetoric and relate it with justice and politics. They draw the conclusion that all socio-political, literary discourse or day to day communication has the elements of Rhetoric- *logos*, *pathos*, and *ethos* used as modes of convincing. In Indian Parliament, judiciary and politics, there has been a versatile experience of the use of rhetoric. *Ms. Debasree Debnath* in her research paper analysed that the active role played by the Indian Judiciary in identifying and highlighting the problems of the issues related to the restitution of conjugal rights.

Ms. Rashmi Potwary stated in her research paper that the customary laws and practices of the northeast India will have to be filtered and moulded to ensure that women in the region are made independent, self-reliant and self-sufficient in all aspects. It is only then, that they shall be able to effectively contribute towards steps for coping climate change. *Mr. Saptarishi Dash* and *Ms. Megha Purohit* reflected that the ICC is expected to be the primary mechanism for the delivery of international criminal justice. But its functioning is riddled with power-politics. This is especially true in the context of its intricate relationship with the United Nations Security Council.

Ms. Niharika and *Ms. Gargi* in their research paper explained that how Indian courts have interpreted the term Obscene and what test is applied

before declaring a piece as obscene. They concluded that there is no particular statute governing the same which can throw a light on the ambiguity that exists in this sphere. There's a dire need for the legislature to enact a law which entirely focuses on obscenity in order to eliminate the confusion and unreasonableness that exists.

Dr.V.P. Tiwari has also critically analysed the decision in the case of *State of Tamilnadu v. K. Balu* that this judgement of the Apex Court is one of the best judgements pronounced in recent times and would go a long way in saving millions of lives from accidental deaths on highways. *Dr. Ragni P. Khubalkar* analysed the judgment in the case of *the Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy services*-that decision will prove to be the biggest landmarks in Intellectual Property Rights jurisprudence. Significantly, it spells out that private rights will have to yield to larger social goals which have to be interpreted widely.

The issue aligns with our aim of engaging scholarly exchange of ideas for furthering the cause of contributing to the existing body of research in academia and all the research papers are based on the studies and analysis of contributors in which they have made definite recommendations.

We extend our gratitude to the all the contributors for their well-researched articles and acknowledge their contribution in furthering the goal of bringing about legal and judicial reforms through their scholarship.

(Editorial Committee)

DIVORCE BY MUTUAL CONSENT AMONG HINDUS : LAW, PRACTICE AND PROCEDURE

Vijender Kumar* & Vidhi Singh^φ

ABSTRACT

Divorce has emerged as a very prospective outcome of marriage, questioning the truth of saying that marriages are 'made in heaven'. In modern era with the advancement of education, information and communication technology and growth of understanding the social stigma of divorce is fast disappearing. It is no odder to come across a divorce even in middle-class society. In fact, marriage is a condition precedent to divorce. Accordingly, divorce is the 'dissolution of a valid marriage in law'. The present paper deliberates on divorce by mutual consent under Hindu law and asserts certain objectives to be accomplished. First, this paper essentially focuses on whether the cooling period of six months for the decree of divorce by mutual consent as provided under the Hindu Marriage Act 1955 should be made mandatory or optional. Secondly, it is indispensable to focus on whether consent can be unilaterally withdrawn or not. Thirdly, the paper would analysis whether mere silence at the second stage would tantamount to withdrawal or not. Finally, the paper highlights that the divorce by mutual consent which came into existence after the fault theory. It seems that the society has civilised and lawmakers feel that the married couple not to be kept together in dead wedlock just by using the law as a tool and their happiness, comfort and well-being must be respected by law otherwise marriage institution per se may lose its own sanctity.

Keywords: *Marriage Institution, Matrimonial Remedy, Divorce, Mutual Consent, Cooling Period, Withdrawal of Consent, ICT Mechanism, Court Proceedings, Jurisdiction.*

Introduction

Since independence there have been significant changes in the status of women, socio-economics and legal sphere of life, along with significant changes in family law, that have reflected social changes. However, these changes have not been as far reaching as some might have desired but slowness in such matters is to be expected. Eventually, the dead weight of centuries cannot easily be put aside. Under old Hindu law marriage was considered to be sacramental union which could not be dissolved. A need was felt for reforming the Hindu matrimonial law and various changes were introduced in the year 1955, while codified and amended the previous Hindu laws. As far as the Hindu marriages

* Professor of Law and Vice-Chancellor, Maharashtra National Law University, Nagpur, e-mail-vijenderkumar@yahoo.com.

φ Student, B.A.LL.B., Symbiosis Law School, Hyderabad.

were concerned the Hindu Marriage Act was passed in the year 1955, the Act provided provisions for marriage and also provided matrimonial remedies, which were not part of uncodified Hindu law but were introduced as influenced by English matrimonial law.

A marriage under the Hindu Marriage Act no longer remains an indissoluble union as various matrimonial remedies were introduced in 1955. The remedy of divorce, a formal dissolution of marriage solemnised properly, also found central place of the Hindu Marriage Act. Reformers felt that Hindu law was reformed, modern and progressive, as adaptability of changes by the Hindu society had been its core philosophy of development. Unfortunately, if we examine and evaluate the status of women under Hindu law, it is difficult to agree with the argument that it is progressive, that it is reformed and that it is modern. The various matrimonial remedies introduced were desired to help the hapless women, but the experiences have proved otherwise. The much desired concept of introducing matrimonial remedies in case of impediments to a marriage has created more problems for the women than it has solved. The entire scheme of the Hindu Marriage Act 1955 was covered by the underlying principle that the ship of the married life should not be wrecked in the first storm of life.

Divorce is known as 'formal dissolution of a valid marriage in law', in a way other than the death of one of the spouses, so that the parties are free to remarry either immediately or after a certain period of time, if any of the parties wishes to do so. For the first time among Hindus, the divorce was introduced in 1955 in the form of the Hindu Marriage Act 1955. However, before the commencement of the Hindu Marriage Act 1955, there were the Acts in some of the states providing for divorce in certain circumstances, *viz.*, the Bombay Hindu Divorce Act 1947, the Madras Hindu (Bigamy, Prevention and Divorce) Act 1949, and the Saurashtra Hindu Divorce Act 1952. These Acts were repealed by Section 30 of the Hindu Marriage Act 1955.

Under the Hindu Marriage Act 1955 there are nine grounds of divorce and they are based on the fault theory of divorce, *i.e.*, adultery; desertion, cruelty; conversion to another religion; incurable insanity or mental disorder; virulent leprosy; venereal disease in a communicable form; renunciation of the world; and presumption of death (*i.e.*, seven years unheard absence). The four additional grounds of divorce on which wife alone can sue, *i.e.*, (a) another wife of the husband's pre-Act polygamous marriage being alive; (b) the husband has been guilty of rape, sodomy or bestiality; (c) cohabitation between the parties has not taken place for one year or upwards after the passing of an order awarding maintenance to the wife under Section 125 of the Code of Criminal Procedure 1973, or under Section 18 of the Hindu Adoptions and Maintenance Act 1956; and (d) the marriage of the wife (whether consummated or not) was solemnized before she attained the age of fifteen years and she had repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Divorce by mutual consent is one of the grounds of divorce under the Hindu Marriage Act 1955 for Hindus. Wherein both the parties, *i.e.*, the husband and the wife come to a mutual understanding that the marriage be dissolved amicably.

Bertrand Russell once observed that “*perhaps easy divorce causes little unhappiness than any other system*”.¹

Divorce by Mutual Consent

Divorce by mutual consent among Hindus was introduced in 1976 through amendment into the Hindu Marriage Act 1955. The amendments of 1976 into the principal Act added Section 13-B providing divorce by mutual consent. This provision is retrospective as well as prospective in its effect. If both the parties to a marriage have agreed to dissolve their marriage, they may do so in a more civilized and cultured way than by quarrelling between themselves in a court. They may file petition together under Section 13-B in a District Court, court of competent jurisdiction,² that they may be granted a decree of divorce. According to sub-section (1) of Section 13-B, the following essentials are required: (i) that the spouses have been living separately for one year or more; (ii) that they have not been able to live together; and (iii) that they have mutually agreed that the marriage should be dissolved.³ However, Section 7 of the Family Courts Act 1984 also deals with the dissolution of marriage.

In *Bipin Kumar Samal v. Minarva Swain alias Samal*⁴ case, the Orissa High Court held that where marriage between the parties has irretrievably broken down and any chance of reunion between the parties seems to be impossible, moreover as per the terms of settlement, the husband has already deposited entire amount of permanent alimony and returned all articles of *stridhana* to the wife; further the court has found that compromise between the parties have been lawfully entered into and no coercion or undue influence was used, hence, a decree of divorce on mutual ground was passed. In *Smt. Shilpa Chaudhary v. Principal Judge*⁵ case the Allahabad High Court held that recording of statement of witness through video conferencing is permissible as word ‘hearing’ used in Section 13-B does not necessarily mean that both the parties have to be examined.

Observance of Statutory Period

Section 13-B of the Hindu Marriage Act enables the parties to a marriage to obtain a decree for divorce by mutual consent by a joint petition to the court. In disposing of any application under this Section 13-B of the Hindu Marriage Act for leave to present a petition for divorce before one year from the date of marriage, the court shall see the welfare of minor children and also made effort for reconciliation.⁶ Further, where both the parties to a marriage together filed petition for dissolution of marriage by a decree of divorce before the District Court stating that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage shall be dissolved.⁷ In *Kiritbhai Girdhar Bhai Patel v. Prafulabeen Kirit Bhai Patel*⁸ case the Gujarat High Court held that the

1 Bertrand Russell, II AUTOBIOGRAPHY OF RUSSELL; H.S. Ursekar, “*Divorce by Mutual Consent*”, The Hindu Marriage & Special Marriage Acts, p. 233.

2 Section 19, the Hindu Marriage Act 1955.

3 *Miten v. Union of India* (2008) 5 Mah LJ 27.

4 AIR 2016 Ori 41.

5 AIR 2016 All 122.

6 Section 14(2), the Hindu Marriage Act 1955.

7 Section 13-B (1), the Hindu Marriage Act 1955.

8 AIR 1993 Guj 111.

expression ‘*have been living separately*’ under sub-section (1) of Section 13-B of the Hindu Marriage Act does not necessarily mean that the spouses have to live in different places. What the expression would seem to require is that they must be living apart, *viz.*, not living with each other as ‘husband’ and ‘wife’. Merely going abroad jointly and staying under one roof is not living as husband and wife. It cannot be a ground to refuse divorce when marriage has not been consummated for more than one year. The parties have mutually agreed that their marriage should be dissolved. The same may proceed from one party to the other or from a third party to both the parties.⁹

After filing of a petition under sub-section (1) of Section 13-B, the court shall not proceed with it for six months, considered to be cooling period. This is for the purpose of giving time to the parties to re-think over their decision of divorce. At the end of six months, the court will not proceed with the petition *suo moto*. If the parties move the court thereafter, then only the court will proceed. The motion must be made by both the parties. The parties have to make a motion not later than eighteen months from the date of the filing of the petition. This is a mandatory provision. The petition will not be heard beyond said period. It is however; open to the parties to withdraw the petition in the meantime. If the second motion is not made within the period of eighteen months, then the court is not bound to pass a decree of divorce by mutual consent.¹⁰

After six months the presentation of the petition and not later than eighteen months after the said date of hearing for second motion, if the petition is not withdrawn in the meantime, the court on satisfaction and on hearing the parties, may pass a decree of divorce declaring the marriage to be dissolved with effect from the date of decree.¹¹ The court may also allow the parties to amend a petition for divorce under Section 13-B to be converted into a petition for divorce by mutual consent. This is possible even at the appellate stage. When a decree of divorce under Section 13-B is passed on such an amended petition, the effect is that all the past allegations and cross-allegations made by the parties against each other during the hearing of the petition under Section 13-B are quashed. In *Arun Chawla v. Reena*¹² case the court held that once an earlier application for dissolution of marriage on some other ground is sought to be converted into one for dissolution of marriage on mutual consent, and if such prayer is allowed, the period of six months would be reckoned from the original date of filing of the application.

It is also important to know that it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of a divorce, unless the date of the presentation of the petition one year has elapsed, since the date of marriage.¹³ A petition may be allowed within one year of the marriage on the

9 R.K. Agarwala, HINDU LAW, 21st ed. 2003, p. 96.

10 *Hitesh Bhatnagar v. Deepa Bhatnagar* AIR 2011 SC 1637:(2011) 5 SCC 234.

11 Section 13-B (2), the Hindu Marriage Act 1955.

12 1(1999) DMC 18 (P&H-DB); *Sureshta Devi v. Om Prakash* AIR 1992 SC 1904: (1991) 2 SCC 25; *Krishna v. Attar Singh* 1 (1992) DMC 211 (Del); *Padmini v. Hemant Singh* 1 (1994) DMC 465 (MP); *Hari Prakash Mishra v. Shakuntala Mishra* II (1995) DMC 202; *Neeranjana Kumar v. Veena Rani* 1995 (2) Pun LR 200.

13 Section 14(1), the Hindu Marriage Act 1955.

ground that the case is one of exceptional hardship to the petitioner or exceptional depravity on the part of the respondent, but it appears to the court that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court, may if it pronounces a decree, may do so subject to the condition that the decree shall not have effect until after expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after expiration of the said year upon the same or substantially the same facts as those alleged in support of the petition so dismissed. Further, Section 13-B is contingent on the mutual consent of the parties to divorce. If one of the parties is not willing to give consent the court cannot pass a decree of divorce. Such a situation arose in *Jayshree v. Ramesh*¹⁴ and *Nachhattar Singh v. Harcharan Kaur*.¹⁵

Waiving off the Statutory Period

Marriage is union of two hearts and success of married life depends on the edifice built with the mutual trust, understanding, love, affection, service of caring and sharing and self-denial, further once this edifice is shaken, happy married life will be shattered into pieces. Where the marriage tie has been broken, the court has to look to the interest of the parties and welfare of the children as paramount. When it is impossible to live like the husband and wife, any compulsion to unite them will lead to social evils and disturbance of mental peace and disorder in the family, needs to be considered as the guiding principle.¹⁶ It is obligatory for courts to make last minutes efforts to save marriage but where there is no possibility of re-union and when process of divorce by mutual consent has been adopted, it is also open to court to waive six months' period. Section 13-B and 13-B(2) are only directory and not mandatory and if held to be mandatory it would frustrate much liberalised concept of divorce by mutual consent.¹⁷ However, there is no reason why two unwilling partners who hate each other should be forced to be bound for solemn-matrimonial bond for the rest of their life against their wish and will.¹⁸ Where both the husband and wife are well educated and matured to understand such decision prayed for divorce on ground of mutual consent, waiver of period of six months as prescribed under Section 13-B(2) of the Act which is directory in nature, and the couple separated for six years, can be waived and marriage can be dissolved.¹⁹

Eventually, a decree of divorce by mutual consent can be passed and is liable to be passed where the parties seek divorce by mutual consent only by resort to the specific provisions of Section 13-B of the Act and not otherwise. It is well settled that where a power is given to do certain thing in a certain way, that must be done in that way alone or not at all and all other methods of performance are necessarily forbidden. Therefore, the statutory provisions which have been

14 AIR 1984 Bom 30.

15 AIR 1986 P&H 201.

16 *Roopa Reddy v. Prabhaker Reddy* 1993 (2) HLR 334 (Ker); II (1993) DMC 274; *Chiranjeevi v. Lavanya* 1999 (2) HLR 457 (AP).

17 *K. Thuruvengadam v. Nil* (2007) 5 CTC 870.

18 *Jatender Singh v. Sonia* 1999 (1) HLR 468 (P&H); *Amandeep Singh Grover v. State of Punjab* 1999 (1) HLR 464 (P&H).

19 *Anita Sharma v. Nil* AIR 2005 Del 365; I (2005) DMC 857(Del); 2006 (1) HLR 178 (Del).

enacted for grant of divorce by mutual consent are to be adhered to and these cannot be circumvented or short circuited by resort to other procedure like Order 23, Rule 3 of the Code of Civil Procedure and grant a decree of divorce by dispensing with the requirements contained in Section 13-B of the Act.²⁰ Ordinarily the statutory period is not waived off but it has been seen that in certain hardships the courts have waived it in the larger interest of the parties to marriage and / or offspring from the wedlock. There have been conflicting judgements in this regard that whether the courts should mandatorily wait for a period of six months as given in the 13-B(2). In *Dinesh Kumar Shukla v Neeta*²¹ case it was held that the waiting period is directory in nature and it can be brought down from six months, provided the mandatory requirements of Section 13-B(1) are fulfilled, when all efforts at reconciliation failed.²² Whereas in *Hitesh Narendra Doshi v. Jesal Hitesh Doshi*²³ case it was held that “*the provision has a definite purpose and object, i.e., giving time to the parties for introspection and reconciliation. That purpose and object stares at us so clearly by the language expressed in Section 13-B(2) of the Act robbing away the right of the court from considering the petition earlier than six months.*”²⁴

In *Apurba Mohan Ghosh v. Manashi Ghosh*²⁵ case it has been clearly held that grant of a decree for divorce cannot be founded on compromise. However, the Apex Court has clearly held that when the court comes to the conclusion that the marriage has irretrievably broken down and that there is no possibility of reunion or reconciliation between the parties and that the consent is free consent not having been obtained by fraud, force or undue influence, the court shall have to pass a decree for dissolution of marriage by mutual consent as the very legislative intent behind enacting such provision would be rendered meaningless if it would render the provision to lead to a position of perpetuation or procrastination of agonies and miseries of the separated spouses despite the realization that re-conciliation was possible.²⁶

In *Shaveta Garg v. Rajat Goyal*,²⁷ it was held that waiting period of six months can be waived on concession of both the parties. In *Smt. Suman v. Ashok Chhajjer*²⁸ in a petition for divorce under Section 13-B, where both the parties appeared in person and stated that it was not possible for them to live together and to secure ends of justice for peaceful life of both the parties, a decree of divorce by mutual consent was granted.

Where parties were living separately for the last several years, it was held that waiting for notice period is not mandatory. It can be dispensed of by the

20 *P. Sunder Raj v. P. Sarika Raj* AIR 2015 P & H 83, 96-97.

21 AIR 2005 MP 106.

22 *Jayshree v. Devendra* AIR 2016 (NOC) 597 (MP).

23 AIR 2000 AP 364.

24 *Hitesh Narendra Doshi v. Jesal Hitesh Doshi* AIR 2000 AP 364, 364.

25 AIR 1989 Cal 115; 93 CWN 79; I (1990) DMC145; (1988) 2 CHN 449.

26 *Chandrakala Menon v. Vipin Menon* (1993) 2 SCC 6; *V. Bhagat v. Bhagat* (1994) 1 SCC 337; *Chandrakala Trivedi v. S.P. Trivedi (Dr.)* (1993) 4 SCC 232; *Romesh Chander v. Savitri* AIR 1995 SC 851; (1995) 2 SCC 7. See also *Harpreet Singh Popli v. Manmeet Kaur Popli* (2010) 15 SCC 316; *Priyanka Khanna v. Amit Khanna* (2011) 15 SCC 612.

27 AIR 2009 (NOC) 1640 (P&H).

28 AIR 2010 (NOC) 549 (Raj).

court.²⁹ However, the waiting period of six months provided in Section 13-B(2) of the Act cannot be curtailed in altogether a freshly instituted petition for divorce under Section 13-B of the Act. This period, however, be curtailed if divorce proceedings have been pending between them since long and they and their relations have strained every nerve to save their marriage and bring about reconciliation between them and they have felt that their marriage is a dead horse and it is of no use flogging a dead horse.³⁰

Where the effort to persuade the boy and the girl to stay together did not yield any fruitful result and their attitude clearly showed that the marriage between them had irretrievably broken down. Both of them were young and no useful purpose would be served by allowing them to continue with the protracted litigation, the court was inclined to dispense with the statutory period of six months under Section 13-B(2) of the Act and passed a decree of divorce.³¹ Similarly, in *Mandeep Kaur Bajwa v. Chetanjeet Singh Randhawa*³² where immediately after the marriage, the parties could not adjust due to different temperaments which led to strained relations between them. In view of the facts and circumstances of the case the period of one year under proviso to Section 14(1) of the Act was condoned and a decree of divorce by mutual consent under Section 13-B of the Act was granted. Further, in *Nilamben Bharatkumar Patel v. Bharatkumar Dahyabhai Patel*³³ the Gujarat High Court while taking cognizance of the facts that when the parties were residing separately for more than seven years and they had obtained customary divorce; moreover, urgency pleaded by the wife that she intended to remarry and her would be husband resides abroad requiring her to complete passport procedure at the earliest; the Court held that in such circumstances warrant of waiving period of six months is justifiable.

In *Om Prakash v. Nalini*³⁴ case an application by the husband for divorce was dismissed by the lower court. During the pendency of the appeal to the High Court a compromise memo was filed by both the parties praying for a decree of divorce by mutual consent. It was held that the appellate court could pass a decree irrespective of the limitations laid down in Section 13-B(2). It is submitted that the requirement that the court should wait for a period of six months is intended to prevent the parties from rushing to a court for decree of divorce and giving them an opportunity for *locus penitential* and hence, the requirement should not be regarded as merely directory.

In *Sureshta Devi v. Om Prakash*³⁵ case, setting at rest a conflict of decisions between different High Courts, the Supreme Court rejected the contention that the consent given at the time of the petition is irrevocable and cannot be withdrawn. The court held that the consent could be withdrawn at any time before the court passes the decree of divorce. The waiting period from six to eighteen

29 *Viji (Dr.M.G.) v. Omana*, (P.T.) 1998 (2) HLR 682 (Ker); *Merukaben Pandya v. Rakesh Kumar Jayantilal Trivedi* 2000 (1) HLR 242 (Guj).

30 *Mohinder Pal Kaur v. Gurmit Singh* 2002 (1) HLR 537 (P&H).

31 *Mona Jain v. Sanjeev Jain* 1995 (1) HLR 326 (P&H); *Suresh Kumar Batra v. Varsha Batra* 1994 (2) HLR 510 (P&H). See also *Rajesh Kumar Sharma v. Preeti Sharma* AIR 2015 Raj 26.

32 AIR 2015 P&H 160. 162-163.

33 AIR 2017 Guj 19. See also *Tallapaneni Sreekanth v. Nil* AIR 2016 (NOC) 433 (Hyd).

34 AIR 1986 AP 167; 1988 (2) ALT 410.

35 AIR 1992 SC 1904; (1991) 2 SCC 25 ; (1991) 1 SCR 274; 1991 (1) HLR 467 (SC).

months was obviously intended to give time and opportunity to the parties to reflect and to have a second thought and change in their mind. The filing of the petition does not authorise the court to make a decree of divorce during that period because the court should be satisfied about the *bona fides* and consent of the parties.³⁶ If there is no consent at the time of enquiry, the court has no jurisdiction to pass a decree of divorce by mutual consent.³⁷

Complete Justice : Supreme Court of India

The Supreme Court of India in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India, ... in such manner... prescribe.³⁸ Further, the Supreme Court may grant appropriate relief where there is some manifest illegality; where there is manifest want of jurisdiction; and where some palpable injustice is shown to have resulted. So in such situations, the Supreme Court can exercise power under Article 142 of the Constitution or powers inherited in the Court as guardian of the Constitution.³⁹ In *Ashok Hurra v. Rupa Bipin Zaveri*⁴⁰ case the Supreme Court held that in exercise of its extraordinary powers under Article 142 of the Constitution, the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the Act. The doctrine of irretrievable breakdown of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. In *Anil Kumar Jain v. Maya Jain*⁴¹ case, the Supreme Court after arriving at a conclusion that the marriage between the parties had broken down irretrievably, the court felt justified to invoke its power under Article 142 of the Constitution, and granted the relief to the parties accordingly. It was further held by the court that 'technicality should be tampered by pragmatism, if substantive justice was to be done to the parties'. Following the *Anil Kumar Jain's* case, the Supreme Court in *Devinder Singh Narula v. Meenakshi Nangia*⁴² case held that the Supreme Court could invoke its power under Article 142 of the Constitution in the best interest of the parties and allowed the appeal while granting decree of divorce by mutual consent. The court further opined that 'it is no doubt true that the legislature had in its wisdom stipulated a cooling period of six months from the date of filing of a petition for mutual divorce till such divorce is actually granted, with the intention that it would save the institution of marriage. It is also true that the intention of the legislature cannot be faulted with, but there may be occasions when in order to do complete justice to the parties it becomes necessary for the Court to invoke its powers under Article 142 in an irreconcilable situation'.⁴³

36 *Inderjit Singh Grewal v. State of Punjab* (2011) 12 SCC 588.

37 *Jyoti v. Darshan Nirmal Jain* AIR 2013 Guj 218; Vijender Kumar (rev.), J.D. Mayne, HINDU LAW & USAGE, 17th ed. 2014, pp. 396-397.

38 Article 142(1), the Constitution of India.

39 *A.R. Antulay v. R.S. Nayak* AIR 1988 SC 1531: (1988) 2 SCC 602.

40 AIR 1997 SC1266: (1997) 4 SCC 226.

41 AIR 2010 SC 229: (2009) 10 SCC 415.

42 (2012) 8 SCC 580.

43 (2012) 8 SCC 580, para 9.

In *Kiran v. Sharad Dutt*⁴⁴ which was considered in *Anil Kumar Jain*'s case, after living separately for many years and 11 years after initiating proceedings under Section 13 of the Hindu Marriage Act, the parties filed a joint application before the Supreme Court for leave to amend the divorce petition and to convert the same into a proceeding under Section 13-B of the Act. Treating the petition as one under Section 13-B of the Act, the Supreme Court by invoking its power under Article 142 of the Constitution, granted a decree of mutual divorce at the Special Leave Petition itself. In different cases in different situations, the Supreme Court had invoked its power under Article 142 of the Constitution in order to do complete justice between the parties.⁴⁵ Therefore, the Supreme Court by way of its extraordinary powers as provided under Article 142 of the Constitution can grant divorce without waiting for six months, if it is satisfied that the marriage is irretrievably broken down.⁴⁶ This power is restricted only to the Supreme Court.⁴⁷ There is still uncertainty whether High Courts and Family Courts have to mandatorily wait for a period of six months; as neither the High Court nor the Civil Court can pass such order before prescribed period.⁴⁸ In *Nikhil Kumar v. Rupali Kumar*⁴⁹ the Supreme Court waived six months' waiting period as the parties to marriage, both were educated persons, were living separately for last around five years and the respondent-wife proposed to move abroad. However, it is evident from many cases where there is no possibility of reconciliation between the parties and the marriage has been broken down irretrievably, the courts should follow the spirit of law more than the formal requirements of the section.

In *Anita Sabharwal v. Anil Sabharwal*⁵⁰ case where the Supreme Court dissolved the marriage of the parties by treating the divorce petition filed under Section 13 of the Act as one filed under Section 13-B of the Act and without waiting for expiry of statutory period of six months. The parties were married about 14 years ago and had spent the prime of their life litigating and were eager to dissolve the matrimonial tie so that they could rearrange their lives. The Supreme Court, considering the fact that all hopes to unite them together had gone, granted to the parties a decree of divorce by mutual consent to end their prolonged unhappiness. The waiving off statutory period was further cemented by the Supreme Court in *Aditi Wadhwa v. Vivek Kumar Wadhwa*⁵¹ wherein Article 142 of the Constitution of India was invoked, where both the parties have arrived at an amicable settlement of entire disputes, and while considering the fact that the parties were living separately for more than five years and respondent-husband had to go back to his work place in USA and appellant-wife

44 2000 (10) SCC 243.

45 Civil Appeal No. 5946 of 2012, arising out of SLP (C) No. 21084 of 2012, para 9.

46 *Vimi Vinod Chopra v. Vinod Gulshan Chopra* (2013) 15 SCC 547.

47 *Anil Kumar Jain v. Maya Jain* AIR 2010 SC 229. See also *Manish Goel v. Rohini Goel* AIR 2010 SC 1099; (2010) 4 SCC 393.

48 *Swapnil Verma v. Principal Judge*, Family Court, Lucknow AIR 2015 All 153.

49 AIR 2016 SC 2163.

50 (1997) 1 SCC 490.

51 AIR 2016 SC 3840.

had to think of her future. In such a situation, the Supreme Court granted decree of divorce by mutual consent by waiving statutory period of waiting.⁵²

Genuineness of Consent

Sub-section 13-B(2) of the Hindu Marriage Act 1955 requires the court of competent jurisdiction to satisfy as to whether the marriage has been solemnised and that the averments in the petition are true. It is the duty of the court to identify whether the consent for divorce is obtained by force, fraud or undue influence on the very first date of proceeding.⁵³ Once consent is given, it can be withdrawn at any time before decree of divorce is granted. In the whole process, an important requirement for grant of a divorce by mutual consent is 'free consent' of both the parties. Unless there is complete agreement between the parties for dissolution of marriage and unless the court is completely satisfied in respect thereof, it cannot grant a decree of divorce by mutual consent.⁵⁴ In case the parties have been living separately one year before the initiation of joint petition for divorce and there was no scope for re-union, normally, the court has no other option than to grant a decree of divorce. Where marriage is a failure and the parties wanted to put an end to the marital bond, the court should respect the sentiments and grant a decree of divorce. It is not the intention of the legislature to deny divorce, in spite of parties taking a conscious decision to part ways. The court cannot enlarge the scope of an enquiry under sub-section 13-B(2) of the Act and act like a fact finding authority. In other words, once it is convinced that it would not be possible for the parties to live together and that they have opted to dissolve their marriage peacefully, the endeavour of the court must be to grant the parties of divorce rather than compelling the parties to live separately even thereafter.⁵⁵

In *Mohanani v. Jijiya Bai*⁵⁶ where one party withdrew the consent it was observed by the court that the court must enquire whether the consent was genuine, willingly given and to consider whether the order of divorce in terms of the application is desirable or not. An order cannot be passed mechanically without being satisfied about the genuineness of the consent. In *Prabala Subbalakshmi v. Prabala Ananta Venkata*⁵⁷ where the wife filed an affidavit that her signature to the joint petition was obtained by fraud and coercion, and withdrew from the petition, it was held that the decree for divorce cannot be granted. In *Ramparas v. Vanamala*⁵⁸ it was held that the court cannot proceed to consider the petition on merits after the expiry of six months from the date of presentation, if one of the parties withdraws the consent or refuses to join the other to make a motion for consideration of the petition on merits. In *Pravakar Muduli v. Smt. Satyabhama Muduli*⁵⁹ the Orissa High Court held that in case of a divorce on ground of mutual consent, the consent so given must continue to *decreenisi* and must be valid consent when case is heard. A decree of divorce

52 AIR 2016 SC 3840, 3841.

53 *Sushama v. Pramod* (2009) 81 AIC 599 (Bom).

54 *Hitesh Bhatnagar v. Deepa Bhatnagar* AIR 2011 SC 1637: (2011) 5 SCC 234.

55 In *Re: A. C. Mathivanam* AIR 2016 Mad 165. See also *Smt. Chandan Kanwar v. Balwant Singh* AIR 2016 (NOC) 580 (Raj).

56 (1987) 2 HLR 709(Ker); *Damyanti v. Kirit* 1992 (2) HLR 635 (Bom).

57 (1987) 1 HLR 503 (AP).

58 (1998) 2 HLR 647 (Kant).

59 AIR 2017 (NOC) 4 (Ori).

cannot be passed if any party at interregnum stage resiles from consent so given. In this case, the wife resiled from her consent given for divorce on ground that permanent alimony as agreed between the parties was not received. Therefore, the court disentitled the husband to obtain divorce on ground of mutual consent.

In *Girija Kumari v. Vijayanandan*⁶⁰ case after the expiry of six months from filing of the petition for divorce by mutual consent, the wife was absent though she had not withdrawn the petition. It was held that the wife cannot be held to be consenting party and the consent decree passed in her absence was not valid. But the petition for divorce by mutual consent cannot be disallowed merely on the ground that the wife was absent on the date fixed for disposal although her lawyer was present who did not raise any objection to the disposal of the suit for divorce by mutual consent of the husband and wife.⁶¹ Where petition for divorce by mutual consent was filed jointly by the husband and the wife and husband continued wilful absence from next date of hearing, the inference can be drawn that consent which was initially given continues. If the husband wanted to withdraw his consent he should have taken positive stand and informed the court that he was withdrawing his consent. The order refusing to grant decree of divorce on basis of mutual consent on ground that consent of husband was missing at second stage is liable to be set aside.⁶² Hence, inquiry under Section 13-B(2) is for ascertaining averments of the parties but not for enquiring unwillingness of any party for dissolution of marriage. If any party to marriage expresses unwillingness to seek divorce; it should be treated as withdrawal of the petition of divorce on mutual consent.⁶³

In *Ram Parkash v. Savitri Devi*⁶⁴ case the Punjab & Haryana High Court held that “with the passage of time and the advancing march of civilization people began to recognise that it was somewhat inequitable that the husband should be at liberty to pick all the plums from the tree of marriage and the wife should be left only with stones. The legislature accordingly proceeded to enact a number of measures with the express object of emancipating married women from the liabilities which the Hindu law attached to them with the object of enlarging their rights and with the object of protecting the wife from the importunities of the husband. These measures introduce a fundamental change of public policy and lay down a new foundation of equality of husband and wife.”⁶⁵

A consent decree passed under Section 13-B of the Hindu Marriage Act 1955 granting divorce by mutual consent of the spouses is entirely different from a consent decree passed by a Civil Court in non-matrimonial matters. A decree passed by the consent of spouses is to be distinguished from decrees passed in other matters by a Civil Court as there are several formalities and requirements,

60 AIR 1995 Ker 159 relying on *Sureshta Devi v. Om Prakash* AIR 1992 SC 1904: (1991) 2 SCC 25 and approving *Aniruddan v. Prasanna Kumari* 1989 (1) KLT 42.

61 *Subhajyati Majumdar v. Arunima Majumdar* 1992 (1) HLR 438 (Cal).

62 *Suman v. Surendra Kumar* AIR 2003 Raj 155: I (2003) DMC 805 (Raj); 2004 (1) HLR 446 (Raj). See also *Roopa v. Santosh Kumar* AIR 2005 AII 172: 2005 (2) HLR 385 (AII); *Yash Mehta v. Arundhiti Mehta* 2006 (2) HLR 731 (Del); II (2006) DMC 474 (Del); *Pankaj Parmar v. Shikha Parmar* 2005 (2) HLR 149 (Del).

63 *Chiliveru Sai Ram Sagar v. Bandaru Haripriya* AIR 2017 Hyd 17.

64 AIR 1958 Punj 87.

65 *Ram Parkash v. Savitri Devi* AIR 1958 Punj 87, 89.

which are prescribed under Section 13-B of the Act. When there is violation of those requirements of law or there is allegation of fraud, undue influence, coercion, deception, deceit in passing a decree under Section 13-B of the Act; an appeal can be made to the next appellate court. Further, Section 28(1) of the Act is very clear that all decrees including a consent decree passed under Section 13-B of the Act is appealable.⁶⁶

Thus, the recent reforms in marriage under Hindu law confirmed due respect for and adherence to the provisions of the Constitution of India and fundamental rights incorporated there under, wherefrom commences a movement of justice in social, economic and political sphere of life.

Use of Technology in Matrimonial Proceedings

Dispensation of justice entails speedy justice and it must be justice rendered with least inconvenience to the parties as well as to the witness. If information and communications technology (ICT) facility is available for recording evidence through video-conferencing, avoids any delay or inconvenience to the parties such facilities should be restored to. There is no requirement that the witness must be required to come to the court and depose in the physical presence in the court. The Code of Civil Procedure 1908 is a procedural code and the procedures are subservient to justice. The courts have to use procedures, which facilitates the courts dispensing speedier justice. The court cannot neglect the development of law and the technology that has taken place over the years. A witness or the party may even be within the city where the court is located or abroad and for reasons it may not be possible for the witness or the party to travel to appear before the court in person, in such circumstances, to assist on the witness travelling the court and waiting for hours may not be judicious.⁶⁷

The word 'after hearing the parties' used in sub-section (2) of Section 13-B, however, does not necessarily mean that both the parties have to be examined. The word 'hearing' is often used in a broad sense which need not always mean personal hearing when there are no suspicious circumstances or any particular reason to think that the averments in the affidavit may not be true, there is absolutely no reason why the court should not act on the affidavit filed by one of the parties. The Family Courts are entitled to ascertain the views of the parties, but however, if one of the parties, appears before the Family Court and expresses no objection to an affidavit of the other party to be taken on record and is not desirous of cross-examining the deponent of the affidavit, the Family Court can entertain, unhesitatingly any such application.⁶⁸

Increasingly the Family Courts have been noticing that one of the parties is stationed abroad or out of the jurisdiction of the court. It may not be always possible for such parties to undertake trip to India, or travel from other jurisdictions to the jurisdiction of the court, for variety of unavoidable reasons. On the intended day of examination of a particular party, the proceedings may not go on, or even get completed, possibly, sometimes due to pre-occupation with any other more pressing work in the court. But, however, technology,

66 *S. Rajkannu v. R. Shanmugapriya* AIR 2016 Mad 42.

67 *Smt. Shilpa Chaudhary v. Principal Judge* AIR 2016 All 122, 124.

68 *Ibid.*

particularly, in the information and communication sector has improved by leaps and bounds. The courts in India are also making efforts to put to use the technologies available. Skype is one such facility, which is easily available. Therefore, the Family Courts are justified in seeking the assistance of any practicing lawyer to provide the necessary skype facility in any particular case. For that purpose, the parties can be permitted to be represented by a legal practitioner, who can bring a mobile device or use ICT installed in the court. By using the skype or video conferencing facility, parties who are staying abroad cannot only be identified by the Family Court, but also enquired about the free will and consent of such party. This will enable the litigation costs to be reduced greatly and will also save precious time of the court. Further, the other party available in the court can also help the court in not only identifying the other party, but would be able to ascertain the required information. The court must ensure that the party making deposition by ICT mechanism is free from any kind of coercion, external pressure, misuse of electronic devices, which may cause him / her to make such statements before the court where the court cannot judge whether he/ she is in the comfortable state of mind while making such statement as the it happens in the courtroom where in person depositions are made, otherwise it may cause threat to justice.

In *State of Maharashtra v. Dr. Praful B. Desai*⁶⁹ case it was held by the Supreme Court that advancement and technology have now, so to say, shrunk the world. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away with the same facility and ease as if he is present, and hence, 'presence' does not necessarily mean actual physical presence in the court. The court further held that an enactment of former days is thus to be read today, in the light of dynamic processing received over the years with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation year in and year out. Thus, while interpreting the law allowances would have to be made for any relevant changes that have occurred since the passing of law, and in social conditions, technology, the meaning of words and other matters. Thus, it is clear that so long as the accused and / or his pleader are present when evidence is recorded by video conferencing that evidence is being recorded in the 'presence' of the accused and would thus fully meet the requirements of Section 273 of the Code of Criminal Procedure 1973. Further, Section 4 of the Information Technology Act 2000 provides legal recognition of electronic recording of evidence. Section 65 B(i) of the Indian Evidence Act 1872 provides administration of electronic record. Hence, recording of such evidence would be as per 'procedure established by law'.

In *National Textile Workers' Union v. P.R. Ramakrishnan*⁷⁰ case Hon'ble Shri Justice P.N. Bhagwati observed that "*we cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values ... The law, must therefore,*

69 AIR 2003 SC 2053; 2003(4) SCC 601.

70 AIR 1983 SC 75; 1983 (1) SCC 228.

*constantly be on the move adapting itself to the fast changing society and not lag behind.*⁷¹ The principle of updating construction has been followed in number of cases.⁷²

Section 3 of the Indian Evidence Act 1872 provides that evidence means and includes all statements which the court permits or requires to be made before it by witnesses, in relation to the matters of fact under enquiry; evidence would, therefore, include video-conferencing which applies in all cases and not necessarily in criminal matters. Further, Order 18, Rule 4(3) of the Code of Civil Procedure 1908 provides that presence in the court does not necessarily mean physical presence. Rule 4(3) provides for recording evidence either by writing or mechanically in presence of the judge. In *Twentieth Century Fox Films Corporation v. NRI Film Production Association (P) Limited*⁷³ case the Karnataka High Court held that mechanical process includes the electronic process both for the court and commissioner. Those are empowered to adopt the mode of evidence as per the amended Indian Evidence Act.

While deciding a matrimonial matter on ‘transfer of matrimonial case’, the Supreme Court strongly observed that “*one cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of video conferencing is used where both the parties have equal difficulty and there is no place which is convenient to both the parties. We understand that in every district in the country video conferencing is now available. In any case, wherever such facility is available, it ought to be fully utilized and all the High Courts ought to issue appropriate administrative instructions to regulate the use of video conferencing for certain category of cases. A matrimonial case where one of the parties resides outside court’s jurisdiction is one of such categories. Wherever one or both the parties make a request for use of video conference, proceedings may be conducted on video conferencing, obviating the needs of the party to appear in person.*”⁷⁴ Further the court observed that “*the other difficulty faced by the parties living beyond the local jurisdiction of the court is ignorance about availability of suitable legal services. Legal Aid Committee of every district ought to make available selected panel of advocates whose discipline and quality can be suitably regulated and who are ready to provide legal aid at a specified fee. Such panels ought to be notified on the website of the District Legal Services Authorities / State Legal Services Authorities / National Legal Services Authority. This may enhance access to justice consistent with Article 39A of the Constitution.*”⁷⁵ Further, the advancement of technology ought to be utilized also

71 *Smt. Shilpa Chaudhary v. Principal Judge* AIR 2016 All 122, 124.

72 *State v. S.J. Choudhary* AIR 1996 SC 1491; 1996 (2) SCC 428; *SIL Import, USA v. EXIM Aides Silk Exporters* AIR 1999 SC 1609; 1999 (4) SCC 567.

73 AIR 2003 Kant 148.

74 *Krishna Veni Nagam v. Harish Nagam* AIR 2017 SC 1345, para 10. See also *State of Maharashtra v. Dr. Praful B. Desai* AIR 2003 SC 2053; 2003(4) SCC 601; *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav* 2005 (3) SCC 284; *Budhadev Karmaskar (4) v. State of West Bengal* 2011 (10) SCC 283; *Malthesh Gudda Pooja v. State of Karnataka* 2011 (15) SCC 330.

75 *Krishna Veni Nagam v. Harish Nagam* AIR 2017 SC 1345, para 15.

for service on parties or receiving communication from the parties. Every district court must have at least one e-mail ID. Administrative instructions for directions can be issued to permit the litigants to access the court, especially when litigant is located outside the local jurisdiction of the court. A designated officer / manager of a district court may suitably respond to such e-mail in the manner permitted as per the administrative instructions. Similarly, a manager / information officer in every district court may be accessible on a notified telephone during notified hours as per the instructions. These steps may, to some extent, take care of the problems of the litigants.⁷⁶ Finally, the Supreme Court directed that “*in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants / respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant / respondent does not result in denial of justice. Order incorporating such safeguards, viz., (i) availability of video conferencing facility; (ii) availability of legal aid service; (iii) deposit of cost for travel, lodging and boarding in terms of Order XXV of the code of civil procedure; and (iv) e-mail address / phone number, if any, at which litigant from out station may communicate; may be sent along with the summons.*”⁷⁷

Conclusion and Suggestions

Through this paper, the researchers have studied in-depth the statutory provisions on divorce under Hindu law and analysed them critically. The researchers aimed at concluding Section 13-B of the Hindu Marriage Act which provides divorce by mutual consent, wherein it provides an opportunity of amicable resolution of disputes between the parties. Eventually, it is the sanctity of marriage as institution which could not or cannot be allowed to be undermined by the whims of one of the annoying spouses. Nowadays all personal laws allow divorce by mutual consent, but their intention is not to facilitate or prompt the dissolution of marriage without any cause or reason. Though the main question of formal dissolution of marriage by invoking divorce by mutual consent remains open for future research as to when and how long to save marriage and not to hasten its dissolution; the core concern of the courts wherein parties to marriage are in hurry to dissolve their nuptial ties by mutual consent. At the same time a due care and legal protection with socio-economic support is to be provided to the women, wherein not only the materialistic comforts but also the intellect existence is to be honoured. In the opinion of the researchers, the view of the Supreme Court on divorce by mutual consent is favourable to simplification and speedy disposal of divorce proceedings. No married couple should be compelled to live with the other against his / her wishes. If this happens, internal strife and extra marital relations are promoted. The verdict in *Ashok Hurra 's*⁷⁸ case upholds this principle.

76 *Krishna Veni Nagam v. Harish Nagam* AIR 2017 SC 1345, para 16.

77 *Ibid*, para 18.

78 AIR 1992 Del 182.

From the preceding research, it has become crystal clear that there is tremendous scope for improvement of the whole procedure of disposal of matrimonial matters with sensitivity towards women. Mediation and conciliation mechanism need to be taken with more rigorously while referring disputed parties to the mediation and conciliation process during the pendency of the case. Efforts should also be made to convene the parties accept the matter be referred to the Lok Adalat for amicable settlement. In all the processes, there should be a neutral party, preferably an expert in family law, an academician in family law, a sociologist and a social worker who would assist the Family Court or Lok Adalat in disposing of the matter. This would not only speed up the process but also reduce the burden on regular courts. Thus, the parties will be able to put an end to their marriage tie without waiting for years together.

A well desired network of family courts would also serve the desired purpose. It is very essential that family courts should be established for every area in the state comprising a city or town; for such other areas in the state as it may deem necessary; and the local limits of the area to which the jurisdiction of a family court shall be extend and may, at any time, increase, reduce or alter, such limits and be allowed to use information and communications technological development in matrimonial proceedings. If adequate skilled resources and modern information and communications technology; especially trained personnel are made available to the family courts; the family court can play a vital role in not only resolving matrimonial cases faster but also would save women from economic abuse and domestic violence by the male spouses or their family members or relatives.

The researchers feel that the time has come when law universities and other universities-central, state or private, imparting legal education must come forward to offer degree, diploma and certificate courses in 'Family Disputes Resolution' (FDR). Wherein a graduate degree holder in any discipline from recognised educational institution may be trend in laws related to family law, procedural laws and allied papers. During these courses, the takers would be trend on mediation and conciliation skills. Once a pool of well trend mediators and conciliators is created; who would act as mediator and conciliator in the matrimonial matters; we are sure that these graduates would be a great help to the family courts in disposing of matrimonial matters.

LAW RELATING TO BIOTECHNOLOGY : ISSUES AND CHALLENGES

Sreenivasulu N.S.* & E. Vijaya Kumar^φ

ABSTRACT

The recent and continuing advances in life sciences clearly unfold a scenario energized and driven by the new tools of biotechnology. Biotechnology, globally recognized as a rapidly emerging and far-reaching technology, is aptly described as the “technology of hope” for its promising of food, health and environmental sustainability. At this juncture there is a need to regulate and provide for governing structure for biotechnology in the larger public interest. From a constitutional perspective, legitimate national processes and policies of decision making on biotechnology should not be circumvented by international regulatory activities.¹ Since there are no uniform acceptance levels for biotechnology across the globe the issues pertinent to policy regulation of biotechnology should be decided by the national legislative through the respective constitutional frameworks. There are number of challenges in the regulation of biotechnology and also there are number issues pertinent to establishing governing structure for biotechnology. Addressing these issues and challenges is the first and foremost concern before there can be regulation of biotechnology through establishing governing structure. The rapid development of biotechnology in the last 30 years, with applications in sectors such as agriculture, medicine industry etc., has generated varied policy responses from governments in the OECD countries. Investments in Indian biotechnology have begun with the early initiatives of government through Department of Biotechnology.²

Key Words - *Biotechnology, genetic engineering, regulation, governance, policy, intellectual property, trade, environment, ethics, human rights, public interest.*

Introduction

Though often labeled ‘biotechnology regulation’ the vast bulk of the policy literature is concerned with the construction of only one element of a regulatory regime; the normative structure of principles, standards and rules. Biotechnology regulation, as a field of public policy, has not yet matured to the point where other

* Professor of Law, School of Technology Laws, National University of Juridical Sciences, (NUJS) Kolkata, e-mail-seenukushi@yahoo.co.in.

φ Professor of Law, School of Law, Christ University, Bangalore. (Formerly Professor, Dean and Chairman, Faculty of Law, Sri Krishnadevaraya University, Anantapur, AP.

1 Danioel Wuger and Thomas Cottier, (ed.) GENETIC ENGINEERING AND THE WORLD TRADE SYSTEM, 1st ed. 2008, p. 16.

2 Sachin Chaturvedi and S.R Rao, BIOTECHNOLOGY AND DEVELOPMENT: CHALLENGES AND OPPORTUNITIES FOR ASIA, ed. 2004, p. 135.

elements of regulatory regimes notably processes for monitoring and mechanisms of behavioral modification are routinely considered or problematized.³ In this background government of India has initiated certain measures to promote biotechnology. Perhaps, the year 1982 could be mentioned as a landmark year in the history of biotechnology in India. In order to promote biotechnology there constituted an agency namely the “*National Biotechnology Board (NBTB) under the Ministry of Science and Technology. It is an apex coordinating body to identify priorities, plan, co-ordinate and oversee research and development, human resource development, industrial development of biotechnology. The same board became department of biotechnology at a later stage*”.⁴ In this write up an attempt has been made to present various concerns, issues and challenges that biotechnology industry as such has thrown open to the legal circles. Policy framework on biotechnology and legal regulation of biotechnology has been briefly highlighted. Intellectual property rights issues, trade and environment concerns in the regulation of biotechnology have been presented in nutshell. At the same time human rights concerns in biotechnology have been highlighted and Indian regulatory outer look on biotechnology has been analyzed.

Biotechnology Policy : Issues and Challenges

There are number of issues, concerns and challenges that need to be addressed and taken care of in the biotechnology policy formulation and in its legal regulation⁵. However, precisely the following issues and challenges a biotechnology policy shall address for its sustainable development:

- (i) Promotion of innovation and development for the larger needs of the people and greater benefit of the society.
- (ii) Protection of research and innovation for promoting the commercialization of innovations for boosting the economy.
- (iii) Incentivizing creative endeavors through protective mechanism and exclusive monopolies on innovations.
- (iv) Right to know/information about the technological advancements and scientific developments in the public interest.
- (v) Inventor’s right on the innovation, confidentiality and monopoly through the grant of intellectual property rights.
- (vi) Balance of interest: Conditional temporary monopoly and compulsory disclosure for maintaining the equilibrium in terms of knowledge exploitation and use.
- (vii) Promotion and regulation of trade related aspects of biotechnology including trade in GMO/LMO and adhering to international obligations.
- (viii) Issues concerning clinical trials⁶ and marketing approvals for biotechnology products and GMO.

3 Han Somsen, *THE REGULATORY CHALLENGE OF BIOTECHNOLOGY: HUMAN GENETICS, FOOD AND PATENTS*, ed. 2007, p. 19.

4 Sachin Chaturvedi and S.R Rao, *BIOTECHNOLOGY AND DEVELOPMENT: CHALLENGES AND OPPORTUNITIES FOR ASIA*, ed. 2004, p. 128.

5 Sreenivasulu NS, *LAW RELATING TO BIOTECHNOLOGY*, 1st ed. 2016, p. 73.

6 Government of India imposed moratorium on clinical trials of at least 15 GM Crops on 29/7/2014. These crops were earlier cleared for clinical trials by the Genetic Engineering Approval Committee functioning under the ministry of Environment and forests.

- (ix) Consumer concerns in trade in biotechnology and GMO, labelling, accessibility, suitability of GM food.
- (x) Technology development and transfer including development of indigenous technology and cross border transfers and issues related.
- (xi) Human Rights approach to biotechnology research and development: Issues concerning integrity, dignity, of human beings: Ensuring right to food⁷ and right to health through biotechnology.
- (xii) Ensuring bio-safety in GMO creation, trade and development, while securing human and other living beings health and safety.
- (xiii) Regulation of access to genetic and biological resources and recognizing the rights of indigenous communities, obtaining their consent and sharing of benefits.
- (xiv) Protection of biodiversity, prohibiting bio-piracy and facilitating sustainable development for the benefit of mankind.
- (xv) Addressing public policy issues and societal concerns in biotechnology research including social acceptance of biotechnology, its use and development.

It is felt that while formulating biotechnology policy one has to take into account above mentioned issues which are in themselves different challenges that are posed towards ensuring sustainable development of biotechnology as such and also for reaping the true benefits of biotechnology by the society

Biotechnology Law

Does there exist biotechnology Law? Perhaps not and in fact biotechnology law is a culmination of rules, regulations and laws pertinent to regulation of various issues, challenges and concerns involved in the biotechnology innovation, development and use. Biotechnology law basically deals with the issues concerning promotion of biotechnology, protection and enforcement of biotechnology innovations, biotech trade and business, regulations of biotechnology use and sustenance, safety in usage, storage, and transfer of biotechnology innovations, societal, ethical, religious concerns over biotechnology, consumer interests and implications of tort law, human rights law, contract law, corporate law and such other branches of business law and public law on biotechnology. When it comes to the question of regulation of biotechnology, probably the most complicated technology at hand the issues are not only concerned with conventional corporate laws, intellectual property laws⁸ but with environmental and bio-diversity laws. The special traits of biotechnology and its innovation require environmental issues to be addressed. Since biotechnology deals with living beings and creates non-natural living beings, the impact on the environment and the biological diversity needs to be checked.⁹ Non-natural living beings, their usage, storage, transfer; release into the

7 Government of India enacted National Food Security Act, 2013 to ensure right to food to the people. It is far widely recognized that objective of ensuring right food cannot be achieved without promoting and using biotechnology in Indian agriculture.

8 Sreenivasulu N.S, BIOTECHNOLOGY AND PATENT LAW: PATENTING LIVING BEINGS, 1st ed. 2008.

9 Ricardo Melendez, Ortiz and Vicente Sanchez, TRADING IN GENES: DEVELOPMENT PERSPECTIVES ON BIOTECHNOLOGY, TRADE AND SUSTAINABILITY, 1st ed. 2007, p. 153.

environment involves certain safety measures to be addressed to avoid any damage to the environment. Improper usage and release of biotechnology¹⁰ innovations might cause damage to the environment and to the ecology. We have seen controversies pertinent to biotechnology in the cases of onco-mouse, dolly sheep, beef hormone, monarch butterfly, EC biotech etc., in the regions of USA, Europe and such other developed nations. There have been many controversies over genetically modified crops in India, for instance, as seen in the case of Bt. Cotton (cash crop) and Bt. Brinjal (food crop). These case studies have also revealed that the current legal and regulatory framework with respect to biotechnology is inadequate. Nations have been endeavouring in bringing biotechnology under the regular clutches of law and policy. Nations such as USA, UK could bring in some amount of legal mechanism and policy initiatives with reference to biotechnology. Developing nations are skeptical with reference the fabric and content of the proposed legal frame works in this regard.

Intellectual Property Rights issues in Biotechnology

The development of capabilities for the effective management of Intellectual Property (IP) is an important element in securing the benefits of public and private sector research in biotechnology. Perhaps, innovations of biotechnology such as living matter or non-natural life has already become a subject matter of intellectual property and patenting.¹¹ It is now a settled matter that living innovations of biotechnology are given patent and intellectual property protection which is boosting the growth in not only the biotechnology sector but as well in number of other sectors. In this context, filings of patents both in India and abroad are critical to the growth of the Indian biotech sector. The expenses for filing patents especially outside India are prohibitive and a major barrier to effective Intellectual Property Management within the country. Whilst expenses incurred with respect to filing of patents in India is eligible for weighted deduction, similar benefit is not provided for expenses incurred with regard to filing patents outside India.¹² This is also imperative in the new WTO-TRIPS regime, which has taken effect on 1st January 2005.¹³ Administration of the new intellectual property rights regime should be improved from the perspective of biotechnology. This will be achieved by

- (i) Encouraging science and biotechnology graduates to pursue law for better understanding of IPR related issues;
- (ii) Inclusion of IPR related issues in curriculum of science colleges for facilitating filing of international patents, license negotiation, dispute resolution etc.

10 David Naidu, *BIOTECHNOLOGY AND NANOTECHNOLOGY: REGULATION UNDER ENVIRONMENTAL, HEALTH AND SAFETY LAWS*, ed. 2009, p. 33.

11 Sreenivasulu NS, *LAW RELATING TO INTELLECTUAL PROPERTY*, 1st ed. 2013, p. 362.

12 As Intellectual Property Right (IPR) creation is a pre-requisite for exports to the regulated markets, it is recommended that expenditure incurred with regard to filing patents outside India be also eligible for weighted deduction under section 35 (2AB).

13 India ratified WTO/TRIPS agreements in 1994 and the agreements have been implemented at various levels in India during the period of 1995 to 2005.

- (iii) Training scientists and biotechnology professionals in the strategy of intellectual property protection relating to assessment of patentability, prior art examination and technology transfer issues;
- (iv) Training patent attorneys on science and biotechnology subject(s) and improving mechanisms for IPR administration through reforms and creation of patent offices, patent codes and ensuring adequate availability of patent attorneys.

It is presumed that; the Department of Biotechnology engages in constant dialogue with the Government of India to address intellectual property rights and patentability issues in Biotechnology. Government of India will have to take into account WTO-TRIPS mandates in imposing and implementing its law in the biotechnology sector.

International Trade Concerns on Biotech Regulation

Perhaps, the regulatory regimes governing international trade have been slow in adapting its rules to regulate the international trade and movement of biotechnology products.¹⁴ Nevertheless, there is emerging global biotech trade regime to promote commercialization and global trade in biotechnology. The trade regime is intending to regulate trade related aspects of biotechnology while imposing certain obligations and restrictions. Basically these obligations and restrictions are for the purpose of ensuring safety and security of the environment.¹⁵ It is because; development should not be at the cost of the environment which we are supposed to hold in trust to be handed over to the future generations. The emergence of global biotech trade regime is promising to balance trade and environment in the context of biotechnology and GMO's. Perhaps, with the development and commercialization of GMOS around the world, an intense debate arose concerning the risks associated with their use. In the early 1990s, national regulation to govern the safe use of GMOs was relatively advanced in Organization for Economic Co-operation and Development (OECD) countries and practically non-existent in the developed countries. In the countries such as USA there is established legal framework for the promotion of trade in biotechnology. The large scale and commercial exploitation of biotechnology and GMO was attempted to encourage and promote under the WTO trade regime¹⁶ which controls trade relations of more than 170 countries at present across the globe. The World Trade Organization (WTO) is the principle body governing international trade which came into being in 1995.¹⁷ Much before the commercialization of biotechnology the final rounds of WTO/GATT negotiations began in 1986 which ended in 1994 and resulted in the formal establishment of WTO in 1995. Though there were some concerns regarding GMO trade to be included in the WTO trade regime, it could not be possible at the time of either

14 Robert E. Evenson and Terri Raney, (eds.), *THE POLITICAL ECONOMY OF GENETICALLY MODIFIED FOODS*, ed. 2007, p. 291.

15 Danioel Wuger and Thomas Cottier, (eds.), *GENETIC ENGINEERING AND THE WORLD TRADE SYSTEM: WORLD TRADE FORUM*, 1st ed. 2008, p. 209.

16 WTO has got membership of more than 150 countries where proposed biotechnology trade regime under the WTO system is applicable.

17 Han Somsen, *THE REGULATORY CHALLENGE OF BIOTECHNOLOGY: HUMAN GENETICS, FOOD AND PATENTS*, ed. 2007, p. 107.

final round of negotiations or even after the formation of WTO. However, in 2001 at the ministerial meeting of WTO in Doha concerns regarding GMO trade and biotechnology were raised. Launch of new round of WTO trade negotiations at Doha in November 2001 provides an opportunity to address international commercial policy conflicts pertaining to biotechnology.¹⁸ There were endeavours to constitute a regulatory framework for the governing of trade relating to GMOs. However, it is facing a crisis of legitimacy as its decision making process as it is claimed to have been undemocratic and being unable to address the concerns of the developing countries. Perhaps, the rules of international trade have been perceived to be slow in addressing the challenges of commercialization of biotechnology, in particular agricultural biotechnology. However, WTO does not specifically provide for agricultural biotechnology. The international regulatory framework does not effectively deal with GMOs. This would augment to the economic and political pressure on the developing countries, which serve to impede the development of an effective and viable legal system. The inequitable structure erodes the policy autonomy of the citizens of the developing countries. It is felt that the United States and the European Union utilize bilateral pressures to prevail upon the developing countries through instruments such as technical assistance or food aid. But this support does not come free of cost or without any strings attached. Technical assistance is provided on the condition that the recipients adopt regulatory policies that are favourable to the benefactors and food aid serves as an instrument to capture new markets for GM food products.¹⁹ In particular, the donor countries have 'captured' the governments of the recipient developing countries, with the result that aid initiatives largely serve the geopolitical and economic interests of the donors and the narrow interests of these governments. This capture in fact leads to a lack of effective democracy (that is, participation in and accountability of governmental decision-making processes) in these countries and thus efforts to ensure that international regulation responds to the needs and concerns of the citizens of these developing countries must therefore include the democratization of national governance frameworks, which is possible through adoption of meaningful institutional frameworks for public participation in biotechnology regulation.²⁰

Environment Related Concern in Regulating Biotechnology

It is observed that; GMOs are capable of spreading to the limits of their ecological niche, oblivious to international boundaries and once released into the environment the spread of a GMO can be difficult to arrest because on release they may cross national borders, spreading diseases by the airborne transport of spores and when they are released. Hence both the citizens and the environment of one country can be affected by a deliberate release originating in another

18 Sreenivasulu N.S., *LAW RELATING TO BIOTECHNOLOGY*, 1st ed. 2016, p. 184.

19 'Food Aid or Hidden Dumping? Separating Wheat from Chaff', Oxfam, 22 (Oxfam Briefing Paper No. 71, 2005) available at [http://www.oxfam.org.uk/what we do/issues/trade/downloads/bp71 foodaid.pdf](http://www.oxfam.org.uk/what-we-do/issues/trade/downloads/bp71-foodaid.pdf), (visited on April 11, 2017).

20 J.M. Migai Akech, 'Developing Countries at Crossroads: Aid, Public Participation, and the Regulation of Trade in Genetically Modified Foods', 29 *Fordham International Law Journal*. (2006) p. 265.

country, thereby creating an international concern.²¹ Since the ecological and geographic ranges of GMOs transcend political boundaries, the potential risks of deliberate releases, as well as the variation in current deliberate release regulations in individual countries, illustrate the need for an international approach to regulating deliberate releases. As a general rule, the General Agreement on Trade and Tariffs (herein after referred to as 'GATT') mandates non-discrimination, that is, equal treatment of like products from among all contracting parties²² and further, it requires national treatment, that is, equal internal treatment²³ of both imported and domestic products. The GATT agreement allows countries to take measures necessary to protect human, animal or plant life or health and relating to the conservation of exhaustible natural resources. Article XX of the GATT permits measures intended to protect human health and the environment, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.²⁴ In practice, this means that environmental and health related measures must be scientifically based and no more trade restrictive than necessary to meet their goals. If an otherwise legitimate import restriction is not based upon solid science, it will be ruled invalid by the WTO, thus limiting the ability of governments to enact protectionist trade measures under the guise of environmental protection. In determining whether a given restriction is scientifically based, the WTO looks to existing scientific research and the relevant standards set by Codex Alimentarius Commission, the International Plant Protection Convention (IPPC), and other relevant international standards.²⁵ However at the Uruguay Round in 1994, it was felt that Article XX had some 'grey areas' that needed to be resolved. For instance, Article XX does not establish any criteria for determining whether measures were necessary and no specific procedure provided for settling disputes on such matters and thus the Agreement on Sanitary and Phyto-sanitary Measures and the Agreement on Technical Barriers to Trade were the result of this review process.²⁶ The WTO multilateral trade regime prescribes the Agreement on Sanitary and Phyto-sanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement) to create specific trade exceptions²⁷ including those for trade in biotechnology and GMO.

21 Judy J. Kim, 'Out of the Lab and into the Field: Harmonization of Deliberate Release Regulations for Genetically Modified Organisms', 16 Fordham International Law Journal, 1993, p. 1160.

22 Most Favored Nation (MFN) Obligation under Article I:1 of GATT.

23 National Treatment Provision under Article III of GATT.

24 Robert Howse & Petros C, 'Mavroidis Europe's evolving regulatory strategy for GMOs - The Issue of consistency with WTO Law: of Kine and Brine', 24 Fordham International Law Journal, 2000, p. 317.

25 Jonathan H. Adler, 'More Sorry Than Safe: Assessing the Precautionary Principle and the Proposed International Bio-safety Protocol', 35 Texas International Law Journal, 2000, p. 173.

26 Philip Bentley Q.C A, 'Re-Assessment of Article XX, paragraphs (b) and (g), of GATT 1994 in the Light of Growing Consumer and Environmental Concern about Biotechnology', 24 Fordham International Law Journal. 2000, p. 107.

27 Han Somsen, THE REGULATORY CHALLENGE OF BIOTECHNOLOGY: HUMAN GENETICS, FOOD AND PATENTS, ed. 2007, p. 107.

Human Rights Concerns in Biotechnology

There are no doubts that biotechnology has opened up many new horizons in the scientific world. However, the scientific progress which is being made in this field is also accompanied by many problematic questions from both legal and human rights points of view. A human rights approach is not the only possible way of dealing with the problem but it has the advantage of combining of law and ethics.²⁸ An inquiry into the integration of law, human rights and ethics reveals that; the fundamental principles of natural law are pre moral and universal in character.²⁹ At the same time, fundamental notions of human rights are also universal in nature and character. A jurisprudential enquiry into the concept of life reveals that there are few intrinsic values attached to life. The conceptual framework of life is connected to natural law which postulate for the inherent values of life like; dignity, integrity, sustenance,³⁰ survival³¹ and self-preservation. These values are often being referred to as human rights by the society. Nature has provided every living being a right to self-dignity and integrity. Every living being deserves a drive for self-preservation of natural features attributed to it by the nature. Every living being has right to preserve the intrinsic values of life, which should not be disturbed or tampered with.³² These rights are popularly known as human rights which have been affected by the application of biotechnology. Biotechnology is capable of marshalling the natural features and incorporating certain novel features into living beings. Such manipulation of living beings, hits at the inherent dignity, integrity and natural set up of living being. Further it disturbs the sustenance and self-preservation of natural features of life. As we can observe, nature is integral part of every living beings' life. Living beings are associated with and forming part of the nature. Any alteration or manipulations of any living being like plant, animal or microorganisms strike not only at the integrity of such living beings but also at the integrity and balance of the nature.³³ In this background it is felt that; certain scientific and technological³⁴ developments such as biotechnology have the tendency to disturb and likelihood of violating the intrinsic values of life and the rights associated there with.³⁵ Such technological interventions of biotechnology in the intrinsic structure and values of life and living beings ignite debates on the prospects of biotechnology from the perspective of human rights and philosophy. The various international conventions and the domestic legal frameworks on human rights do directly or indirectly provide for the protection of and perseverance of human values and it is interesting to conduct an inquiry into the

28 Francesco Francioni and Tullio Scovazzi, (eds.), *BIOTECHNOLOGY AND INTERNATIONAL LAW*, 2006, p. 369.

29 A.H. Chrost, '*Generally an introduction to Aquinas*', 19 *A.M.J of Jurisprudence* 1974, p. 1.

30 Freeman M.D.A (ed.), *LLOYD'S INTRODUCTION TO JURISPRUDENCE*, 6th ed. 1994, p. 81.

31 H.L.A. Hart, *GENERALLY, THE CONCEPT OF LAW*, ed. 1992, p. 188.

32 Sreenivasulu N.S, *BIOTECHNOLOGY AND PATENT LAW: PATENTING LIVING BEINGS*, 1st ed. 2008, p. 196.

33 MDA Freedman (ed.) *GENERALLY, KNOWLEDGE AND POLITICS*, 6th ed. 1994, pp. 595-597.

34 James B. Conant, *GENERALLY MODERN SCIENCE AND MODERN MAN*, ed. 1953, pp. 97-98.

35 Radhakrishna and P.T. Raju (eds.), *THE CONCEPT OF MAN, A STUDY IN COMPARATIVE PHILOSOPHY*, 1995, p. 17.

fundamental notions of these rights in the wake of developments of biotechnology.

Biotechnology Regulation in India

Attempts to provide for a regulatory mechanism for biotechnology in India started about 25 years ago. As early as in 1989 itself government of India brought out guidelines on the Rules for the manufacture / use / import / Export of Genetically engineered organisms. Since then, there have been number initiations through guidelines, rules, regulations, legislations. These initiations intended to ensure environmental safety of use of genetically modified organism, regulatory approvals for dealing with genetically engineered entities, promoting research in biotechnology including providing for patents rights on novel biotechnology innovations, addressing public policy concerns involved there in, protection and maintenance of biological diversity, catering to the food and health needs in a better way and finally for providing for a national level authority on biotechnology regulation in India. It is submitted that the laws and policies pertaining to biotechnology must be in compliance with the law of the land, that is the Constitution and the golden thread underlying such a law should be the socio-economic goals as set out in the Directive Principles of State Policy as prescribed under the constitution. At the same time the fundamental rights of the people of India shall also be provided to be fulfilled in the most dynamic way by any policy that intends to regulate biotechnology. Although GMOs have not been specifically dealt with under the domestic laws of India, nevertheless there have been piecemeal attempts to address aspects of the same through including few guidelines, regulations, legislations and measures to establish institutional mechanism. That includes; Rules for the manufacturer, use, import, export and storage of hazardous microorganisms/genetically engineered organisms, 1989, adopted under the Environment Protection Act of 1986, guidelines such as Recombinant DNA Safety Guidelines, ICMR guidelines of Indian Council of Medical Research, Revised guidelines for research in transgenic plants and guidelines for toxicity and allergen city evaluation, 1998, Guidelines for stem cell issued by the ICMR in association with Department of biotechnology, government of India, Guidelines for the conduct of confined field trials of transgenic plants, 2008, Guidelines for the safety assessment of GM foods, 2008, Protocol for safety assessment of genetically engineered plants and crops, 2008.³⁶ Legislative efforts in the form of Protection of Plant Varieties and Farmer's Rights Act 2001, Patents Amendments Act 2005, The Biodiversity Act 2002, DNA Profiling Bill 2015,³⁷ and the pending Biotechnology Regulatory Authority of India Bill of 2013 are notable. At the institutional level there are few committees constituted that includes; Genetic engineering appraisal committee, Recombinant DNA advisory committee, Review committee on genetic manipulation, the Institutional bio-safety committee constituted under the Recombinant DNA safety guidelines of 1990. Further there is also State biotechnology coordination committee, District level committee. At the policy

³⁶ Sreenivasulu N.S., LAW RELATING TO BIOTECHNOLOGY, 1st ed. 2016, p. 291.

³⁷ In 2015 a new DNA profiling Bill was introduced by updating and upgrading the earlier introduced Bill.

level, Indian parliament appointed Parliamentary committee which functioned during 2009-2012 and also the Supreme Court of India appointed Technical Advisory committee in July, 2012. To understand the regulatory and policy framework towards biotechnology regulation in India we need to look into, analyze and debate on these guidelines, legislations and the institutional mechanisms. Let us discuss and look into each of these legal and policy initiatives in the direction of regulation of biotechnology in India.

Conclusion

There are quite a good number of issues and challenges that the biotechnology sector is facing the in the legal context. The regulation of biotechnology is done from different perspectives and the law in this regard will have multiple dimensions while addressing number of concerns. The law relating to biotechnology will have to address a wide range of issues concerning trade, environmental, intellectual property, consumer protection, and human rights, ethical, social and religious issues both at international and national level.³⁸ The application of law on biotechnology for addressing above mentioned concerns has been yielding considerably good and reasonable result. It is leant that from the experiences that; while formulating policies and while implementing laws the approach should be of, balancing public and private interests while ensuring sustainable development. One has to keep open mind flexible hand to promote, adopt, use, exploit and regulate innovative technologies such as biotechnology which not only caters to various needs but throws open various challenges.

³⁸ Ricardo Melendez, et al, TRADING IN GENES: DEVELOPMENT PERSPECTIVES ON BIOTECHNOLOGY, TRADE AND SUSTAINABILITY, 1st ed. 2007, pp. 11-15.

DEOXYRIBO NUCLEIC ACID (DNA) FINGERPRINTING : AN ANALYSIS OF PREVAILING SCENARIO

Anand Pawar* & Deepti Singla^φ

ABSTRACT

Science in the twenty-first century provides the law in requisite ways, by offering evidence for and against meticulous reports of how things occurred that are of concern to the law. Scientific techniques, particularly the technique of DNA testing, have come to play a progressively more critical job in the justice delivery system and in the confirmation of an innumerable of civil and criminal disputes. For the purpose of DNA testing there is no specific law in India to compel a suspect for taking of blood or other biological sample. It is necessary to incorporate DNA technology in an Indian legislation or to draft an exclusive independent enactment on the use of DNA technology in Indian Courts, so that this technique could be effectively used as valuable in the administration of justice.

Keywords- *Fingerprinting, DNA, Scientific evidence, Criminal Justice System, identification.*

Introduction

We must be vigilant in our actions towards criminals and innovative in our approach towards solving crime.

-Thomas Menino

The crime scenario in the 21st century has become very complex. The modus operandi of crime have become scientific; hence it is important to make use of science and technology in apprehending the criminals. Improved testing technologies are emerging, that provides efficient and effective DNA evidence possessing which assures to expand the application of DNA information and thus aids in search of truth by exonerating the innocent. With the help of DNA evidence, law enforcement agencies are proficient to convincingly confirming the guilt of an accused. Consequently, the significance of DNA fingerprinting in the administration of justice delivery system cannot be denied.

Science in the twenty-first century provides the law in requisite ways, by offering evidence for and against meticulous reports of how things occurred that are of concern to the law. Scientific techniques, particularly the technique of DNA testing, have come to play a progressively more critical job in the justice delivery system and in the confirmation of an innumerable of civil and criminal disputes. At present, DNA fingerprinting has enthused from the status of 'novel and contested scientific' to a 'taken for granted' application in the toolkit of forensic science. Huge progress has been made in the direction of regulating the procedure of DNA testing and assuring high levels of quality control in DNA

* Professor of Law, Rajiv Gandhi National University of Law, Punjab, (Patiala), e-mail: ap.rgnul@gmail.com.

φ Research Scholar, Rajiv Gandhi National University of Law, Punjab, (Patiala).

testing laboratories. Though it is said to be an effective means for investigation and prevention of crime, its application in the judicial system persists to elevate many legal and ethical questions. Significantly it is argued that DNA in criminal justice system violates human rights and privacy rights of individuals.

For the application of DNA testing there is no specific law in India to compel a suspect for taking of blood or other biological sample. In India a comprehensive law regulating the use of DNA technology and DNA data banking is absent. It is necessary to incorporate DNA technology in an Indian legislation or to draft an exclusive independent enactment on the use of DNA technology in Indian Courts. In India, existing laws like The Code of Criminal Procedure, 1973, The Indian Evidence Act, 1872 are too old. An exclusive law or Act relating to DNA technology (other than the amendments in the provisions of Cr.P.C. and The Indian Evidence Act) as in America, England and in Canada should be legislated by our Parliament, so that this technique could be effectively used as valuable in the administration of justice.

DNA Fingerprinting

DNA testing is nowadays regularly applied and extensively cherished as a mode of detection in criminal investigations and to confirm paternity and maternity. DNA is an abbreviation for “deoxyribonucleic acid”. It is the chemical name for a gene which is found in every cell in the body carrying genetic information passed from one generation to the next. The chemical composition of DNA is different in each person except monozygotic twins. It can be extracted from a wide range of sources, including blood, hair, bone, teeth, saliva, semen, skin, sweat, urine, etc. The highest advantage of DNA information is that it cannot be altered or damaged. DNA evidence does not decay or disappear over time. However, even in the absence of particular law relating to DNA in India, Sections 53, 53A and 54 of the Cr.P.C. brings provision relating to DNA tests which can widely be used in justice delivery system. DNA fingerprinting is essentially a biological tool which discloses the gene information of an individual providing an adequate proof against suspects or criminals when matched with DNA samples collected from crime scene.¹ DNA information has been used in a number of significant cases in India. For instance, *the Priyadarshini*² Matto rape and murder case, *Naina Sahani*³ tandoor and murder case, the *Rajiv Gandhi*⁴ assassination case, and *N.D. Tiwari Paternity case*.⁵

Admissibility of Scientific Evidence

Law of evidence allows the expert to give opinion evidence of the facts related to a fact in issue or to related fact. The Judge is not supposed to be proficient in all the areas particularly where the area under discussion involves scientific and technological perceptive. He is not proficient of depicting conclusion from the particulars that are extremely technical. In these conditions he needs the aid of an expert who is believed to have advanced knowledge in

1 Anshu Jain, ‘DNA Technology and its Impact on Law’, Nalsar Law Review, Vol. 3, No. 1, 2006-2007, p. 42.

2 *Sidhartha Vashisht @Manu Sharma v. State* (NCT of Delhi) AIR 2010 SC 2352.

3 *Sushil Sharma v. State* (NCT of Delhi), (2014) 4 SCC 317.

4 *Union of India v. V Sriharan @ Murugan* AIR 1999 SC 2640.

5 2012 (2) R.C.R. (Criminal) 889.

connection to the subject matter. This ability formulates the expert's opinion admissible in that particular case although he is no way associated to the case. Scientific DNA evidence, which is accepted in the Court, have to not only be relevant but also reliable.

In India, Section 45 of the Indian Evidence Act 1872 includes the requirement of expert opinion. An expert eyewitness is one who is skilful, trained and experienced in any particular art, trade or profession, by making a special study of the area under discussion. The tasks of an expert are to present required scientific standard for testing the accurateness of his conclusions in order to facilitate judges to form their independent judgment by the appliance of these standards to the particulars established in support. The expert opinion, if lucid, compelling and tested, turns out to be a significant issue for consideration among other evidences of the case. The result of scientific tests will not be in terms of a straight forward 'yes' or 'no', but will be a 'match probability' or 'likelihood ratio'. Because of the fact that scientific technology is rather new and the techniques through which the results are offered to the court are new, there is an unquestionable need for expert testimony. An expert witness may give his opinion, but the court is free to draw its own conclusions. The court is not bound to follow blindly the opinion of the expert. Section 27 says, "*when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.*" It says that any information collected from DNA tests can apparently be used for gathering other evidences.

In courts in the United States of America, two major standards exist for deciding whether scientific evidence to be admitted into evidence has fulfilled two major criteria *viz.*, the general acceptance test and the sound methodology standard. In United States, the Court of Appeals in 1923⁶ determined that every scientific presumption to be acceptable in Court ought to be generally accepted by the related scientific society. However, the decision in *Daubert v. Merrell Dow Pharmaceuticals*⁷ changed the landscape of scientific evidence admissibility. In *Daubert's* case, the Court held that the Frye rule of general acceptance should not be a compulsory clause for the acceptability of scientific facts under Rule 702 of the Federal Rules of Evidence, which puts emphasis on the principle that expert testimony should rest on a reliable foundation. In this case, the court said that, the judge would assume the role of a gate keeper and certify that all scientific facts that were admitted were both relevant and reliable. To confirm whether the scientific evidence is admissible the court may regard as:

- (i) *Whether the scientific technique has been reliably used;*
- (ii) *Whether the scientific theory has been subjected to peer review and publication;*
- (iii) *Its known or potential rate of error;*
- (iv) *Whether there are recognized principles that control the practice of implementation of the technique;*

6 *Frye v. United States* 293 F. 1013 (DC Cir. 1923).

7 509 U.S. 579 (1993).

- (v) *Whether the theory is generally accepted by a related scientific community; and*
- (vi) *Whether the technique was introduced or conducted independently of the litigation.*

Judicial Interpretation

Till date DNA evidence has been denied by the courts in order to disprove the parenthood of the child keeping in view the adverse bearing it shall have upon the future of the child. Even if the end result of an authentic DNA report is assumed to be technically true, the Court rejected DNA evidence by observing that it is not sufficient to get away from the conclusiveness of Section 112 of the Act, for instance, if a husband and wife were residing together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This might seem harsh from the point of view of the husband who would be required to accept the fatherhood of a child of which he may be above suspicion. But in such cases the law bends in favour of the innocent child from being bastardised if his mother and her husband be residing together during the time of conception.⁸

Nevertheless, the court held in *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik*⁹ that Section 112 of the Evidence Act was passed at a point whilst the contemporary scientific innovations and DNA tests were not even in consideration of the Parliament. Even though Section 112 elevates a presumption of conclusive proof on fulfilment of the requirements specified in it but this presumption can be rebutted by proving non access when the child could have begotten. Interest of justice is best served by establishing the fact and the court ought to be equipped with the preeminent existing science and might not be left to depend upon presumptions, unless science has no counter to the facts in issue. When there is a disagreement amid a conclusive proof imagined under law and a confirmation based on scientific innovation established by the world community to be acceptable, the later must prevail.¹⁰ The husband's claim that he had no access to the wife when the child was begotten stands established by the DNA test details and in the facade of it; we cannot force the litigant to stand the paternity of a child, when the scientific reports prove to the contrary. We are aware that an innocent child may not be bastardized as the marriage amid her mother and father was existing at the point of her birth, but in view of the DNA test reports and what we have examined over, we cannot preclude the effect. It is refuting the truth.¹¹

In *Goutam Kundu v. State of West Bengal*,¹² the court has set clear guiding principles concerning DNA tests and their acceptability to confirm paternity. These are:

- (i) That the courts in India cannot order blood test as a matter of routine.
- (ii) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

8 *Kamti Devi v. Poshi Ram* (2001) 5 SCC 311, para 10.

9 (2014) 2 SCC 576.

10 *Ibid.* para 13.

11 *Ibid.* para 14.

12 (1993) 3 SCC 418.

- (iii) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
- (iv) No one can be compelled to give sample of blood for analysis.

The Delhi High Court in *Rohit Shekhar v. Narayan Dutt Tiwari*¹³ has held that a court's order directing an individual to undertake DNA test is not a violation of the right to life, or privacy. A person can be directed by the court to undergo DNA test to determine paternity and direction in this regard should not be made in a routine manner but it can be issued only after the test of eminent need is satisfied. It was also held that the court is not obliged to describe adverse inference in case of refusal of a direction for DNA testing.

Committee's and Commission's Recommendations

Justice V.S. Malimath Committee on 'Reforms of the Criminal Justice System' also recommended that DNA expert be included in the list of experts under Section 293(4) of Code of Criminal Procedure, 1973. Committee Report also recommended for amendment of Section 482 of Cr.P.C., 1973, in the following lines: "*Every Court shall have inherent power to make such orders as may be necessary to discover truth or to give effect to any order under this Code or to prevent abuse of the process of court or otherwise to secure the ends of justice*".

By using this provision, the Court will be better equipped with more powers of investigation like the Courts of Inquisitorial system. DNA testing can also be carried out with the help of this provision. Section 313 of Cr.P.C. be required to be modified so as to draw adverse presumption against the accused, if he fails to reply any related material against him. The committee also recommended for amendment of Identification of Prisoners Act 1920 to authorize the Magistrate to empower collecting from the accused hair, saliva, semen, blood sample etc. for DNA testing. The Law Commission of India in its 37th Report established that to support successful investigation, stipulation has been prepared empowering an assessment of an arrested person if he has reasonable grounds to believe that such assessment will provide evidence as to commission of an offence. The Law Commission of India in its 185th Report has suggested changes to the section 112 of the Indian Evidence Act for the inclusion of DNA test in the part of section by broadening the criteria. The Law Commission recommended that the person refusing to undergo DNA test should not be allowed to take a defensive stand that he is not the father and that an adverse inference can be drawn if a party refuses to undergo a DNA test.

DNA Database

DNA technology has been a most important hit and the DNA database is the tool of DNA technology facilitating the law enforcement in identification of individuals. DNA databases can give distinct results as one can change his name, his appearance, but not DNA profile that could confirm or deny a person's presence. If DNA profiles were stored in DNA databases, DNA information could be applied in crime without suspect that could be used as an aid for law

13 (2012) 12 SCC 554.

enforcement agency to search for suspects. Therefore, DNA database is a need of the hour. Every country must take a step forward to establish DNA database as the establishment of databases containing DNA profiles (such as in the United Kingdom's National DNA Database) have greatly improved law enforcement agencies' power to fight crimes.

Conclusion

DNA fingerprinting has now emerged as a robust and reliable technique. It is an incredibly significant development helping the experts to solve crimes which were not feasible to solve earlier. These developments saved countless lives. We ought to have faith in scientific techniques, which is extremely important for public at large; there are loads of existing instances, which confirms that it in reality assists the general public. It has been accepted in the U.S. in a number of high profile cases, like for instance, O.J. Simpson's case which was decided mainly on the basis of DNA evidence. In India too, DNA evidence has been relied on in number of case, such as, *Priyadarshini Matto*¹⁴ rape and murder case, *Goutam Kundu*¹⁵ case, etc. Generally, the courts across the world have increasingly accepted DNA evidence as admissible if it produces a trustworthy and reliable result. The process of DNA Fingerprinting is not under dispute throughout the world. The dispute only revolves around the issues raised in relation to standardisation of laboratory procedures and problems of possible technical or human errors. Government should take necessary steps for standardising the laboratory procedures. Once standards monitoring laboratory procedure are set, the disputes to the admissibility of the DNA evidence are expected to be narrowed than they are at this time since the only issue that stays on is if benchmark principle has been adhered to or not.

14 *Sidhartha Vashisht @Manu Sharma v. State* (NCT of Delhi) AIR 2010 SC 2352.

15 *Goutam Kundu v. State of West Bengal* 1993 AIR 2295.

ENVIRONMENTAL JUSTICE IN INDIA AND ROLE OF NATIONAL GREEN TRIBUNAL

Naresh Kumar Vats* & Urmil^φ

ABSTRACT

In the globalizing world the increasing competition of establishment of more and more industries and use of comfortable has led to the degradation of global environment. Every state is in race of strengthening economic on the cost of environmental degradation, however, the priority in the last decade had gradually shifted to protection of environment. The rise of environmental issues increased after the very well-known interpretation of the judiciary saying that 'Right to clean and healthy environment' is part of our fundamental rights and is interpreted within the scope of Article 21 of the Constitution of India and which led to the establishment of Environmental Courts and there is a need for speedy justice for environmental protection and to reduce the burden on the High Court's which were not able to do quick disposal of cases involving environmental issues as they were over burdened by cases. The incidence like Bhopal gas tragedy and mushrooming of industries as well as builders unauthorized without caring the proper provisions of adequate space utility, disposal of emission from the industries, and disposal of garbage are the emerging issues and needs to be taken care properly. The sports as well as health related issues where such products are used and thrown without proper disposal action like construction of latrine and use of Chinese Manja.

Keywords: *Environmental Court, Rio de Janeiro Summit, National Environment Protection Authority, Manja, Garbage.*

Introduction

The Constitution of India through its directive principles of state policy made the provisions that “*Protection and improvement of environment and safeguarding of forests and wild life The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country*”.¹ The implementation of directive principles of state policy immediately after independence was a difficult task for government being inherited of many other problems that were given priority over the environment. To overcome the basic problems of poverty, illiteracy, unemployment and to provide basic health care facilities, environment issues were not given that much importance. In order to increase the production and strengthening the economy, more and more

* Professor of Law and Chairman, Centre for Post Graduate Legal Studies, Maharashtra National Law University, Nagpur, e-mail: vatsnk2006kurukshetra@gmail.com.

^φ Scholar, Kurukshetra University, Kurukshetra (Haryana).

¹ Article 48A, of the Constitution of India.

industries were set up. Consequent to this step which has led to degradation of environment at a large scale in India and the priority since last decade had gradually shifted to 'protection of environment'.

The Supreme Court of India suggested for establishment of environmental courts on the basis of locality with judges and experts keeping in mind to deal with complex environmental issues to achieve the above target. As a result, this will lead for speedy justice and environmental protection as well as reduce the burden of the High Courts which were unable dispose of environmental issues speedily. Consequent to this, the National Green Tribunal (NGT) was founded on 18th October, 2010 under the National Green Tribunal Act 2010 for speedy justice of environmental issues.

India is the third country following Australia and New Zealand to have such unique system for protection of Environment. The NGT is a special fast-track quasi-judicial body comprising of judges and environment expert who will ensure expeditious disposal of cases.² The traditional approach to deal with environmental pollution had been criminal sanctions in India. The very strict evidentiary requirements for criminal conviction often resulted in situations where the polluter walked free. The proper execution of penalty to the polluters was manifested in the form the National Green Tribunal Act 2010. The Act consist of the provisions where the aggrieved can approach for redress in the form compensation as if in a civil court. It was predicted that the formation of the Tribunal will result in the development of the relatively new field of environmental forensics in India. This is because; both the contending parties will have to prove their claim in the Tribunal for which they will require the help of environmental forensic experts.³

Indian Courts dealt with the environmental issues by the means of writs and PILs, but the technicality was missing from the judiciary as expertise knowledge is must to decide environmental issue. The rise of environmental issues increased after the very well-known interpretation of the judiciary saying that "*Right to clean and healthy environment*" is part of our fundamental rights and is interpreted within the scope of Article 21 of the Constitution of India. Number of Public Interest Litigations filed by M.C Mehta where the judiciary has taken very necessary stand point for the protection of environment. The Courts directed expert committees if any environmental issue knocks the Court of Law, but the report of expert committee was not interpreted in technical terms which is very essential. In cases like, *M.C. Mehta v. Union of India*;⁴ *Indian Council for Environmental-Legal Action v. Union of India*;⁵ *A.P. Pollution Control Board v. M. V. Naidu*;⁶ *A.P. Pollution Control Board v. M. V. Naidu II*,⁷ the Supreme Court has stressed on the point that it is a very important and prominent time to set up

2 Jayashree Khandare, 'Role of National Green Tribunal in Protection Environment', Paripex-Indian Journal of Research, December, 2015, p. 4.

3 Muhammed Siddik Abdul Samada et al, 'Environmental Forensics in India –Four Years After the National Green Tribunal Act, 2010', Proceeding Environmental Sciences 30 (2015) pp. 91-96, available at www.sciencedirect.com.(visited on December 11, 2016).

4 1987 AIR 965; 1986 SCR (1) 312.

5 1996 AIR 1446.

6 AIR. 1999 SC 812.

7 (2001) 6 SCC 62.

‘Environmental Courts’. The 186th report of Law Commission of India also emphasized on starting of environmental courts in the light of the 3rd case judgment from the above cited cases. The report also referred to countries like England, Australia, and New Zealand etc. where Environmental Courts have been started.⁸ Ministry of Environment and Forests (MoEF) has brought out a proposal for setting up a National Environment Protection Authority (NEPA), which will be an autonomous statutory body responsible for regulation, monitoring and enforcement of environmental matters along with establishment of The National Green Tribunal (NGT).⁹ Justice Swatanter Kumar while chairing the National Green Tribunal (National Green Tribunal) stated in an interview to ‘*Down to Earth*’, that basic issues are still confronting the tribunal.

Establishing Environmental Courts in India

During the Rio de Janeiro Summit of United Nations Conference on Environment and Development in June 1992, India vowed the participating states to provide judicial and administrative remedies for the victims of the pollutants and other environmental damage. There lie many reasons behind the setting up of this tribunal such as after India’s move with Carbon credits, tribunal may play a vital role in ensuring the control of emissions and maintaining the desired levels. This is the first body of its kind that is required by its parent statute to apply the ‘*polluter pays*’ principle and the principle of sustainable development.¹⁰ This court can rightly be called ‘special’ because India is the third country following Australia and New Zealand to have such a system.¹¹

It was a result of long procedure and the demand for such tribunal started long back in the year 1984 after the Bhopal gas tragedy. Then the Supreme Court specifically mentioned the need for such tribunals in the case where the gas leaked from Shriram food and fertilizers limited in Delhi. The Supreme Court then in a number of cases highlighted the difficulty faced by judges in adjudicating on complex environmental cases and laid emphasis on the need to set up a specialized environmental court. Though the credit for enacting the NGT Act, 2010 goes to the then Environment Minister, Jairam Ramesh, it became functional only because of repeated directions of the Supreme Court while hearing the Special Leave Petition titled *Union of India v. Vimal Bhai*.¹² The National Green Tribunal Act, 2010 opens with “*An Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto*”.¹³

8 Assessment of Working of National Green Tribunal with special reference to the cases from Gujarat and Western Region Bench of Pune, June 2014.

9 National Green Tribunal Bill, 2008 has been referred to a parliamentary standing committee.

10 National Green Tribunal Act, available at https://en.wikipedia.org/wiki/National_Green_Tribunal_Act, (visited on December 12, 2016).

11 *Ibid.*

12 (2009) DLT. 477.

13 The National Green Tribunal Act (No. 19 of 2010).

Law Commission of India 186th Report

The environmental Courts were advocated in two earlier judgments also. One was *M.C. Mehta v. Union of India*¹⁴ where the Supreme Court said that in as much as environment cases involve assessment of scientific data, it was desirable to set up environment courts on a regional basis with a professional Judge and two experts, keeping in view of expertise required for such adjudication.

- (i) The Law Commission in its 186th Report has, inter-alia, recommended establishment of 'Environment Court' in each State, consisting of Judicial and Scientific experts in the field of environment for dealing with environmental disputes besides having appellate jurisdiction in respect of appeals under the various Pollution Control Laws.
- (ii) The Commission has also recommended repeal of the National Environment Tribunal Act 1995 and the National Environment Appellate Authority Act 1997.
- (iii) To achieve the objective of Article 21, 47 and 51A (g) of the Constitution of India by means of fair, fast and satisfactory judicial procedure.
- (iv) 'Environment Courts' should be constituted in each State, and also stated that as under Article 253 read with Entry 13 list I of VII that the parliament has exclusive jurisdiction to enact law for the purpose of establishment.
- (v) Emphasis on Stockholm declaration and the conference at Rio de Janeiro of 1992.
- (vi) No powers of Judicial review to High Court as under Article 226, but there can be provision for appeal to the Supreme Court under Article 32.
- (vii) These Courts must be established to reduce the pressure and burden on the High Courts and Supreme Court. These Courts will be Courts of fact and law, exercising all powers of a civil court in its original jurisdiction.
- (viii) They will also have appellate judicial powers against orders passed by the concerned authorities under the Water (Prevention and Control of Pollution) Act 1974; Air (Prevention and Control of Pollution) Act 1981 and The Environment (Protection) Act 1986 with an enabling provision that the Central Government may notify these Courts as appellate courts under other environment related Acts as well.
- (ix) The environmental court shall consist of a chairperson and at least two other members each. Environmental court shall be at least three scientific or technical experts known as commissioners.
- (x) The Court shall not be bound to follow Civil Procedure Code and the rules of Evidence under the Indian Evidence Act 1872.
- (xi) The Court should follow the principles of natural justice, and should apply the principles/doctrine of strict liability *Ryland's v. Fletcher*¹⁵ / *Bhopal Gas Tragedy*,¹⁶ polluter pays, doctrine of public trust, etc.

14 1986(2) SCC 176, p. 202.

15 (1868) UKHL 1.

16 *Union Carbide Corporation v. Union of India* AIR 1992 SC 248, 261; AIR 1999 SC 1248, 309.

- (xii) The *locus standi* before the court shall be as wide as it is before the High court/Supreme court. That means that any member for the cause of many can stand before the court of law.
- (xiii) The powers of High Court under Article 226 and Supreme Court under 32 shall not be ousted.

Thus, a very specific and realistic approach was drawn in the 186th report of the Law commission of India with respect to the formulation of Environment courts.¹⁷

Structure of National Green Tribunal Act 2010

After the NGT Act 2010, the Principal Bench of the NGT has been established in the National Capital-New Delhi, with regional benches in Pune (Western Zone Bench), Bhopal (Central Zone Bench), Chennai (Southern Bench) and Kolkata (Eastern Bench). Each Bench has a specified geographical jurisdiction covering several States in a region. There is also a mechanism for circuit benches, i.e., the Southern Zone bench, which is based in Chennai, can decide to have sittings in other places like Bangalore or Hyderabad.

The appointment of Chairperson of the NGT will be a retired Judge of the Supreme Court, seating in Delhi. Other Judicial members are retired Judges of High Courts. Each bench of the NGT will comprise of at least one Judicial Member and one Expert Member. Expert members should have a professional qualification and a minimum of 15 years' experience in the field of environment/forest conservation and related subjects.¹⁸

Jurisdictional status of NGT Act

The NGT has the power to hear all civil cases relating to environmental issues and questions that are linked to the implementation of laws listed in Schedule I of the NGT Act which include—“*The Water (Prevention and Control of Pollution) Act 1974; The Water (Prevention and Control of Pollution) Cess Act 1977; The Forest (Conservation) Act, 1980; The Air (Prevention and Control of Pollution) Act 198; The Environment (Protection) Act 1986; The Public Liability Insurance Act 1991 and The Biological Diversity Act 2002.*”¹⁹

Powers of the Tribunal

National Green Tribunal has conferred with power to hear all civil matters which are related to environment and questions regarding the enforcement and implementation of laws which fall under these categories of laws mentioned above in schedule-I.²⁰

The NGT has the power to regulate the procedure by itself and does not follow the principles of civil procedure code and rules of evidence instead it follows principles of natural justice and apply the principals of sustainable development where “*Polluter Pay Principle*” as applied. It will have the same power as of the civil court in deciding the matter falling within these seven legal acts. NGT does not admit anything which is not covered under above enactment

17 Law Commission of India 186th Report, “Proposal to Constitute Environment Court”, September, 2003.

18 Praveen Bhargav, ‘*Everything you need to know about the National Green Tribunal (NGT)*’, available at <http://www.conservationindia.org/resources/ngt> (visited on December 13, 2016).

19 *Ibid.*

20 The National Green Tribunal Act 2010 (19 of 2010).

mentioned in Schedule-I. The major drawback of this limitation is that a person cannot approach the NGT for every environmental issue like NGT cannot admit a suit for cutting of trees in a forest even though it is related to environment.

The major benefit with NGT is that it has a strong order enforcing mechanism. If the orders of NGT are not complied with then it has the power to impose both punishment as well as fine. The punishment is up to three years and the penalty is up to rupees ten crore and for firms it can extend up to rupees twenty-five crores. Also the director or manager of the firm can be punished or penalized if it is found by the tribunal that the offence has been committed on the orders or with the consent of such officer of the firm.

Need for an Environmental Tribunal

Keeping in view a large number of pending environmental cases in the courts and involving the complex issues of facts of science and technology, the 17th Law Commission of India, through its 186th report, recommended the constitution of Environmental Courts at State level as its original jurisdiction for issues and appellate authorities under the environmental statutes. These courts were also recommended to include technical members. The recommendation was pursuant to the observation of the Supreme Court in these judgments, viz., *M.C. Mehta v. Union of India*;²¹ *Indian Council of Environmental–Legal Action v Union of India*;²² *AP Pollution Control Board v. M.V. Nayudu*;²³ *AP pollution control board v. MV Nayudu-II*.²⁴ The recommendation of the Law Commission were implemented to redress environmental problems of the country in conformity with the National Environmental Policy, 2006, which led to the establishment of National green tribunal (NGT) on 18th October 2010 under the National Green Tribunal Act 2010.²⁵ The purpose of the Act is to fulfil the obligation of India towards Stockholm declaration, 1972. Sections 4, 14, 15, 17, 19 and 26 of the NGT Act are of considerable significance to environmental forensics.²⁶

Key Verdicts

The current Indian practice of handling scientific sensitive environmental issues has to be understood before discussion over the role of the tribunal and decision-makers. A change may be necessary on a comparative level.²⁷ As Lord Woolf asks, is the judiciary environmentally myopic?²⁸ Environmental legislations were enacted on the basis of the shared legislative authority, and other constitutional provisions. Environmental protection was not mentioned in the original Constitution and was later introduced as a directive principle of state

21 1986 (2) SCC 176.

22 1996 (3) SCC 212.

23 1999 (2) SCC 718.

24 2001 (2) SCC 62.

25 Muhammed Siddik Abdul Samada et al, 'Environmental Forensics in India–Four Years After the National Green Tribunal Act, 2010', *Procedia Environmental Sciences* 30 (2015) 91-96, available at www.sciencedirect.com. (visited on December 11, 2016).

26 *Ibid.*

27 Sridip Nambiar, 'Paradigm of 'Green' Adjudication: Developing Principles for Indian Environmental Decision making in Disputes involving Scientific Uncertainty', 1 *ILI Law Review* 1, 25 (2010).

28 Lord Woolf, 'Are the Judiciary Environmentally Myopic?', 4(1) *Journal of Environmental Law* (1995).

policy²⁹ and as a fundamental duty³⁰ by way of an amendment. Every citizen is entrusted with a duty to protect the environment. The very purpose of the amendment was to ensure that the State and citizens are guided by environmental considerations when pursuing any activity.

The conspicuous absence of ‘right’ to environment, even after the amendment may be noted that the Bhopal gas tragedy case reminded the court that an unenforceable directive principle and inactive citizenry could lead to governmental inaction and serious damage to the public. This is called for relaxation of norms for entertaining disputes relating to environment, which would in turn encourage participation by concerned individuals and keep a check on unrestrained governmental power. As a first step, right to a healthy environment as a right was recognized in *Subash Kumar v. State of Bihar*.³¹ It was then included within the ambit of the ever-growing ‘right to life’. The scope of right to environment within the right to life was then developed to include right to clean water,³² clean air³³ etc. The recognition of these rights coincided with the development of public interest litigation and relaxation of *locus standi* principle, which led to an increase in the volume of litigation.³⁴ Courts became more confident in dealing with and governing environmental disputes. In most cases, governmental apathy was noted as the major cause for disputes. The activist court began to actively involve itself in the environmental governance of the country on the basis of its interpretation of the Constitution and lack of directional policy. The shift from ‘duty’ to ‘rights’ created by the judiciary, influenced future judicial thought in a tremendous way.

In POSCO case,³⁵ the NGT asked the Environment Ministry to review clearances after some local villages refused to consent to the project under the pro-tribal Forest Rights Act, 2006. Officials say the requirement of mandatory consent from the gramsabha for initiating any project is the biggest hurdle in pushing infrastructure development in mineral rich, poor regions. The NGT has repeatedly rejected the views of its nominal master, the Ministry of Environment and Forests (hereinafter referred to as ‘MoEF’). It has criticized the Ministry for poor decisions or actions and has been frequently resorted to by civil society groups seeking and getting relief from environmentally irresponsible actions of the government. Before the NGT was enacted, some environmental disputes were referred for settlement to the woefully ineffective National Environment Appellate Authority (hereinafter referred to as ‘NEAA’). This body was created

29 *Ibid.*, Article 48a, inserted by Constitution (Forty-second amendments) Act, 1976 section 10 (with effect from Jan. 3, 1977), states that, “State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.”

30 *Ibid.*, Article 51a (g) of the Constitution of India states that it 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.”

31 AIR 1991 SC 420.

32 *Susheta v. State of Tamil Nadu* (2006) 6 SCC 563.

33 *Murli Deora v. Union of India* (2001) 8 SCC 765.

34 Jona Razzaque, ‘Public Interest Environmental Litigation in India’, Pakistan and Bangladesh (2004).

35 *Prafulla Samantray v. Union of India*, Appeal No. 8 of 2011 dated 30-3-2012. available at http://www.wvfindia.org/about_wvf/enablers/cel/national_green_tribunal/case_summaries/?7945/Praffula-Samantra-Vs-Union-of-India-and-Others (visited on January 3, 2015).

by the Parliament in 1997.³⁶ The NEAA Act created a body that mainly dealt with environmental clearances, and was always under MoEF's thumb. The Parliament of India, recognizing the need for the speedy and expeditious disposal of environmental cases, especially in light of the burden of pending litigation,³⁷ established the NGT in 2010, which has superseded NEAA.

The NGT applied the principles of sustainable development, the precautionary principle and the polluter pays principles while passing Orders/decisions/awards. The case of *MP Patil v. Union of India*³⁸ wherein the Tribunal examined the details of the basis on which environmental clearance was obtained by the National Thermal Power Corporation Ltd. (hereinafter referred to as 'NTPC'). It was found that NTPC was guilty of misrepresenting facts to obtain the environmental clearance. Additionally, in this case the tribunal stressed on the importance of a Rehabilitation and Resettlement Policy that adequately took into consideration the needs of those affected by the project. In determining who would fall within the ambit of such persons, the tribunal chose an expansive definition instead of restricting it only to the land owners in the region. Finally, it was reiterated that the burden of proving that the proposed project was in consonance with goals of sustainable development was on the party proposing the project. Hon'ble Apex Court held in *TN Govandaraman Thirumulpad v. Union of India*³⁹ that "*Environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric. Many of our principles like sustainable development, polluter-pays principle, intergenerational equity has their roots in anthropocentric principles. Anthropocentrism is always human interest focussed and that non-human has only instrumental value to humans. In other words, humans take precedence and human responsibilities to non-human based benefits to humans. Ecocentrism is nature-centred where humans are part of nature and nonhumans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligations to non-humans independently of human interest. Ecocentrism is therefore life-centred, naturecentred where nature includes both humans and nonhumans.*"

The NGT's Principal Bench gave its verdict in *Braj Foundation v. Govt. of U.P.*⁴⁰ that the Government should be directed to execute the Memorandum of Understanding (MoU) for the aforesaid forest land, which was brought forth by the Braj Foundation. The Tribunal gave the verdict against them, holding that the MoU is not legally enforceable and decided that the advertisement issued by the Forest Department was only an 'invitation to treat' which could not be a ground to enforce contractual obligations. Thus, the Government was allowed to continue with its policy decision of taking up the aforesaid work on its own, especially since involvement of third parties would give rise to the possibility of illegal mining and encroachment. However, the

36 National Environment Appellate Authority Act 1997 (Act 22 of 1997).

37 Performance Report of the 15th Lok Sabha MPs (on the floor of the house) *Fifteenth Lok Sabha Debate*, Lok Sabha Debates, (30-4-2015), available at <<http://164.100.47.132/LssNew/psearch/Result15.aspx?dbsl=2380> (visited on December 2, 2016).

38 2014 All (I) NGT Reporter (1) (Del) 113.

39 Para 17, (2012)3 SCC 277.

40 Application No. 278/2013 and M.A. No. 110/2014 before Principal Bench, Delhi.

Tribunal also went a step forward and gave directions to the Government itself to ensure proper afforestation. One of the most significant was the direction to declare that at least a 100-meter-long stretch on both sides of the Braj Parikrama route as a 'no development zone'.

In *Vardhaman Kaushik v. Union of India*,⁴¹ the tribunal took cognizance of the growing pollution levels in Delhi. It directed a Committee to prepare an action plan and in the interim, directed that vehicles more than 15 years old not be allowed to ply or be parked off the roads; burning of plastics and other like materials be prohibited. A web portal and a special task force be created as well as sufficient space for two-way conveyance be left on all market-roads in Delhi and similarly cycle tracks be constructed. The overloaded trucks and defunct buses not be allowed to ply and air purifiers and automatic sensors be installed in appropriate locations.⁴² NGT directed that a fine of Rs. 1000 be levied on all cars parked on metalled roads and the multi-level parking be construed in appropriate areas.

In another decision wherein the importance of proper analysis and collation of data and application of mind by the EAC was stressed upon and the questions of the jurisdiction of the Tribunal have also been fairly recurrent by the NGT in case of *T. Murugandam v. Ministry of Environment and Forests*.⁴³

In *Kalpavriksh v. Union of India*⁴⁴ the Tribunal ruled that its jurisdiction extends to all civil cases which raise the substantial question of environment and arise from the implementation of the Acts stated in Schedule I of the NGT Act. The inference drawn from the term 'implementation' which must neither be too constrained nor expansive, keeping in view of all the Notifications, Rules and Regulations promulgated under the Act. Again in *Tribunal at its Own Motion v. Ministry of Environment & Forests*⁴⁵ it was held that wildlife is a part of environment and any action that causes damage or is likely to cause damage to wildlife, could not be excluded from the purview of the tribunal. The Tribunal has also given detailed directions in decisions involving contamination and pollution of river waters. For instance, in *Krishan Kant Singh v. National Ganga River Basin Authority*⁴⁶ the Tribunal gave a range of time bound and specific directions to the polluting industrial units as well as the Municipal authorities who were asked to allow the former to comply with directions. In another, *Manoj Misra v. Union of India*⁴⁷ the Tribunal gave a set of twenty eight directions, ranging from prohibition on dumping debris to restricting silviculture and floriculture activities, in the interest of protecting and restoring the River Yamuna. One such case was *Samata v. Union of India*⁴⁸ in which the Tribunal relaxed the concept of *locus standi* to allow a wider base of people to approach it with regard to environmental concerns. It was found that in the relevant

41 2014 All (1) NGT.

42 *Ibid.*

43 Appeal No. 17 of 2011(T), NEAA no. 20 of 2010.

44 Application No 116 (THC) of 2013.

45 237 (THC)/2013, Original Application No. 16 of 2013 (CZ) dated April 4, 2014.

46 Application No. 299 of 2013 dated 31-5-2014.

47 Original Application No. 6 of 2012 and MAs Nos. 967 of 2013 & 275 of 2014 dated 13-1-2015.

48 Judgment of the NGT, dated 13 December 2013 in *Samata v. Union of India* Appeal No. 9 of 2011, NEAA Appeal No. 10 of 2010 dated 13-12-2013.

provisions the term ‘aggrieved persons’ would include not just any person who is likely to be affected, but also an association of persons likely to be affected by such an order and functioning in the field of environment. The other issue in this case was whether the public hearing had been conducted if the Environmental Impact Assessment (hereinafter referred to as ‘EIA’) report had not been published in the local language. The Tribunal found that there was no such requirement imposed; however, in the same breath it mandated the Expert Appraisal Committee to act in light of the public’s larger interests and work to balance developmental and environmental concerns. As in *Samata*,⁴⁹ the South Zone bench emphasized the importance of the principles of precautionary principle and sustainable development in the *KK Royson case*.⁵⁰ Again in this case we witness the relaxation of *locus standi* requirements. The Bench held that where the matter concerned the ecology and the environment, everybody was directly or indirectly affected and thus, the right to initiate action could not be limited only to persons who were actually aggrieved. Other issues that the Court examined in this case were that of an unqualified agency giving approval and of the requirements of conducting public hearing according to the EIA Notification, 2006.⁵¹

On September 3, 2014, the Principal Bench of the National Green Tribunal (NGT) at New Delhi passed a landmark judgment that, for the first time wherein it brought an important principle of “*town planning*” within the scope and jurisdiction of the Act. NGT in its judgment in the matter of *Sunil Kumar Chugh v. Secretary, Ministry of Environment and Forests, New Delhi*,⁵² held that “*open spaces, recreational grounds and adequate parking facilities in buildings had an important bearing on the right to life of people.*”

The Court expanded the right to life of citizens in urban India in a case *Sunil Kumar Chugh v. Secretary, Ministry of Environment and Forests, New Delhi*,⁵³ the General Principles and Rules of International Environmental Law. The boom in India’s economic growth has resulted in mass urbanization on a scale rarely witnessed in the history of mankind. The population of Tier-I and II cities has grown exponentially in the last two decades as millions of peoples are seeking better economic opportunities. However, this economic growth has come at a tremendous cost to the quality of human life, as unplanned urban developments have mushroomed and giving rise to pollution, congestion and diseases that has given rise to living conditions which would be termed ‘miserable’ by western standards. Thus, it’s not a surprise that Indian cities figured at the bottom of any quality of life survey done at the international level.

The prime reason for this bleak state of affairs is visible everywhere due to illegal constructions and developers blatantly violate development control regulations that stipulate mandatory open spaces, recreation grounds, parking and fire safety. Unscrupulous municipal officials look the other way and consequently,

49 Appeal No. 9 of 2011, NEAA Appeal No. 10 of 2010 dated 13-12-2013.

50 *K.K. Royson v. Govt. of India*, Appeals Nos. 172, 173, 174 of 2013 (SZ) and Appeals Nos. 1 and 19 of 2014 (SZ) and Appeal No. 172 of 2013 (SZ) dated 29-5-2014.

51 *Ibid.*

52 Appeal No. 66 of 2014.

53 *Ibid.*

the right to life of citizens gets compromised. To make matters worse, the enforcement of development control regulations was considered a municipal matter and not as one falling within the scope of the term 'environment'.

In an appeal by Sunil Kumar Chug and Ravinder Khosla against the developer M/s Priyal Builder on March 25, 2015 at Bombay, stated that the builder had violated the Environmental Impact Assessment Notification, 2006 by starting construction without EC, way back in 2009. The developer continued construction without EC for five years and the State Environmental Impact Assessment Authority (SEIAA) of Maharashtra ignored this blatant violation and blindly granted EC to the builder. It was further averred by the appellants that the developer did not provide any recreation ground to the residents. Further, he did not provide any parking spaces for the residents of the rehabilitation tenements, as a result of which, they were forced to park on the street. This severely prejudiced their right to life under Article 21 of the Constitution of India.

The case was heard by the principal bench at New Delhi, comprising Justice Swatanter Kumar and Justice U.D. Salvi, along with Expert Members, D.K. Agrawal and M.A. Yusuf. In its judgment, the bench held that the developer had violated the EIA Notification, 2006 and the Environment Protection Act 1986 by commencing construction without prior EC. Further, by not providing adequate recreation grounds, the developer had severely prejudiced the right to life of the appellants. Consequently, the bench held the developer liable for violating the law and imposed a fine of Rs.3 Crore to be paid into the environmental relief fund maintained under the Public Liability Insurance Act 1991. Further, taking note of the fact that the developer had provided deficient recreation grounds to the residents, the court directed that a further sum of Rs.32,63,600 be paid to the Maharashtra Pollution Control Board (MPCB) for the deficient recreational area in the building. The approved plan of the building was quashed and the builder was directed to submit a fresh plan that would contain adequate parking for all residents of the building and address the shortfalls.

During the court proceedings, the developer had claimed that prior EC was not required as the 'FSI Area' (Floor Space Index or Floor Area Ratio) of the project was less than 20,000 square meters, the prescribed statutory limit. He claimed that the lift lobby and staircase area were exempt from the computation of built-up area under the EIA Notification. The NGT strongly rejected this argument, stating that the term 'built-up area' includes the entire construction area, saleable and non-saleable. It further held that the 2011 amendment to the EIA notification which clarified the term 'built-up area' was clarificatory in nature and would have a retrospective effect from 2006 itself. The National Green Tribunal has questioned the Uttar Pradesh government and its pollution control board over regulation of tanneries on the banks of river Ganga in Kanpur, asking how they could regulate them if their officials 'can't even enter their premises'. The NGT said industrial effluents, which contain high chromium, emanating from tannery clusters were polluting Ganga and even UP Pollution Control Board (UPPCB) was not aware of the actual number of tanneries till now.⁵⁴

54 Sandeep Rai, 'NGT forms panel to check sewage joining Ganga through drains', The Times of India, October 20, 2016, New Delhi.

The Government of Odisha has decided to seek consideration by NGT to resolve the Interstate Water Dispute Act (IWDA) 1956 and to pursue its fights against Chhattisgarh over the Mahanadi waters. The State of Odisha placed Mahanadi issue also to be brought up to be considered in light of the main principles on which National Green Tribunal functions including the principle of sustainable development, the precautionary principle and polluter pays principle.⁵⁵

The National Green Tribunal (NGT) also expanded its wings pulling up the Art of Living (AOL) Foundation for doing ‘wrong things’ wherein the Sri Sri Ravi Shankar-led organisation had prevented, the expert panel from visiting the Yamuna floodplains that hosted the World Culture Festival. The expert committee was constituted by the NGT to inspect the venue, determine a compensation amount and chart out a plan for rejuvenation after it found that the festival hosted by AOL caused environmental damage at the site and upon hearing, the expert committee also informed the NGT that the AOL was yet to pay the initial compensation amount that the Tribunal had ordered it to deposit within three weeks of its order.⁵⁶

Analyses of Cases

Since, inception of the NGT the number of cases filed in the tribunal shows that majority of the cases are related to the environmental clearances granted by the Government to development projects. The Environmental Impact Assessment Notification, 2006 mandates that certain categories of development projects get environmental clearance from the government before the execution start. The disputes related to the no objection certificates granted by the authorities to projects like setting up of new industry, expansion of existing industry, new power plants and the disputes related to the environmental clearance given by the authority to different project like MSW treatment plant, landfills, etc. dominate the case list before the Tribunal.⁵⁷ The Table below shows the nature of cases handled by the NGT.⁵⁸

Table–1. Nature of case handles by National Green Tribunal (2010-2014)

Type of cases	Percentage
Environmental Clearance & Related	41
Pollution	23
Conservation & Related	19
Others	17

55 ‘State Govt. files petition for setting up tribunal to settle Mahanadi river water dispute’, The New Indian Express (November 21, 2016), available on <http://www.newindianexpress.com/states/odisha/2016/nov/21/state-govt-files-petition-for-setting-up-tribunal-to-settle-mahanadi-river-water-dispute-1541115.html> (visited on December 12, 2016).

56 Kedar Nagarajan, ‘World Culture Festival: NGT pulls up Sri Sri Ravi Shankar’s AOL for barring panel from site’, The Indian Express (New Delhi, 22/4/ 2016), available at <http://indianexpress.com/article/india/india-news-india/world-culture-festival-ngt-pulls-up-sri-sri-ravi-shankar-aol-for-barring-panel-from-site-2764691/> (visited on March 11, 2017).

57 Muhammed Siddik Abdul Samada, et al, ‘Environmental Forensics in India –Four Years after the National Green Tribunal Act, 2010’, *Procedia Environmental Sciences* 30 (2015) 91 – 96, available at www.sciencedirect.com (visited on December 11, 2016).

58 Sanjay Kumar, ‘Green Report’, 3 NGT International Journal on Environment, 2014, pp.108-118.

The Table 2 shows the case disposal statistics of NGT as on 31-08-2014. This indicates considerable improvement from past.⁵⁹

Table-2. Case Disposal Statistics of NGT as on 31-08-2014

NGT Benches	Year	No. of Cases	Disposed	% of Disposed Cases
Principal Bench	2011 - 2014	2597	2073	79.8
Southern Bench	November 2012 - 2014	1496	574	38.3
Central Bench	April 2013 - 2014	1091	680	62.3
Western Bench	August 2013 - 2014	387	271	71.1
Eastern Bench	May 2014	46	15	31

Though one may not find the explicit usage of the terms ‘environmental forensics’ in any of the judgments delivered by the Green Tribunal, cases where the Tribunal has recommended environmental forensic investigation are many. So are the cases where the Tribunal has relied on the results of environmental forensic investigations to deliver its judgments.

In *Raghunath S/o Rakhmaji Lokhane v. MPWPB*⁶⁰ the Applicants have demanded restitution of the environment, especially the groundwater environment, polluted by the industries of Waluj industrial area of Maharashtra. While investigations shown pollution of the groundwater system, the individual industries shirked its responsibilities. The tribunal ordered the Maharashtra Pollution Control Board (MCB), the government agency primarily responsible for monitoring and controlling pollution in the State, to work out the remediation cost with the help of experts and equitably distribute this cost on the polluters after identifying their extent of responsibility in pollution. Clearly, an environmental forensic investigation has to be initiated by MPCB to comply with the order of the tribunal. Similar orders were issued in *Janardan Pharande v. MoEF*⁶¹ and *Vinesh Madanyya Kalwal v. State of Maharashtra*.⁶²

In *Himanshu R. Barot v. State of Gujarat*,⁶³ the tribunal had sought the help of the experts from a University to investigate the case of pollution by an industry. Based on their report the industry was made to take actions to prevent pollution. Moreover, the industry was made to pay rupees ten lakh being compensation in general to be used for providing public facilities for the population surrounding the industry who were the victims of pollution. But, in *Ramubhai Kariyabhai Patel v. Union of India*,⁶⁴ the tribunal itself collected relevant records and monitoring data available with various regulatory agencies pertaining to an accident that had happened a year back where hazardous waste was spilled to the environment, and arrived at the best estimate of the damage that could have happened at the time of spill. The operators were made to pay rupees twenty-five lakh towards restitution of environment in addition to compensation for farmers.

⁵⁹ *Ibid.*

⁶⁰ Original Application No. 11/2013 (THC)(WZ).

⁶¹ Original Application No. 7/2014 (THC) (WZ).

⁶² Original Application No. 30 (THC)/2013(WZ).

⁶³ Original Application No. 109/ (THC)/2013.

⁶⁴ Application No. 87/2013 (WZ).

Along with the many examples of successful use of environmental forensics, one also find cases where failure to take the forensic approach had resulted in the Tribunal not entertaining claims. In, *Godavari Magasvargiya Mastya Vyavσαι Sahakari Sanstha Mayradit v. The Ganga Sugar Energy Ltd.*,⁶⁵ the applicants were not granted compensation for their loss of income from fisheries due to the effect of pollution, because their claims were not legally established. Similarly, in *S. Munuswami v. The Chairman Tamil Nadu Pollution Control Board*⁶⁶ the Tribunal did not entertain the Applicants' request to order the Respondent industry to re-mediate the pollution as it was not substantiated. Thus, it can be said that the introduction of the National Green Tribunal has created a space for environmental forensics in India.

The data, however, showed that environment-related crimes across the country fell in 2015, with 5,156 offences compared to 5,846 incidents in 2014. Nearly 75% of all environmental crimes in India are reported from Uttar Pradesh and Rajasthan, data released by the National Crime Record Bureau (NCRB) on Tuesday showed. The total of 5,156 environmental crimes included offences related to violation of the Indian Forest Act 1927, Wildlife Protection Act 1972, Environmental (Protection) Act 1986, Air (Prevention & Control of Pollution) Act 1981 and Water (Prevention and Control of Pollution) Act 1974. Out of the total of 5,156 offences, 3,968 cases, which are nearly 77%, were related to the violation of the Indian Forest Act 1927. However, with 829 cases, Wildlife Protection Act was second on the list. Rajasthan with 2,074 cases topped the list and was followed by Uttar Pradesh with 1,779 cases, Jharkhand with 233 cases, Karnataka with 211 and Andhra Pradesh with 181 cases.⁶⁷

The data also revealed that a total of 8,034 people were arrested across India in 2015 on account of environmental crimes. In 2014, 8,765 persons were arrested. Out of which 8,034 people, nearly 66% (5,327) were from Uttar Pradesh (2,966) and Rajasthan (2,361) alone. The next highest number of people arrested were from Andhra Pradesh with 1,095 people, Karnataka with 321 cases and 244 from Maharashtra. According to the data, most of the arrests in 2015, were total of 6,344 people, for violation of the Indian Forest Act 1927, specifically for illegal felling of trees or illegally moving forest produce.⁶⁸

Pro-Active role of National Green Tribunal

NGT decision on Manja Ban- With the National Green Tribunal (NGT) imposing an interim nationwide ban on use of glass-coated 'Manja' for kite flying, the state government's ban on stocking and sale of 'Chinese Manja' has gained more weight. The State government has been banning Chinese Manja since last two years which is a good step to enforce the ban. However, the implementation will be a major challenge, PETA India's government affairs liaison Nikunj Sharma said the police need to gear up and take the responsibility.

65 Original Application No. 30/2013(WZ).

66 Original Application No. 152/2013(SZ).

67 Mayank Agarwal, 'NCRB data reveals environment crimes decrease in India', (last updated August 30, 2016) available at <http://www.livemint.com/Politics/e0qy4ZGLns8DRbKdOxbYrM/NCRB-data-reveals-environment-crimes-decrease-in-India.html>, (visited on April 21, 2017).

68 *Ibid.*

“The green court has not just banned nylon manja but also cotton threads coated with glass or metal. This order is wider than the existing state government ban”.⁶⁹

Order on Garbage Disposal

The National Green Tribunal’s direction against burning garbage is being thrown to the winds as the Vrindavan Municipal Council continues to set fire to local refuse. Garbage is also being indiscriminately dumped in trenches, situated just a few meters away from the Yamuna riverbed on Maant Road. Garbage generated in Vrindavan is not being taken to the designated site where it could be disposed of safely. The site mentioned in an affidavit submitted to the Green Court is not being used for garbage disposal at all. It should be noted that the NGT previously charged Mathura’s District Magistrate a fine of Rs.5 lakh for failing to prevent the dumping of solid waste on the banks of the sacred river there. A fine of a similar amount was also imposed on the Vrindavan Municipality, while the UP Pollution Board was fined one lakh rupees and the UP State Government were fined fifty thousand rupees.

Earlier the NGT ordered an immediate ban on use of plastic and polythene in Vrindavan. The district authorities have clearly been told to stop burning garbage and make proper arrangements for solid waste disposal and the fines have been imposed on several government agencies was confirmed by the report of a court commissioner appointed by the Tribunal, who visited the garbage sites of Vrindavan and collected photographic evidence to expose the truth.

The Vrindavan Municipal Council has filed a review petition in the Supreme Court of India, appealing against the fines imposed on the Municipality. Meanwhile, the NGT has sought a reply from the UP Pollution Control Board requesting compliance with its orders stating that, *“Learned counsel appearing for the Uttar Pradesh Pollution Control Board submits that he will take instructions and inform the Tribunal as to the compliance to the directions issued by the Tribunal. List this matter on 5th January, 2017.”*⁷⁰

“Ganga Jal” is considered to be the sacred water and the only water which can be kept for longer duration and do not stink comparatively to other water taken from other source,⁷¹ followed by a landmark ruling on March 20, 2017, the State of Uttarakhand could establish two sacred rivers i.e. Ganga and Yamuna as *“Living entities”* as pronounced by Uttarakhand High Court in its landmark judgment. Considering from the decades these holy rivers have been massively polluted with sewage, industrial chemicals and pilgrims’ ritual baths. Now, this order makes polluting or damaging the rivers, will be prosecuted for human rights. Three officials, i.e., Director of Namami Ganga Program, The Chief

69 Manka Behl, ‘NGT decision on manja will add weight to state ban’, The Times of India, Nagpur, December 17, 2016.

70 VT Staff, ‘NGT Order on Garbage Disposal Being Thrown to the Winds’, Vrindavan Today. 22/12/2016, available at <http://news.vrindavantoday.org/2016/12/ngt-order-garbage-disposal-thrown-winds/> (visited on December 22, 2016).

71 Naresh Kumar Vats, ‘GI-The factors of Rural Development and Strengthening Economy’, Vol. 21 Sep-Nov 2016, JIPR, p. 351.

Secretary, State of Uttarakhand and the Advocate General of Uttarakhand are assigned as legal guardians to ensure their conservations and protection.⁷²

Conclusion

The NGT has its strong teeth in relation to enforcement and its proceeding in spite of the fact that Tribunal is not bound by the procedure laid down by the Code of Civil Procedure, 1908 and not bound by the rules of evidence contained in Indian Evidence Act 1872. Tribunal proceedings shall be considered as judicial proceedings within the meaning of section 193, 219 and 228 for the purpose of section 196 of Indian Penal Code and the act as Civil Court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 but for the enforcement of its award Tribunal shall have all power of civil court. The NGT is the most consistent and progressive environmental authority in India. Unlike the Supreme Court, the NGT does not routinely favour infrastructure projects, nor does it cause a delay in resolving the cases before it. It had redefined the role of environmental experts and the criteria to select such experts. The passing of the National Green Tribunal Act was a significant development in the environmental jurisprudence of India. A welcome shift from the traditional approach of Criminal sanctions with strict evidentiary requirements, to a mix of Civil and Criminal sanctions was made possible by the Act. Another major change was the relatively quick decisions in the Green Tribunal. These improvements have resulted in more people approaching the court for redressal of the environment problems. NGT has been successful in implementing its orders which usually relate to staying environmental clearances be it introduction of CNG running buses in NCR Delhi or prohibition of diesel vehicles in Delhi or the limitation on maximum number of vehicles to be plied in Rohtang of Himachal Pradesh to save the glaciers of Himalayas which decision of the NGT considerably reduced the quantity of carbon emission. Further, the regional green tribunals seem even more active and aggressive than the NCT in Delhi, as the regional judges are fearless and have no ambition for national positions. Finally, the NGT seems to have encouraged a number of lawyers all over India to specialize in environmental law. Thus it can be seen from the above discussions on the functioning of the NGT that the consistent stress of Supreme Court of India to set up an environment court, the recommendation of Law Commissions of India for establishing the environment courts in India and lastly the decision of Govt. of India to set up environment tribunal by enacting the National Green Tribunal Act, 2010 was justified and the National Green Tribunal proved its aim and object to make India pollution free country.

Suggestions

- (i) There is an adequate need to create more Zonal Branches/places of sitting to be created.
- (ii) NGT must play its proactive role and *suo moto* summoning to take care of any act which is detrimental to the environment.

⁷² Ananya Bhattacharya, 'India's Sacred Rivers now have Human Rights' available at <https://qz.com/938190/the-ganga-and-yamuna-rivers-in-india-were-given-human-rights-to-protect-them-from-pollution/> (visited on June 10, 2017).

- (iii) The time limit for adjudication of disputes under section 14(3) of NGT Act may be extended Five Year as application for claim of damages.
- (iv) Professor having expertise in Environmental Law and more than 10 years teaching experience; Advocate(s) having more than 20 years' experience at Bar District / High Court / Supreme Court must be accommodated as Judicial Members of NGT. Since they are having ground root level experience and aware of practical difficulties.

REGULATION IN ELECTRICITY SECTOR AND PROTECTION OF CONSUMER RIGHTS : A CRITICAL ANALYSIS

Manish Yadav*

ABSTRACT

Electricity is an essential requirement for all facets of our life. It has been recognized as a basic human need. It is a critical infrastructure on which the socio-economic development of the country depends. The overarching aim of the research paper is to review the nature and degree of consumer protection in electricity sector under the regulatory regime. This research will seek to examine the practice of electricity regulation in India, using studies of various cases in protecting consumer's rights. Energy is the basic building block of economic development. Electricity is the most flexible form of energy that constitutes one of the vital infra-structural inputs in socio-economic development. Towards the end, it will highlight the issues concerning consumer protection to make the entire regulatory process more effective and transparent with the help of existing consumer grievance settlement mechanism provided under The Electricity Act, 2003. This research paper will review the existing legal and regulatory framework of the Indian power sector and discusses the status of the reforms in the sector. It also deals with the various provisions for consumer protection provide under the existing electricity laws and The Consumer Protection Act 1986. This research paper also aims to deals with the need for improving existing consumer grievance settlement mechanism in the Indian electricity industry from grievance settlement to problem solving. The present research paper is restricted to examination of the existing legal and regulatory framework for consumer protection mechanism such as consumer grievance redressal forums and electricity Ombudsman.

Keywords: *Electricity, Regulation, Consumer Grievances Redressal Forum, Ombudsman, Settlement Mechanism.*

“Electricity has become one of the basic necessities of life, not only does it drive the economic growth but also determines the Standard of living of people”

- Ex Prime Minister, Shri Atal Behari Vajpayee

Introduction

Regulatory reforms have become a major priority of economic policies throughout the world in the last two decades. However, it is a very complex matter and these are progressive reforms that cannot be done overnight. It started in the

* Assistant Professor of Law, Maharashtra National Law University, Nagpur, e-mail-manishyadavlaw@nlunagpur.ac.in.

late seventies in the United States and then the wave came to Europe and the rest of the world.¹ Governments around the world are transforming their infrastructure sectors to better meet the needs of their people. Regulatory reform is an essential part of this process, and there is a growing consensus around the key principles that should shape the design of regulatory systems for infrastructure.²

Governments around the world are transforming their infrastructure sectors to better meet the needs of their people. Regulatory reform is an essential part of this process, and there is a growing consensus around the key principles that should shape the design of regulatory systems for infrastructure.³ It is a critical infrastructure on which the socio-economic development of the country depends. Supply⁴ of electricity⁵ at reasonable rate to rural India is essential for its overall development. Equally important is availability of reliable and quality power at competitive rates to Indian industry to make it globally competitive and to enable it to exploit the tremendous potential of employment generation. Services sector has made significant contribution to the growth of our economy. Availability of quality supply of electricity is very crucial to sustain high growth rate of this sector and of Indian economy.⁶ While providing an investor friendly environment is one objective of the regulatory system, it is equally important to ensure a level playing field for competing suppliers and also credibility in the ability of the system to safeguard the interests of consumers in terms of quality of service provided and its cost.⁷ Electricity is an essential requirement for all facets of our life. It has been recognized as a basic human need. It is a critical infrastructure on which the socio-economic development of the country depends.

Growth of Indian Power Sector since after independence is noticeable. Indian economy is also witnessing remarkable changes. Following the liberalization and reform of the economy in 1991-92, the electricity sector too witnessed major policy and regulatory initiatives. The sector while it was growing rapidly in the eighties, faced issues of a debilitating and serious nature. Prior to 1991, the electricity sector was a government monopoly, which used to perform all the functions of generation, transmission, distribution and trading through a vertically integrated setup.⁸

1 Marta Isabel Da Costa Paiva Pinto, 'A Study on the deregulation of the electricity sector and the implications for the Portuguese Market' January 2001, at p. 1 <"http://in3.dem.ist.utl.pt/master/thesis/99 files/thesis02.pdf"> (visited on January 2, 2011).

2 Smith Warrick, 'Regulating infrastructure for the poor perspectives on regulatory system design' (2000) at p. 3 [http://www.globalclearinghouse.org/infradev/assets5C10/documents/WB\(Smith\)Regulating%Infrastructure%for%the%Poor%\(2000\).pdf](http://www.globalclearinghouse.org/infradev/assets5C10/documents/WB(Smith)Regulating%Infrastructure%for%the%Poor%(2000).pdf). (visited on April 10, 2017).

3 *Ibid.*

4 Section 2 (70) of the Electricity Act 2003 "supply", in relation to electricity, means the sale of electricity to a licensee or consumer.

5 Section 2 (23) "electricity" means electrical energy- (a) generated, transmitted, supplied or traded for any purpose; or (b) used for any purpose except the transmission of a message.

6 Yadav Manish, ENERGY LAWS: REGULATION IN ELECTRICITY SECTOR & PROTECTION OF CONSUMER RIGHTS, ed. 2015.

7 Consultation Paper of the Secretariat for the Committee on Infrastructure of Planning Commission of India "Approach to regulation of Infrastructure: Issues and Options" at p. 4 http://infrastructure.gov.in/pdf/approach_to_regulation_of_infrastructure.pdf (20 December, 2010), (visited on April 10, 2017).

8 Yadav Manish, STANDARDS OF PERFORMANCE AND ELECTRICITY ACT 2003, ed. 2014, p. 34.

The growing interdependence of the world economy and international character of many business practices have contributed to the development of universal emphasis on consumer rights protection and promotion. Consumers,⁹ clients and customers all over the world, are demanding value for money in the form of quality goods and better services. Modern technological developments have no doubt made a great impact on the quality, availability and safety of goods and services. But the fact of life is that the consumers are still victims of unscrupulous and exploitative practices.¹⁰

An estimated 1.2 billion people-16% of the global population-did not have access to electricity¹¹ according to The World Energy Outlook¹² (*WEO-2016*), 15 million fewer than reported in the previous year. Many more suffer from supply that is of poor quality. More than 95% of those living without electricity are in countries in sub-Saharan Africa and developing Asia, and they are predominantly in rural areas (around 80% of the world total). While still far from complete, progress in providing electrification in urban areas has outpaced that in rural areas two to one since 2000.¹³

Traditionally, infrastructure sectors in India were monopolies that were generally state-owned. With the introduction of economic reforms in early 1990s, this situation has changed significantly. The electricity, telecom, and ports sectors are being restructured and reformed in order to create competition, attract private investment, and also improve operational efficiency. Independent regulatory bodies have been established for electricity regulatory sector. Prior to this, there was no sector-specific law protecting the consumers' interests. The Consumer Protection Act 1986 was the only recourse that existed earlier. Now, in the new regulatory environment, consumer protection is one of the important mandates of infrastructure regulators.

9 Section 2(15) of the Electricity Act 2003 Define Consumer as-

“‘consumer’ means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be”.

10 Singh, S.S. and Chadah Sapna (eds), CONSUMER PROTECTION IN INDIA: SOME REFLECTIONS, 2005.

11 See on 1 January 2016, the 17 Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development — adopted by world leaders in September 2015 at an historic UN Summit —officially came into force. Over the next fifteen years, with these new Goals that universally apply to all, countries will mobilize efforts to end all forms of poverty, fight inequalities and tackle climate change, while ensuring that no one is left behind. available at http://www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/7_Why-it-Matters_Goal-7_CleanEnergy_2p.pdf (visited on January 12, 2017).

12 The annual World Energy Outlook is the International Energy Agency's flagship publication, widely recognised as the most authoritative energy source for global energy projections and analysis. It represents the leading source for medium to long-term energy market projections, extensive statistics, analysis and advice for both governments and the energy business; The International Energy Agency (IEA), an autonomous agency, was established in November 1974. Its primary mandate was – and is – two-fold: to promote energy security amongst its member countries through collective response to physical disruptions in oil supply, and provide authoritative research and analysis on ways to ensure reliable, affordable and clean energy for its 29 member countries and beyond.

13 *‘World Energy Outlook’* available at <http://www.worldenergyoutlook.org/aboutweo/> (visited on January 29, 2017).

Therefore, in order for the reforms to succeed, consumer's protection in the entire regulatory process is a must. This research reviews the nature and degree of consumer protection in electricity sector. Towards the end, it highlights the issues concerning consumer protection to make the entire regulatory process more effective and transparent.

The Electricity Act 2003 seeks to create liberal framework of development for power sector by distancing Government from regulation. The Electricity Act 2003 seeks to bring about a qualitative transformation of the electricity sector through a new paradigm by replacing the three existing legislations, namely Indian Electricity Act 1910, the Electricity (supply) Act 1948 and Electricity Regulatory Commission Act 1998. The changes that have brought up by passing The Electricity Act 2003, while significant, have not necessarily been in the direction intended, and the core problem of leakage, providing enforcement support to independent regulators by state, clarity of understanding on role of regulators, regulatory independence and powers, viability of distribution, tariff reform, open access, competition and consumer protection still remain to be addressed successfully. Privatization alone did not seem to be paying rich dividends. In the absence of either regulation or competition, whatever gains privatization has to offer may never reach to the consumers.¹⁴

Protection of the interests and rights of Consumers is one of the primary objectives of the Electricity Act 2003 as well as the National Electricity Policy 2005. Reliable and adequate availability of service at reasonable price and addressing consumer grievances are the key consumer issues in electricity regulation. Furthermore, the crucial factor in sustainable development of the Power Sector is to make it accountable, transparent and acceptable to people. It has generally been accepted that the Electricity Act 2003 has heralded effective steps in the right direction for mitigating the grievances of Electricity Consumers in general. New mechanisms to protect the interests of the Consumers have been envisaged in the Act. The Electricity Act 2003 insists that Forums for Redressal of Consumer Grievances shall be set up by all Electricity Distribution Companies. The Act also envisages the setting up of an Electricity Ombudsman for a state with powers to hear appeals on the verdicts of the Consumer Grievance Redressal Forums.¹⁵

Constitutional Provisions Relating to Electricity Sector

The Constitution of India contains important provisions related to the power sector in India. The provisions dealing with the division of powers between the Union and the states are relevant in this context. Under the federal structure of governance in India, the legislative powers of the Center and the States have been demarcated. The apportionment of legislative powers is made in the three lists of subjects. Schedule-VII of the Constitution of India contains the three Lists and the Parliament and the State Legislatures have the power to make laws on the subject matters contained in List-I (Union List) and List-II (State List)¹⁶

14 Sajal Ghosh, '*Electricity Consumption and economic growth in India*', ELSEVIER 1 (2002).

15 Yadav Manish, *ENERGY LAWS: REGULATION IN ELECTRICITY SECTOR & PROTECTION OF CONSUMER RIGHTS*, 2015, p. 44.

16 Article 246 (1) and (3) of the Constitution of India.

respectively. List-III (Concurrent List), however, confers powers of legislation with respect to listed subject matters on both the Centre and the States.¹⁷

Under Entry 38, List-III, both the Parliament and the State Legislatures have been empowered to make laws on the subject of 'Electricity'. The Constitution has, however, given supremacy to Central Legislation, meaning thereby that if there is a direct conflict or inconsistency between a Central Act and the provisions of a State Legislation, then the law made by the Parliament shall prevail and the inconsistent provisions of the State Legislation shall be void.¹⁸ However, if the aforesaid provision has received Presidential Assent, the State legislation can operate within the State.¹⁹ Despite such Presidential Assent, according to the Proviso to Article 254 (2) of the Constitution of India, a provision of the State legislation would not sustain if it is repealed, modified or amended by a subsequent Central Enactment's.

Legal Provisions Regarding Consumers' Interests in Electricity Act 2003

The Electricity Act 2003 makes comprehensive provisions seeking to protect the interests of consumers. As per provisions of the Electricity Act 2003 protection of consumer interest is one of the major objectives of reforms.²⁰ A number of steps have been taken to ensure consumer empowerment in this sector. Some of the key provisions are described below:

The commitment of the law makers in terms of safeguarding consumer interest is referred to in the preamble of the Act. The preamble says that the objectives of the Electricity Act 2003, among others, are to promote competition, protect the interests of the consumers and supply of electricity to all areas. The broad objectives of the Electricity Act 2003, as incorporated in preamble of the Act, is to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.²¹

The Act goes on to make specific provisions seeking to protect the consumers' interests. Section 43 of the Electricity Act 2003 provides for universal service obligation for the licensee to provide connection to a consumer within a

17 Article 246 (2) of the Constitution of India.

18 Article 254 (1) of the Constitution of India.

19 Article 254(2) of the Constitution of India.

20 Yadav Manish, ENERGY LAWS: REGULATION IN ELECTRICITY SECTOR & PROTECTION OF CONSUMER RIGHT, 2015, p. 34.

21 Preamble of The Electricity Act 2003- "*An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto*".

stipulated period of time, failing which the licensee is liable to pay compensation to the affected consumer.²²

Section 42 of the Electricity Act 2003 provides, inter alia, for the establishment of a CGRF for settling the grievances of consumers. It also provides for a channel of appeal in the form of ombudsman for settling non-redressal of grievances at the stage of CGRF.²³

Section 56 of the Act provides, inter alia, that no sum due from a consumer can be recovered after a period of two years unless such sum has been shown as arrears continuously from the date such sum became first due.²⁴

Section 57 of the Act requires the appropriate Commission to frame regulations on standards of performance which a licensee is required to follow

22 Section 43. Duty to supply on request (1) [Save as otherwise provided in this Act, every distribution licensee], shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply : *“Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate commissioning or within such period as may be specified by the Appropriate Commission”*. Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area. [Explanation. - For the purposes of this sub-section, “application” means the application complete in all respects in the appropriate form, as required by the distribution licensee, along with documents showing payment of necessary charges and other compliances.] (2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1): Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission. (3) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.

23 Section 42. (Duties of distribution licensee and open access): --(1) ... (2) ... (5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission. (6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as ombudsman to be appointed or designated by the State Commission. (7) The ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

24 Section 56. Disconnection of supply in default of payment (1) Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days' notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer: Provided that the supply of electricity shall not be cut off if such person deposits, under protest, -(a) an amount equal to the sum claimed from him, or (b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months, whichever is less, pending disposal of any dispute between him and the licensee. (2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity:

failing which he is liable to pay penalty.²⁵ The Commission has to specify different standards of performance by licensee in exercise of the powers vested in it under section 58.²⁶ Section 59 of the Act provides for monitoring all such performance standards through periodic reports to be submitted before the Regulatory Commissions.²⁷

Section 3 of the Consumer Protection Act 1986 and Section 175²⁸ of the Electricity Act 2003; provide that they are in addition and not in derogation of rights under any other law for the time being in force. Therefore, the rights of the consumers under the Consumer Protection Act are not affected by the Electricity Act 2003.²⁹ The provisions of the Electricity Act have overriding effect qua provisions of any other law except that of the Consumer Protection Act 1986, the Atomic Energy Act 1962 and the Railways Act 1989.³⁰

Provisions in the Electricity Rules 2005

Under the provisions of Electricity Act 2003, the Government of India has framed Electricity Rules³¹ and National Electricity Policy. There are some important provisions in the rules to ensure better consumer protection in the sector. For example, Rule 7 specifies guidelines for constituting grievances redressal forums and electricity Ombudsman.³² The Government of India has also framed rules giving flesh to the provisions of the CGRF and ombudsman.³³ The relevant rules (Rule 7 of the Electricity Rules,³⁴ 2005 (as amended) are quoted

25 Section 57. Consumer Protection: *Standards of performance of licensee* (1) *The Appropriate Commission may, after consultation with the licensees and persons likely to be affected, specify standards of performance of a licensee or a class of licensees. (2) If a licensee fails to meet the standards specified under subsection (1), without prejudice to any penalty which may be imposed or prosecution be initiated, he shall be liable to pay such compensation to the person affected as may be determined by the Appropriate Commission: Provided that before determination of compensation, the concerned licensee shall be given a reasonable opportunity of being heard. (3) The compensation determined under sub-section (2) shall be paid by the concerned licensee within ninety days of such determination.*

26 Section 58. Different Standards of performance by licensee- *The Appropriate Commission may specify different standards under subsection (1) of section 57 for a class or classes of licensee.*

27 Section 59. Information with respect to levels of performance (1) *Every licensee shall, within the period specified by the Appropriate Commission, furnish to the Commission the following information, namely: - (a) the level of performance achieved under sub-section (1) of the section 57; (b) the number of cases in which compensation was made under subsection (2) of section 57 and the aggregate amount of the compensation. (2) The Appropriate Commission shall at least once in every year arrange for the publication, in such form and manner as it considers appropriate, of such of the information furnished to it under sub-section (1).*

28 Section 175. (Provisions of this Act to be in addition to and not in derogation of other laws): *The provisions of this Act are in addition to and not in derogation of any other law for the time being in force.*

29 *UP Power Corpn. Ltd. v. Anis Ahmad* (2013) 8 SCC 491.

30 Section 173. (Inconsistency in laws): *Nothing contained in this Act or any rule or regulation made there under or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act 1986 or the Atomic Energy Act 1962 or the Railways Act 1989.*

31 Section 2 (59) of the Electricity Act, 2003 'rules' means rules made under this Act.

32 Yadav Manish, *ENERGY LAWS: REGULATION IN ELECTRICITY SECTOR & PROTECTION OF CONSUMER RIGHTS*, 1st ed. 2015, p. 10.

33 See Report of Forum of Regulators on "*Protection of Consumers' Interest*" September 2008.

34 The Ministry of Power, Government of India came out with a notification on June 8, 2005 (as amended on October 26, 2006) specifying rules under Section 176 of the Act (which empowers it to make rules for carrying out the provisions of the Act).

as “under rule 7 (1) of the electricity rules, 2005, the distribution licensee shall establish a Forum for redressal of consumer’s grievances as per regulations specified by the appropriate Commission. The Commission shall also nominate one independent member in the forum.³⁵ As per rule 7 (1) and (2) of the electricity rules, 2005, The state Commission shall appoint or designate Ombudsman³⁶ as per rules, regulations made by the commission for the purpose of deciding appeals against the order of Forums.³⁷ It is a responsibility of Ombudsman to prepare a report on a six monthly basis including details of nature of grievances of consumer dealt by him, response of the licensees in the redressal of consumer grievances and compliance of the standards of performance as specified³⁸ by the Commission under section 57 of the Act.”³⁹

National Electricity Policy 2005

Protection of consumer interest is one of the primary objectives of the Electricity Act of India 2003 as well as the National Electricity Policy 2005. According to the National Electricity Policy 2005,⁴⁰ the Central Government, respective State Governments and Regulatory Commissions should enable the protection of consumer interest and adherence to quality by specifying standards and norms of quality of service. It also requires Regulatory Commissions to conduct consumer satisfaction surveys and build the capacity of consumers to participate in regulatory decision making.

-
- 35 The Electricity Rules, 2005 (Rule-7.) Consumer Grievance Redressal Forum and Ombudsman
 (1) *The distribution licensee shall establish a Forum for Redressal of Grievances of Consumers under sub-section (5) of section 42 which shall consist of officers of the licensee. The Appropriate Commission shall nominate one independent member who is familiar with the consumer affairs. Provided that the manner of appointment and the qualification and experience of the persons to be appointed as member of the Forum and the procedure of dealing with the grievances of the consumers by the Forum and other similar matters would be as per the guidelines specified by the State Commission.*
- 36 The Electricity Rules, 2005, Rule-7. (2) *-The ombudsman to be appointed or designated by the State Commission under sub-section (6) of section 42 of the Act shall be such person as the State Commission may decide from time to time.*
- 37 The Electricity Rules, 2005, Rule-7.(3) *-The ombudsman shall consider the representations of the consumers consistent with the provisions of the Act, the Rules and Regulations made hereunder or general orders or directions given by the Appropriate Government or the Appropriate Commission in this regard before settling their grievances.*
- 38 Section 2 (62) of the Electricity Act, 2003.
- 39 The Electricity Rules, 2005, Rule-7 (4) (a) *The ombudsman shall prepare a report on a six monthly basis giving details of the nature of the grievances of the consumer dealt by the ombudsman, the response of the licensees in the redressal of the grievances and the opinion of the ombudsman on the licensee’s compliance of the standards of performance as specified by the Commission under section 57 of the Act during the preceding six months.*
- 40 *Under the provisions of section 3(1) of the Electricity Act 2003, the Central Government is required to prepare the National Electricity Policy for development of the power system based on optimal utilization of resources in consultation with Central Electricity Authority (CEA) and State Governments. The National Electricity Policy aims at laying guidelines for accelerated development of the power sector, providing supply of electricity to all areas and protecting interests of consumers and other stakeholders keeping in view availability of energy resources, technology available to exploit these resources, economics of generation using different resources, and energy security issues. The Policy has been evolved after extensive consultations with the States, other stake holders, the Central Electricity Authority and after considering the advice of the Central Electricity Regulatory Commission. The National Electricity Policy is one of the key instruments for providing policy guidance to the Electricity Regulatory Commissions in discharge of their functions and to the Central Electricity Authority for preparation of the National Electricity Plan.*

The Electricity Act 2003 provides for a robust regulatory framework for distribution licensees to safeguard consumer interests by framing regulation on standard of performance and working of grievance redressal forum and electricity Ombudsman. Para 5.13 the National Electricity Policy 2005 provides guidelines to the regulatory commission for the protection of consumer interests and quality standards.

The Electricity policy stated that the Appropriate Commission should regulate utilities based on pre-determined indices on quality of power supply under Standards of Performance including frequency and duration of interruption, voltage parameters, harmonics, transformer failure rates, waiting time for restoration of supply, percentage defective meters and waiting list of new connections.⁴¹ Reliability Index (RI) of supply of power to consumers should be indicated by the distribution licensee. A road map for declaration of RI should be drawn by up SERCs for all cities and towns up to the District Headquarter towns as also for rural areas.⁴² The National Electricity Policy lay down guidelines for setting up of grievance redressal forum by the licensees and Ombudsman within six months through the regulation.⁴³

Poor consumer participation in the policy and regulatory decision-making process is another major challenge faced by the SERCs. Consumer participation in the regulatory decision-making process is a crucial factor in order to make it accountable, transparent and acceptable to people. This affects the quality of regulation. Therefore, there is a need to develop the capacity of staff of the regulatory bodies so that they can assist the respective SERCs in protecting the interest of electricity consumers and promoting effective consumer participation in the decision-making process. The National Electricity Policy advised all the State Commissions to facilitate capacity building of consumer groups and their effective representation before the Regulatory Commissions so consumer participation will enhance in regulatory process.⁴⁴

Consumer Issues

Grievance Redressal- With the advent of reform, there has been an increased attention to consumer grievances. Earlier some utilities have been conducting public courts (adalats), State reform acts and the Electricity Regulatory Commission Act had provision for a consultative committee with consumer

41 Para 5.13 Protection of consumers' interests and quality standards "5.13.1 *Appropriate Commission should regulate utilities based on predetermined indices on quality of power supply. Parameters should include, amongst others, frequency and duration of interruption, voltage parameters, harmonics, transformer failure rates, waiting time for restoration of supply, percentage defective meters and waiting list of new connections. The Appropriate Commissions would specify expected standards of performance.*"

42 Para "5.13.2 *-Reliability Index (RI) of supply of power to consumers should be indicated by the distribution licensee. A road map for declaration of RI for all cities and towns up to the District Headquarter towns as also for rural areas, should be drawn by up SERCs. The data of RI should be compiled and published by CEA.*"

43 Para "5.13.3 *It is advised that all State Commissions should formulate the guidelines regarding setting up of grievance redressal forum by the licensees as also the regulations regarding the ombudsman and also appoint/designate the ombudsman within six months.*"

44 Para "5.13.4 *The Central Government, the State Governments and Electricity Regulatory Commissions should facilitate capacity building of consumer groups and their effective representation before the Regulatory Commissions. This will enhance the efficacy of regulatory process.*"

representation. Regulatory Commissions have been organising public hearings on major issues. The Electricity Act has many provisions intended to further this.⁴⁵

Every distribution licensee⁴⁶ is to establish a forum for redressal⁴⁷ of consumer grievances as per the guidelines of the respective Regulatory Commission. The Regulatory Commission is to set up a redressal authority one level higher in the form of an ‘Ombudsman’.⁴⁸ As a first step, licensees would generally be required to publish comprehensive document describing their rules and in-house grievance redressal process. If the consumer complaint is not satisfactorily solved by utility, he/she can approach the Forum, with an appeal. And appeal against the decision of forum will lie with the Ombudsman. Hence, now the consumers can approach these specialized courts in addition to the consumer forums. Distribution licensees have the duty to provide power supply to any consumer within one month of receipt of an application, subject to some clauses [43,44]. Regulatory Commission is expected to specify standards of performance for distribution licensee. Performance of the licensee with respect to the performance standards is to be published by the Regulatory Commissions once in a year. Fines can be imposed and compensation can be if these are not met⁴⁹. Advisory Committees of the Regulatory Commissions at the Central and State levels will have a representation from consumers.⁵⁰

Continuity of supply has a significant impact on production costs of industrial production sites as, *e.g.*, outages may cause severe damages. Due to globalization, European industry is subject to a strong worldwide competition.⁵¹

Continuity of supply particularly, and to a much lesser extent voltage quality, as delivered by system operators is being used increasingly by regulators in their assessments of their overall performance. Electricity consumers in India as well as in many other developing countries often suffer from poor quality of electricity supply. Ironically the area of consumer satisfaction is sadly neglected as more of a rule than an exception by every electricity DISCOM, the first interface between the consumer and the electricity sector. This neglect of consumer needs was so

45 Yadav Manish, ENERGY LAWS: REGULATION IN ELECTRICITY SECTOR & PROTECTION OF CONSUMER RIGHTS, ed. 2015, p. 78.

46 Section 2 (17) of the Electricity Act 2003 “distribution licensee” means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply.

47 Section 42 (5), every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

48 Section 42 (6), any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

49 Section 57, (Consumer Protection: Standards of performance of licensee): “(1) The Appropriate Commission may, after consultation with the licensees and persons likely to be affected, specify standards of performance of a licensee or a class of licensees...”

50 Section 80 (3), the Chairperson of the Central Commission shall be the ex-officio Chairperson of the Central Advisory Committee and the Members of that Commission and Secretary to the GOI in charge of the Ministry or Department of the Central Government dealing with Consumer Affairs and Public Distribution System shall be the ex-officio Members of the Committee.

51 Yadav Manish, STANDARDS OF PERFORMANCE AND ELECTRICITY ACT 2003, 1st ed. 2014 p. 70.

glaring that initially consumers were never a part of the decision making process neither had they any mechanism of questioning their DISCOM about poor service quality.⁵² However, last few years have seen increased attention to this neglected area and there are some initiatives towards improving the quality of consumer service. Public declaration of Citizens 'charter (on performance and service), formation of CGRF and Electricity Ombudsman, and regulations on Standards of Performance are all results of this increased attention. SERCs were established in many states in India under the Regulatory Commissions Act 1998 and their responsibilities are widened by the Electricity Act 2003.⁵³

Settlement of Consumer Disputes in Electricity Sector

An important goal of sustainable power sector reforms is that consumers enjoy a reasonable level of satisfaction with utility prices and service quality. If they are not satisfied they need an efficient and fair process, they can use to resolve disputes and complaints. The Electricity Act 2003 casts a mandatory duty on the Distribution Licensees to establish Forums for redressal of grievances of consumers. The word 'shall' used in sub-section (5) of Section 42 of the Electricity Act 2003 and sub-rule (1) of Rule 7 of the Electricity Rules, 2005 makes it amply clear that the Distribution Licensees have to compulsorily establish Forums for redressal of consumer grievances. Similarly, it is also mandatory for the Electricity Regulatory Commissions to nominate/designate Ombudsman as an Appellate Authority over the Forums. The role of the Regulatory Commissions in the functioning of these Forums and Ombudsman is crucial. First and foremost, responsibility of the State Regulatory Commissions is to ensure that the Forums are constituted and Ombudsman is designated and they discharge their functions in a time bound manner. The State Regulatory Commissions have to ensure that vacancies arising in the forums should be filled in periodically by the Distribution Licensee concerned and to nominate (4th) the independent member as per the amendment made to sub-rule (1) of rule 7 of the Electricity Rules 2005 by the Government of India.⁵⁴ To ensure that the Forums and the Ombudsman are discharging their duties effectively, State Regulatory Commissions have to periodically monitor their performance as mentioned in the Electricity Act 2003 and the Electricity Rules made there under.

The creation of the Regulatory Commissions at the Central⁵⁵ and State level⁵⁶ is looked upon by the consumers as an opportunity to seek redressal for their grievances in respect of supply of power given by the power utilities. The quality of power supply being poor by any standards, there has been a large number of complaints against the service rendered by the utilities. There is a tradition in India to seek redressal at the highest level without even going through the normal channels where grievances could have been redressed. Therefore, the

52 *Ibid.* p. 12.

53 *Ibid.* p. 56.

54 Yadav Manish, ENERGY LAWS: REGULATION IN ELECTRICITY SECTOR & PROTECTION OF CONSUMER RIGHTS, 1st ed. 2015, p. 123.

55 Section 2(9) of the Electricity Act, 2003 "*Central Commission*" means the Central Electricity Regulatory Commission referred to in sub-section (1) of section 76.

56 Section 2(64) of the Electricity Act, 2003 "*State Commission*" means the State Electricity Regulatory Commission constituted under sub-section (1) of section 82 and includes a Joint Commission constituted under sub-section (1) of section 83.

Commissions have to ensure that clear instructions for systematic handling of grievances have to been given by the licensees,⁵⁷ especially the Distribution Licensees. The utilities should be encouraged to draw up a Citizens Charter or Standards of Service and give it wide publicity. Any complaint or grievance would be in relation to the non-adherence of a provision in the Citizens Charter or Standards of Service.⁵⁸ In our system the supply is 'far' stretched and there would be a lot of problems. It would not be possible to satisfy all consumers. Therefore, Standards of Service which can be practiced should be fixed with reference to ground realities and published and made available. If this is not there, the Regulatory Commissions should insist on such a Statement being made by the Distribution Company. These Standards of Service will be basis for deciding the 'consumer' grievance and how it should be redressed. What would be the penalties that the Distribution Company would suffer if it does not confirm to the promised standards has to be indicated.⁵⁹

Consumer Grievance Redressal Forum

The Electricity Act 2003 provides a comprehensive legal framework for consumer grievance redressal. Section 42 (5) of the Act makes it mandatory for the distribution licensee to establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the SERC. Such a grievance redressal forum was to be established within six months by the licensee from the grant of license to it. The Electricity Rules 2005 provided for this forum to consist of officers of the licensee only. However, the rules were amended in 2006 to include in this forum, one independent member familiar with consumer affairs to be nominated by the Commission. Even after this amendment, which is a step in the right direction, aggrieved consumers will continue to represent to a forum consisting mainly of utility officials. This may raise question marks on the impartiality of the forum's decision.⁶⁰

The idea behind ECGRF under the Act is to (i) formalize grievances redressal mechanism through guidelines as may be specified by the Electricity Regulatory Commission and, (ii) bring in greater objectivity and fair play through induction of an independent outside member to be nominated by the concerned State Electricity Regulatory Commission. The Act also provides that any consumer, who is aggrieved by non-redressal of his grievance by the forum, may make a representation to an authority to be known as Ombudsman to be appointed or designated by the SERC. The Ombudsman is required to settle the grievance of the consumer within time and manner as may be specified by SERC. Alternatively, a consumer can also approach consumer courts directly for redressal of his grievance.

The first step is to approach the electricity company's internal complaint handling section as shown in the Figure below available to a consumer to take up

57 Section 2 (39) of the Electricity Act 2003 "*licensee*" means a person who has been granted a licence under section 14.

58 Yadav Manish, STANDARDS OF PERFORMANCE AND ELECTRICITY ACT 2003, 1st ed. 2014, p. 12.

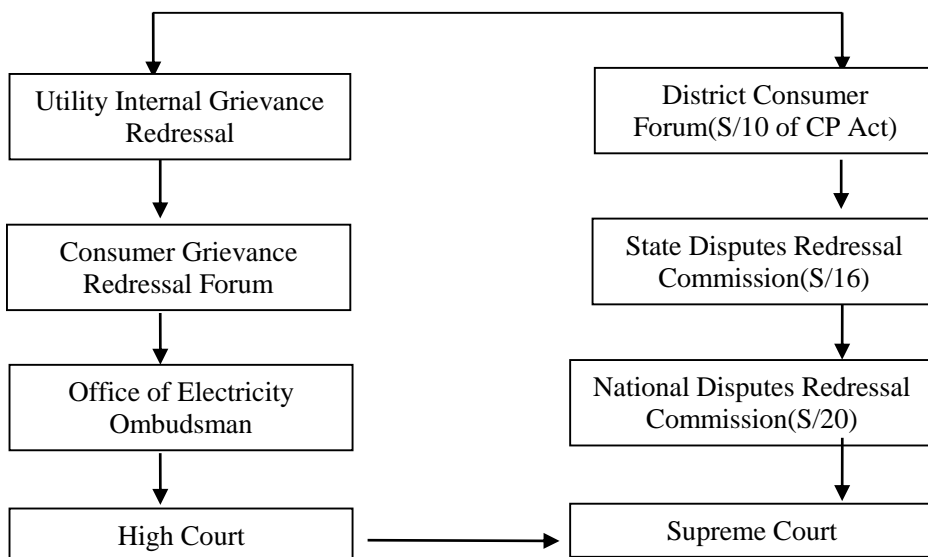
59 *Ibid.* p. 24.

60 Yadav Manish, ENERGY LAWS: REGULATION IN ELECTRICITY SECTOR & PROTECTION OF CONSUMER RIGHTS, 1st ed. 2015, p. 10.

complaints. If they do not solve the problem in time, then consumer has two options. One is to pursue the complaint through the consumer forum, which handles all types of consumer complaints, including electrical. This approach is shown on the right side of the figure, with district, state and national consumer forums; these have been set up under the Consumer Protection Act 1986. The second option is to pursue the complaint through the complaint handling mechanism exclusively set up for electrical complaints after the Electricity Act 2003.⁶¹

This approach is shown on below of the figure with grievance forum and office of the ombudsman.

Consumer Grievance Redressal Frame work



However, if the consumer is not satisfied by redressal of his grievance by Ombudsman, whether or not he can approach the commission, is not specified in the Act. This has given rise to doubts about the issue of regulator’s jurisdiction in redressing the consumer grievances.

Approach of Electricity Consumer Grievance Redressal Forum

The ECGRFs shall have the jurisdiction to entertain the complaints filed by the complainants with respect to the electricity services provided by the distribution licensee. The Consumers approach to the appropriate Officers of the Distribution Licensee for redressing their grievances initially. If the complaint is not rectified in time to their satisfaction they may approach the Electricity Consumer Grievance Redressal Forum (ECGRF). Before discussing the procedure for filling complaints and action taken by forums, first we will discuss who can submit Complaint to ECGRFs. In this context the provision of Section 42(5) of the Electricity Act 2003 reproduce as- *“Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever*

61 *Ibid.*

is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.”

After reading the above provision, it is clear that Consumer Grievance Redressal Forums are established for the redressal of consumer grievances by the distribution licensee. Thus, consumer can approach to ECGRFs for redressal of their grievances.

A consumer has been defined in Section 2(15) of the Electricity Act 2003, as follows:- “consumer” means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person⁶² whose premises⁶³ are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be.”

The definition of Complainant is not given in the Electricity Act 2003, however the definition of Complainant is provided by the State Regulatory Commissions through regulation regarding Consumer Grievance Redressal Forum and Ombudsman. The definition of Complainant as contemplated in the Madhya Pradesh Electricity Regulatory Commission (Establishment of Forum and Electricity Ombudsman for Redressal of Grievances of the Consumers) (Revision-I) Regulations 2009 is reproduce below-

Regulation 2.4 Sub Clause (d) Complainant means, (a) consumer as defined under clause (15) of Section 2 of the Act; or (b) an applicant for new connection; or (c) any registered consumer association; or (d) any unregistered association of consumers, where the consumers have similar interest; or (e) in case of death of a consumer, his legal heirs or representatives.

Similar definition has also given in the Model Regulations for Protection of Consumer Interest (Consumer Grievance Redressal Forum, Ombudsman and Consumer Advocacy Regulations) of Forum of Regulators for harmonizing of the regulations concerning the Forum and Electricity Ombudsman.⁶⁴

Individual Complaints Regulatory Commissions Jurisdiction

In this context it is submitted that as per Section 42(5) and 42(6) of the Electricity Act 2003, the power to resolve disputes between the licensee and the consumers has been vested only with the Grievance Redressal Forum and the Ombudsman and not with any other authority. In support, the following decisions of Appellate Tribunal for Electricity (APTEL) and Hon’ble Supreme Court may be mainly relied upon-

*Dakshin Haryana Bijli Vitaran Nigam Ltd. v. DLF Services Ltd.*⁶⁵ wherein the relevant observations made by the APTEL are as follows: “...*The State Commission in law cannot usurp either the jurisdiction of the Grievance Redressal Forum or the Ombudsman. In respect of the grievance of the consumers, the specific forum of redressal and representation to a higher authority are provided and the regulatory commission has no jurisdiction apart*

62 Section 2 (49) of the Electricity Act, 2003 “Person” shall include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person.

63 Section 2 (51) of the Electricity Act 2003 “premises” includes any land, building or structure.

64 Regulation 1.5 Clause (c).

65 2007 APTEL 356.

from the fact that it is either the appointing authority or the authority conferred with the powers to frame Regulations, and not even an Appeal power has been conferred on the State Commission with respect to consumer grievance”.

In *Dakshin Haryana Bijli Vitaran Nigam Ltd. v. Princeton Park Condominium*,⁶⁶ the APTEL observed: “... *The regulatory commission could exercise jurisdiction only when the subject matter of adjudication falls within its competence and the order that may be passed is within its authority and not otherwise on facts and in the law. All these statutory provisions conferring jurisdiction on the redressal forum, thereafter to approach the Ombudsman, it follows that the State Commission has no jurisdiction to decide the dispute raised by the consumers.*”

Hon’ble Supreme Court decided in the case of *MSEDC v. Lloyd Steel Industries Ltd.*⁶⁷, and observed: “...*The basic question is whether the individual consumer can approach the State Commission under the Act or not. By virtue of Section 42(5), all the individual grievances of the consumers have to be raised before the Grievance Redressal Forum and the Ombudsman only. The Commission cannot decide about the disputes between the licensees and the consumers.*”

Thus, it is evidently clear after going through the above provisions of the Electricity Act 2003 and above referred cases of APTEL and Hon’ble Supreme Court that the State Electricity Regulatory Commission is not an authority to adjudicate upon the dispute between licensee and consumer. Further, the Commission has no jurisdiction to adjudicate upon the disputes between an individual consumer and the licensee.

Ombudsman Legal Status under the Electricity Act 2003

Electricity Ombudsman is appointed under Section 42(6) of the Electricity Act 2003. This section authorizes the State Regulatory Commission to establish Ombudsman as an appellate authority over Consumer Redressal Forum through an appropriate notified regulation. Each distribution licensee is required to establish a Forum for redressal of grievances consumers as required under section 42 (5) of the Electricity Act 2003.⁶⁸ The Appeals arising out of the decisions of these Forums lie with the Ombudsman who has to settle the grievances of consumer as per the Regulations of the Commission vide Section 42 (6)⁶⁹ and 42 (7)⁷⁰ of the Electricity Act 2003.

Electricity Ombudsman is an authority providing an effective, alternate, time-bound and cost-less route for resolving the problems of the Electricity Consumers. Any person affected by deficiency in electricity-related-service can approach the Ombudsman for redressal of grievances.

66 2007 APTEL 764.

67 AIR 2008 SC 1042.

68 Section 42(5): “*Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of consumers in accordance with the guidelines as may be specified by the State Commission.*”

69 Section 42(6): “*Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.*”

70 Section 42(7): “*The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.*”

Licensee has no Right to Appeal before the Ombudsman

The Researcher noted that some State Commissions had reservations on the provisions of section 42(6) of the Act in that the said provision did not give a right to the licensees to appeal before the ombudsman against the orders of CGRF. It is discussed earlier that CGRF was conceived as an internal organ of the licensee, it was obvious that the orders of the CGRF would be acceptable to the licensee and that only the aggrieved consumer could have grievance against the order of such internal organ of the licensee. Thus, logically the Act did not provide for the right to a licensee to appeal against the orders of CGRF.⁷¹ Only consumer has right to appeal against the order of CGRF.

Conclusion

The Electricity Act 2003 is landmark legislation, aims at development of a power system which catalyses investment, promotes competition and protects consumer interest. The Electricity Act 2003 makes elaborate provisions which seek to protect the Interest of consumers. The National Electricity Policy and the Tariff Policy framed Under the Act reinforce its provisions. They stipulate a road map and action plan for various stakeholders in ensuring protection of consumers' interests. In line with the provisions of the Act and the policies, steps have been taken by stakeholders in different states towards institutionalizing the mechanisms of grievance redressal machinery, such as the Consumer Grievance Redressal Forum (CGRF) and the ombudsman.

The Act provides protection to consumers with reference to standards of performance. If a licensee fails to meet the specified standards than any penalty that may be imposed or prosecution pronounced, the regulatory commissions will have powers to impose appropriate compensation to be paid to the affected person within the time limit of 90 days. In addition, every licensee will have to furnish information about the level of performance achieved by it to the commission and the ERCs shall arrange for publication of such information at least once every year. Besides the tariffs shall be regulated by the commissions such that safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner, is ensured. Besides the State advisory Committee constituted by the respective SERCs will have consumer protection as one of its objectives.⁷²

Suggestions

Dispute settlement and adjudication through the Civil Courts has been complex, lengthy and unaffordable process for many. Government of India has tried to put in place an alternative legal mechanism harnessing the requisite judicial and technical expertise in the fast growing electricity sector in the country. In view of the explosive growth and complex emerging scenario, an integrated and comprehensive dispute settlement mechanism to protect the interest of consumers and industry is need of the hour. An effective grievances redressal mechanism is necessary for promoting growth in electricity sector. It is

71 Section 42(6): "Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission."

72 Tripta Thakura, S.G. Deshmukh 'Impact assessment of the Electricity Act 2003 on the Indian Power Sector' Energy Policy 33 (2005) p. 1.

submitted that the study attempts to look at an ideal grievances redressal mechanism in the electricity sector. The idea is to evoke different points of view so that a suitable model may emerge. For this purpose, a number of suggestions revolved after this research work are submitted for consideration to improve the grievances redressal processes in electricity industry.

- (i) Electricity is largely a technical field. As such, dispute settlement between service providers would often require understanding of technical issues for successfully resolving them. The regulator which possesses technical expertise would appear to be the most competent body to resolve such disputes. As against this, it is also possible to argue that the tribunal could be composed in such a way that it comprises technical as well as judicial members. Thus, a properly constituted tribunal will not suffer from the technical handicap as apprehended.
- (ii) In a sector like electricity, disputes between generating company, trading companies and transmission companies must be settled swiftly and speedily. It is submitted that adjudicatory proceedings before courts and tribunals often take a long time to come to finality.
- (iii) It is necessary here to ponder over the issue of efficacy of dispute resolution mechanism which is necessary for promoting growth in electricity sector. There is also a need to develop more transparent procedure in regard to settlement of disputes through ADR methods like mediation and arbitration. In this context institutionalized mechanisms for settlement of disputes whether in the shape of regulator or an appellate body do play an important role in settlement of disputes. However, one should not lose sight of alternative dispute settlement mechanisms which can play an equally important role involving much less time and cost in sorting out dispute in this sector.
- (iv) It is submitted that if the regulatory frame-work is clear and transparent and the service providers themselves provide an effective in-house dispute resolution mechanism, it will go a long way in not only providing satisfactory consumer services but would strengthen the desired meaningful growth in electricity sector. This will also reduce strain on SERC, CERC, APTEL and other legal forums and make the entire Dispute Resolution mechanism very efficient and effective.
- (iv) The clarity and transparency in regulatory and licensing regime minimizes the disputes and improves the efficiency of the system. In-depth analysis of the issues will go a long way to make the dispute resolution mechanism more effective. Frequent changes in the regulatory and licensing policies adversely affect the planning and investment decisions of the stake holders and results in disputes at various forums. Simplification of regulatory regime by licensor and regulator and to make the same more transparent will ensure that the issues do not get converted in to disputes.
- (v) ERCs many times do not even follow the limited reporting to the legislature that is required for them. They favour some over others appearing before them. They cannot be disciplined. Accountability is to the public opinion through the media. But a few other things are possible

to make this accountability more precise and well defined. An independent ratings process of the ERCs can be brought into being. As with ratings of the other institutions (for example of business schools, companies, etc.), there needs to be more than one independent rating. It should not be by government.⁷³

73 Rao, S.L., POWERING INDIA-A DECADE OF POLICES AND REGULATION, 2011, p. 60.

PUBLIC-PRIVATE PARTNERSHIP : A FOCUS ON THE DEVELOPMENT OF STADIUMS IN INDIA

*Shaik Nazim Ahmed Shafi**

ABSTRACT

India is a home of unity in diversity, population playing many different sports across the country. History speaks that India was never an exception to games and sports even though original games began in ancient Greece in 776 BC. 'Games' and 'Sports' serve society by providing vivid examples of excellence. A healthy nation is a wealthy nation by taking part in games and sports thereby making people strong and healthy. Since the ancient period i.e. the archaeological excavations of Mohenjadaro and Harappa to the modern era of Olympics, India stood for a variety of games and sports. But today, games and sports have become a neglected area in India. Prominence is given to a very few games or sports like the cricket, football and hockey while the other are neglected or undermined due to various factors like the lack of infrastructure, budgetary constraints on the government, dearth of stadiums and defunct stadiums. The author tries to balance the games and sports which are presently played, at par with those of being neglected due to various reasons, through the initiation of the concept of PPP in the development of stadiums in India. India does have many stadiums but as a matter of fact only few are functioning and the others have become defunct. Some stadiums were seen being used for the last time averaging 8 to 10 years are the victims of shortage of funds. To elevate the present poor state of stadiums in India to a 'World Class Stadiums' the author introduces the concept of PPP Modelled Stadiums in the development of stadiums in India benefitting the government, the private investor and the public at large and suggests for a policy initiation. Hence, there is a need for a national policy on infrastructure pertaining to Stadiums in India at par with the other infrastructural policies in other sectors as is evident today.

Keywords: *Public-Private Partnership, Mohenjadaro and Harappa, udayana krida, Special Economic Zone, Modeled Stadiums.*

Introduction

*"Champions aren't made in the gyms. Champions are made from something they have deep inside them—a desire, a dream, a vision."*¹

* Assistant Professor of Law, NALSAR University of Law, Hyderabad, e-mail-snashafi@yahoo.co.in.

1. Boxer, Philanthropist and a Social Activist, Kentucky, USA.

India is a home of unity in diversity, population playing many different sports across the country. 'Games'² and 'Sports'³ serve society by providing vivid examples of excellence.⁴ They play a vital role in building a person's physical and mental health. A habit of sports in one's life will lay the foundation for his success in good health leading to the nation's building socially, economically, politically etc. Sports keep human beings fit for all purposes whether family life, employment life, business life or even political life. A healthy nation is a wealthy nation by taking part in 'Games' and 'sports' making people strong and healthy.

The idea behind selecting this topic is that the author having visited many educational institutions, lack infrastructure building, games and sports in educational institutions. Games and sports have become farce than a reality. This paper brings out the history of games and sports from the period of archaeological excavations to the modern times and its importance in human life. It tries to bring out the development of stadiums a neglected area through the concept of 'Public-Private Partnership' (PPP) thereby reducing the burden on the government which speaks of "health is nation's wealth. Through PPP mechanism the author tries to explore the economic viability to the parties to a contract i.e. the government on one side and the private entity on the other with an overall benefit to the public at large. The author focuses on the initiation of a Policy on Stadium Infrastructure in India which is the need of the hour benefiting all.

History of 'Games' and 'Sports'

History speaks that India was never an exception to games and sports even though original games began in ancient Greece in 776 BC. The archaeological excavations of Mohen jadro and Harappa⁵ throws light that dancing, singing, swimming, marbles, balls, dice and hunting were regarded as games. The other periods like the Vedic period⁶ witnessed swinging, chariot race, hide and seek, run and catch, dices and boxing; the early Hindu period⁷ i.e., the Ramayana witnessed chariot-riding, horse-riding, hunting, swimming, chaturang or chess, and ball games; the Mahabharata relates to games and gymnastics, jumping, arms contracting, wrestling, playing with balls, hide and seek, chasing animals, Iti-danda or gulli-danda, dicing, water sports and swimming. The Puranas speak of discus and rope-fighting; the Buddhist and Jain literature of chess, swimming and boxing. The Jataka stories also prove of archery, udayana krida or garden games, salila krida or water games.

Later the Hindu period during 320 AD and 1200 AD, great universities like the Takshila and Nalanda witnessed military training, wrestling, archery, mountain-climbing, swimming, breath exercises and yoga, hunting, elephant fighting, ram fighting and partridge fighting. Finally, yoga which occupied in the

2. A 'game' is a physical or mental competition conducted according to rules with the participants in direct opposition to each other; <https://www.merriam-webster.com/dictionary/game> (visited on January 18, 2017).

3. A 'sport' is an individual or group activity pursued for exercise or pleasure, often involving the testing of physical capabilities and taking the form of a competitive game such as football, tennis etc.; <https://www.collinsdictionary.com/dictionary/english/sport>, (visited on January 18, 2017).

4. George F. Will is a Pulitzer Prize-winning conservative political commentator.

5. Indus Valley Civilization 3250 BC-2750 BC.

6. Vedic Period 2500 BC-600 BC.

7. Early Hindu Period 600 BC-320 BC.

cultural history of India, from times immemorial, an unparalleled and distinct recognition as the one and only practical system of physical, mental, moral and spiritual culture is gaining its importance and playing a prominent role in our present day life.

The purpose behind the 'games' and sports' is to bring up the harmoniously developed generation i.e. the generation of strong and healthy people. Sport makes our bodies strong, quickens our reaction, and shapes the wits. It also prevents us from getting too fat, gives us so valuable practice in making eyes, brain and muscles work together and makes us more self-organized and better disciplined.

'Games' and 'Sports' in India

'Games' and 'Sports' are played at two places i.e., one in educational institutions and the other in stadiums. Educational institutions play a vital role in shaping the students mentally and physically fit through their curriculum of academics and games. And on the other hand 'stadiums' were designed to host more than one type of sport or event, and the concept of 'stadium' usually refers to a specific design philosophy that stresses multi-functionality over specificity.

India does have many stadiums as well as many games and sports. Today, prominence prevails over a very few games which are played in a very few stadiums. Cricket, football, hockey is given importance leaving the other games and sports behind, which India has witnessed traditionally from the ancient period. Whether authorities have neglected some games and sports or have undermined the other, except the aforesaid three, is a million-dollar question. In any way the author wants to bring out a balance between the games and sports which are presently played, at par with the other which are not played and tries to bring out a platform form by creating a space to those games and sports which were neglected in India, through the initiation of the concept of PPP in the development of stadiums in India. India does have many stadiums but as a matter of fact only few are functioning and the others have become defunct (e.g. 54 cricket stadiums in India have become defunct).⁸ Some stadiums were seen being used for the last time averaging 8 to 10 years are the victims of shortage of funds.

Very recently, India witnessed a thriving at the Olympics or at the other International event in a very particular game or sport. The question here is does people in India know only few games and sports—the answer is not. The author opines that all traditional games along with the modern are to be played at each and every stadium and thereby making India proud of its games and sports at the international level. India being no exception to the process of liberalization, privatization and globalization, ratified the World Trade Organization (WTO).⁹ Hence, the concept of PPP has emerged by which the author tries to apply the said concept in the development of stadiums in India providing a stake to one and all.

8. 'Defunct cricket grounds in India' available at https://en.wikipedia.org/wiki/Category:Defunct_cricket_grounds_in_India, (visited on March 20, 2017).

9. India had formally ratified the World Trade Organization's (WTO) Trade Facilitation Agreement, which aims at easing customs procedures to boost commerce...agreement. India is the 76th WTO member to accept the TFA.

Origin of ‘Stadiums’

The word “stadium” originates from the town of Olympia in Ancient Greece. The Olympians used to run a race over a distance of 192m, which in Greece was a unit of measurement called a “stadium”, which in turn gave its name to the venue. Stadiums were a large structure providing the inspiration for a type of sports arena. The stadium involved the juxtaposition of two semicircular theatres to produce a venue where the spectator area completely surrounded the “stage”, creating what was, in effect, a stadium bowl.¹⁰ The concept of ‘stadium’ was developed since the days of ancient Greece and Rome, to reflect the specific requirements of a wide variety of sporting disciplines. These stadiums were regarded as football stadiums and were designed to be used for other sports too (e.g. athletics). But in the modern era, the emphasis is on the specific needs of the game henceforth, the stadium developers of the 21st century must be aware of while undertaking the projects under PPP model.

Public-Private Partnership

Over the years, Government of India (GoI) has been providing infrastructure through budgetary provisions. Infrastructure is the key to development of any nation, both for economic growth and poverty eradication. Over the years, developing countries, including India, have seen inadequate public expenditure in the infrastructure sector owing to pressing demands for other government obligations. GoI has recognized that there is significant deficit in the availability of physical infrastructure across different sectors and that it is hindering economic development. Large investments are required in infrastructure. These cannot be drawn from public finances alone and there is a specific role for private investment that was for long missing. In order to attract private capital as well as the techno-managerial efficiency associated with it, the GoI has decided to accelerate promotion of Public-Private Partnership (PPP) in infrastructure development to keep the games and sports actively alive. Government has also recognized the fact that in, all infrastructure projects cannot be viable because of their long gestation period and poor cash flow in the initial years. These projects with a large social and economic value cannot be bankable for the purpose of private investment. Therefore, there is need for government’s grant to make such projects viable if private investment is welcomed.¹¹ Hence, the first decade of 21st century has witnessed Indian economy experiencing an unprecedented growth in almost all sectors.

Today’s infrastructure development in any sector requires land. Land has become a buzz word because; in any aspect or for any sector land is required. Whether it for Special Economic Zone (SEZ) or Industrial Corridors, or Information Technology Corridors, or residential, or commercial or corporate or two bed room house for below poverty line (BPL) as was announced by the Hon’ble Chief Minister of Telangana State or as was announced by our Hon’ble Prime Minister Narendra Modi- ‘Housing for All by 2020’ anyway in all cases

10. ‘UEFA guide to quality stadiums’, available at https://www.uefa.org/MultimediaFiles/Download/EuroExperience/competitions/General/01/74/38/69/1743869_DOWNLOAD.pdf (visited on March 20, 2017).

11. Yogendra Sharma, (rev.) PUBLIC PRIVATE PARTNERSHIP, 2015, pp. 1-3.

there is requirement of land. But stadiums also require land. Before setting up of new stadiums in India, the GoI or the respective State Governments must think over the optimum utilization of the defunct stadiums as well as the functional stadiums for the public purpose. As the population of India majorly comprises of youth, it is the need of the hour that the stadiums must be given away for development to a private party under the PPP model, which will go a long way in protecting the health of the youth.

PPP : Definition and its Mechanisms

The concept of PPP can be discussed by making a brief review of definitions at the international level including those from international agencies such as OECD,¹² IMF,¹³ and ADB¹⁴ etc. Generally, a 'Public Private Partnership' is a partnership between the public and private sector for the purpose of delivering a project or service which was traditionally provided by the public sector. By adopting the PPP model, the governments can be benefitted in many ways like; it induces private development at strategic locations; maximizes governmental investment, development and operational incentives; maximizes use of funds in a special assessment district; creates employment opportunities; uses less public capital in developing facilities or the infrastructure and finally improves performance of under-used assets.

The various mechanisms which can be applied under PPP are; Operations and Maintenance (OM); Operations, Maintenance and Management (OMM); Design-Build (DB); Design-Build-Maintain (DBM); Design-Build-Operate (DBO); Design-Build-Operate-Maintain (DBOM); Design-Build-Finance-Operate-Maintain (DBFOM); Design-Build-Finance-Operate-Maintain-Transfer (DBFOMT); Build-Operate-Transfer (BOT); Build-Own-Operate (BOO); Buy-Build-Operate (BBO); Developer Finance (DF); Enhanced Use Leasing or Underutilized Asset (EUL/UA); Lease-Develop-Operate or Build-Develop-Operate (LDO/BDO); Lease-Purchase (LP); Sale-Leaseback (SL); Tax-Exempt

-
12. Organization for Economic Cooperation and Development defines a public-private partnership as "an agreement between the government and one or more private partners (which may include the operators and the financiers) according to which the private partners deliver the service in such a manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners."
 13. According to International Monetary Fund (IMF 2006: 1 and 2004:4) public-private partnerships (PPPs) refer to arrangements where the private sector supplies infrastructure assets and services that traditionally have been provided by the government. In addition to private execution and financing of public investment, PPPs have two other important characteristics: there is an emphasis on service provision, as well as investment, by the private sector; and a significant risk is transferred from the government to the private sector. PPPs are involved in a wide range of social and economic infrastructure projects, but they are mainly used to build and operate hospitals, schools, prisons, roads, bridges and tunnels, light train networks, air traffic control systems, and water and sanitation plants.
 14. Asian Development Bank defines the term "Public-Private Partnership" as a range of possible relationships among public and private entities in the context of infrastructure and other services. PPPs present a framework that - while engaging the private sector-acknowledge and structure the role for government in ensuring that social obligations are met and successful sector reforms and public investments achieved. A strong PPP allocates the tasks, obligations and risks among the public and private partners in an optimal way. The public partners in a PPP are government entities, including ministries, departments, municipalities, or state-owned enterprises. The private partners can be local or international and may include businesses or investors with technical or financial expertise relevant to the project. (Source: Public-Private Partnership Handbook [Asian Development Bank]).

Lease (TEL) and Turnkey (T). However, in India since the initiation of the reform process, measures were introduced to strengthen the existing infrastructure and to develop new projects with private participation.¹⁵ PPP is applied in the form Build-Operate-Transfer (BOT) or Build-Own-Operate-Transfer (BOOT) and Concession Agreements. Recently established Joint Venture structure of institutions to develop and modernize the Delhi and Mumbai airports is an apt form of PPP. Hence, the respective governments can opt for any of the aforesaid mechanism under the PPP for the development of stadiums in India.

Beneficiaries under PPP Modelled Stadiums

Taking the economic viability into consideration, the author focuses the three-way benefits to the government, private investor and also to the public at large in the development of stadiums in India. The following are benefits:

- (i) **Benefits to the Government**-Project-wise, a PPP represents considerable benefits like improved service quality, lower project costs, less risk (in matters of project design; execution; operation and financing), framework conducive to innovation; more rapid project execution; easier budget management; source of additional revenue, exploring PPPs as a way of introducing private sector technology and innovation in providing better public services through improved operational efficiency, incentivizing the private sector to deliver projects on time and within budget, extracting long-term value-for-money through appropriate risk transfer to the private sector over the life of the project—from the design/construction to operations/maintenance.¹⁶ PPPs help the public sector develop a more disciplined and commercial approach to infrastructure development whilst allowing them to retain strategic control of the overall project and service,¹⁷ asset management implementation, capital improvement efficiencies, ability to retain ownership of the assets, retention of workforce, customizable PPP models, relief of financial stresses on government, upfront capital, economic growth, new revenue opportunities, ability to handle aging workforce, and investment in new technology.¹⁸ Hence, the government can shoulder its responsibility to a private party in operations and maintenance of the said stadiums. When once a stadium gets operated, the government will have its stake in the profits earned through the PPP model.
- (ii) **Benefits to Private Party**-Project-wise a private party is not benefitted due to its major role in investment, construction, operations and maintenance. A high risk factor is an inherent quality in a PPP model whether it may relate to the price of goods, raw material, labour, tax, law and policy issues, etc. It is only when once the project enters into operation stage one can

15. 'The National Council for Public Private Partnership' available at <http://www.ncppp.org/ppp-basics/types-of-partnerships/>, (visited on March 20, 2017).

16. PPIRC 'Government Objectives: Benefits and Risks of PPPs' available at <https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives>, (visited on January 21, 2017).

17. 'International Project Finance Association'; <http://www.ipfa.org/industry-resources/benefits/>, (visited on January 21, 2017).

18. 'Black & Veatch Reprint Permission Policy'; <https://www.bv.com>, (visited on January 22, 2017).

think of the profits. Here the private party must estimate how best it can retain the project till it gets its stake from the project. However, a private party can be benefitted only after it completes the project and brings into operation. But this is purely based on its business plan which establishes the financial viability of a stadium development project and sets out the anticipated sources of revenue.

In the past, stadiums were used only on match days and in case of national venues far less. Those days are long gone. Modern stadiums¹⁹ need to identify other means of generating revenue on a daily basis due to the involvement of a private party under PPP model. Stadiums must be commercialized so as to generate the revenue on daily basis. To be commercialized, the income initiatives must include; extending use of the stadium to non-match days (by providing facilities and activities for the local community, schools, colleges, universities, and the public at large for running, jogging, physical exercises etc. throughout the week); maximizing match-day revenue; VIP areas providing superior catering and washroom facilities and direct access to premium seating; providing at a premium the skyboxes; catering facilities and restaurants; retail outlets/merchandising; car parking; ticket sales; maximizing non-match revenue; other sports events; corporate events; weddings and other special occasions; conference facilities; cinema, nursery facility; air ticketing; cab facility; medical and ambulance facility; book-shops, fire brigade; security staff etc. Finally, the developers of the stadium must open schools of games and sports by hiring people familiar with the respective game or sport so as to cater the need of the public.

- (iii) **Benefit to Public**-It is evident that prominence is given to few sports in India while the other is neglected. It may be due to the dearth of stadiums or the infrastructural issues the government is facing today or due to the defunct stadiums or lack of funds. Through PPP model stadium, all the issues can be subsided and a new era of games and sports can be re-looked into. The said model stadiums can benefit the students of all educational institutions as well as the public at large. A new dimension can be given by inviting the sportsman to be attached to the model stadium so as to render their valuable services to the students and the public. The model stadium can invite competitions among educational institutions intra and inter-district, as well as intra and inter-State. Those weak in studies can opt for the sports and can lead the team to the international level. Unemployment issue can be curbed by bringing out more and more stadiums with various games and sports to be played.

The PPP modelled stadiums can invite various types of games and sports like;

- (i) *Olympic Sports*-which include Archery, Athletics and Triathlon, Badminton, Basketball, Boxing, Cricket, Cycling, Equestrian sports, Football, Golf, Gymnastics, Handball, Hockey, Kayaking, Power lifting, Rugby, Table Tennis, Taekwondo, Tennis, Volleyball, Weightlifting, Wrestling etc.; *Non-Olympic Sports* – like American football, Baseball and softball, Billiards and Snooker,

19. UEFA Guide to Quality Stadiums.

Chess, Floor ball, Kabaddi, Karate, Korfbal, Lacrosse, Motorsports, Netball, Polo, Rock climbing, Sepak takraw, Throw ball; (iii) *Winter Sports*—bandy, ice-hockey and (iv) *Traditional and Regional Sports*—like Seval Sandai, Jalikattu, Gilli-danda, Kancha, Kite-flying, Indian martial arts, and Kho-kho, Bhatkamma festival etc.²⁰

Keeping in view the aforesaid games and sports, the sports activity can boom and can reach to the highest of the highest heights on a precondition that the government takes initiative in introducing the PPP modelled modernized stadiums in India and making people of India strong and healthy. Our Hon'ble Prime Minister, Shri Narendra Modi's statement was right which says 'Make in India' concept which can be achieved with spirit.

Conclusion

A National Policy on Infrastructure on Stadiums is the need of the hour. Greenfield and Brownfield Infrastructure Policies on Stadiums must be initiated in at par with other existing Infrastructure Policies of various sectors in India. PPP has become the buzz word for the growth and prosperity of a nation. In India only Rajasthan has a programme on infrastructure initiated in 2015.²¹ The author opines that the government must explore the possibilities of introducing many 'World Class Stadiums' in India through the PPP model. The lost and the past glory of ancient culture of games and sports can be restored only through the concept of PPP. It may not be out place to place those organizations like ports, airports, highways which have come into action. India having entered into global market started in spreading its wings of economic development in various sectors like the air and space; trade and commerce; information technology; etc. Today the world is at a competitive edge and India must also excel in other sectors like the one in games and sports. India hosted several international sporting events, including the Asian Games, Cricket World Cup, Afro-Asian Games, Hockey World Cup, Commonwealth Games, Indian Premier League, Chennai Open in Tennis, the Indian Masters in Golf, and the Indian Grand Prix Formula-1. India will be hosting the 2017 FIFA U-17 World Cup. However, PPP will ignite the slow process of development through its various mechanisms in the field of games and sports. Hence, the PPP modelled stadiums will play a vital role affecting people of various walks of life in the near future.

Today India is witnessing 'world class airports' etc., and in the same way, India must witness 'World Class Stadiums' attracting the players globally. India must become a hub of games and sports internationally drawing the attention of various players whether indoor or outdoor to India. It creates an opportunity for Indians to participate in the international events without any exception. It generates employment from the root level i.e., village to metros or cosmopolitan city. Every educational institution requires a qualified physical director and many more making it a mandatory through a policy etc. Every State has its own traditional games and sports which can be recognized and can be brought to limelight paving way for participation by the public. It is unfortunate to state that

20 'Sports in India' available at https://en.wikipedia.org/wiki/Sport_in_India (visited on January 24, 2017).

21 Integrated Stadium (Sports Infrastructure) Development Programme in 2015.

some educational institutions for its glory compel students in academics forgetting the other part of curricula, i.e., games and sports. After schooling, students who aspire for higher studies are not getting an opportunity to play nor so called educational institutions provide a platform to play. In a tussle between the two, students who are well in academics will have a say in employment, and the others have no place of employment in any field. This at a later stage may lead to discrimination resulting into unemployment creating frustration and compelling him to find a wrong path of life. Today, everyone aspires to become a doctor, a lawyer or an engineer but why a good sportsman can't. The government must come forward in introducing the Sports Schools, Sports Colleges and Sports Universities with a minimum educational qualification but giving impetus to the sports who desire. Games and Sports is a neglected area and if the government comes forward as a helping hand to those who aspire completely for games and sports, hope India can get an opportunity of participation in international games through 'World Class Stadiums'. At this juncture, if the government explores the possibilities of creating 'Greenfield' and 'Brownfield' Stadiums under the umbrella of Public-Private Partnership, then in India the development of stadiums will become a reality which in turn encourages games and sports making the nation healthy and wealthy. Hence, a National Policy on Infrastructure of Stadiums is the need of the hour.

INTERNATIONAL TAX TREATIES AND DEVELOPING INDIAN ECONOMY : AN ANALYSIS

Anindhya Tiwari*

ABSTRACT

Where a taxpayer is resident in one country but has a source of income situated in another country, it gives rise to possible double taxation. This arises from two basic rules that enable the country of residence as well as the country where the source of income exists to impose tax, namely, (i) source rule and (ii) the residence rule. The source rule holds that income is taxed in the country in which it originates irrespective of whether the income accrues to a resident or a non-resident whereas the residence rule stipulates that the power to tax should rest with the country in which the taxpayer resides. If both rule apply simultaneously to a business entity and it were to suffer tax at both ends, the cost of operating in an international scale would become prohibitive and deter the process of globalization. It is from this point of view that Double taxation avoidance Agreements (DTAA) become very significant. This double taxation agreement shall form part of the local laws of the state. If it cannot be enforced, it will not serve its purpose. This is an accepted principle of such agreement that is automatically becomes part of domestic law through agreement itself or the convention as is usually described, is made by approval of the legislature or where the legislature as in India has already delegated such power to the executive, the formal approval of executive by notification or such other means of ratification.

Keywords: merger, amalgamation, foreign direct investment, Companies Act, Competition Act, Income Tax Act, OECD.

Introduction

In the present era of cross border transactions around the globe, the effect of taxation is one of the most important considerations for any trade and investment decision in other various countries. One of the most significant results of globalization is the visible impact of one-country domestic tax policies on the economy of the other countries. This has led to the need for continuously assessing the tax regimes of various countries and bringing about various reforms in them. Where a taxpayer is resident in one country but has a source of income situated in another country it gives rise to the possibility of double taxation. This arises from the two basic rules that enable the country of residence as well as the country where the source of income is present. If both rules are to be applied simultaneously to a business, entity and it were to suffer tax at both the ends. The

* Assistant Professor, School of Law, Galgotias University, Greater Noida, Uttar Pradesh, e-mail: anindhya.tiwari@gmail.com.

cost of operating on an international scale would become prohibitive and would seriously harm the process of globalization. This research paper discusses the intricacies of today's modern world of advanced globalization where any business is not restricted to a single territory and crosses all borders of all countries. This had emerged as complex world of business along with complex world of accounting and taxation.

Cross-border transactions across the world, due to unique growth in international trade and commerce and increasing interaction among the nations, residents of one country extend their sphere of business operations to other countries where income earned taxed. One of the most significant results of globalization is the noticeable impact of one country's domestic tax policies on the economy of another country. This has led to the need for incessantly assessing the tax regimes of various countries and bringing about indispensable reforms. Therefore, the consequence of taxation is one of the important considerations for any trade and investment decision in any other countries. Fiscal jurisdiction is often the most aggressively protected jurisdiction in India. Consequently, even in times when economies are going global and borders vanishing, leading to liquid movement of goods, services and capital, double taxation is still one of the major obstacles to the development of inter-country economic relations. India are often forced to negotiate and accommodate the claims of other nations within their heavily defended fiscal jurisdiction by the means of double taxation avoidance agreements, in order to bring down the barriers to global trade.

Where a taxpayer is resident in one country but has a source of income situated in another country, it gives rise to possible double taxation. This arises from two basic rules that enable the country of residence as well as the country where the source of income exists to impose tax, namely, (i) source rule and (ii) the residence rule. The source rule holds that income is taxed in the country in which it originates irrespective of whether the income accrues to a resident or a non-resident whereas the residence rule stipulates that the power to tax should rest with the country in which the taxpayer resides. If both rule apply simultaneously to a business entity and it were to suffer tax at both ends, the cost of operating in an international scale would become prohibitive and deter the process of globalization. It is from this point of view that Double taxation avoidance Agreements (DTAA) become very significant.

For this purpose, only¹ Double Taxation Avoidance Agreements (hereinafter referred to as DTAA) become very significant. The country has a right to tax on the profits earned in its territory by anyone and it has the right to tax the global income of its residence. This leads to taxation of the same income more than once in two countries. To avoid this double taxation of same income, countries are entering into double tax avoidance agreements with each other. There is generally bilateral agreement entered into by two countries, however there are also multi-lateral agreements, entered into between two or more countries. It lays down the rules for taxation of income by the source country and the country of residence;

1 *'Double taxation relief'* available at http://www.icaiknowledgegateway.org/littledms/folder1/chapter15_doubletaxationrelief.pdf, (visited on May 30, 2016).

such rules is laid for various heads such as interest, dividend, royalties, capital gains and business income.

Constitution of India and DTAAs

The constitution of India has conferred the sovereign power to levy taxes and to enforce collection and recovery thereof on the state under Article 265 by mandatorily providing that no tax be levied or collected, except by authority of law. The power to levy taxes conferred on Union in respect of matters falling within its ambit in List-I of Schedule-VII of the constitution. While the powers to levy taxes conferred on the state, legislatures are relatable to all and fall within the ambit of scope of List-II to Schedule-VII but largely matters falling under List-III relate to the administration of states. The specific entry in the Seventh Schedule, which empowers the Union of India to enter into treaties and agreements with foreign countries and implementation of such treaties, agreements and conventions with foreign countries, is Entry-14 List-I in Schedule-VII to the constitution of India.

Treaty v. Constitution-The importance of recognizing the right of the government of this day to negotiate agreements, which will bind not only itself but also even successive government, has recognized, by incorporating a provision relating to international agreements as a part of the directive principles. While directive principle may not be justifiable in the sense, in which the Fundamental rights are. The 42nd Constitutional Amendment to the given Directive principle (hereinafter referred as 'DPSP') force of law by insertion of Article 31C was however, shot down by the Supreme Court in *Minerva Mills*.² The earlier view was that fundamental rights and the Directive principles supplement each other or fundamental rights has been found to be unacceptable in that the majority held that the DPSP are merely directory, unless they are supported by legislation, but again in a manner that they cannot damage or destroy the basic structure of the constitution. However, Directive principle has a role to play because no law implementing Directive principle can ever violate the basic structure of our constitution as decided in *Waman Rao*.³ However, the decision in *Sanjeev Coke Mfg. Co.*⁴ restored for the Directive principle greater authority than what the earlier two decisions had indicated, where legislation in pursuance of Directive principle was upheld as constitutional based on the emended Article 31C.

A provision in the Directive principle for international agreements indicated the recognition of the importance of such agreements in our constitution. It is because, as pointed out by H.M. Seervai⁵ written that our courts have endorsed Directive principle wherever possible though such Directive principle cannot override the explicit constitutional provisions. Article 51 reads as under:

The state shall endeavor to - (a) Promote international peace and security, (b) Maintain just and equitable relations between nations, (c) Foster respect for

2 *Minerva Mills Ltd. v. Union of India* AIR 1980 SC 1789.

3 *Waman Rao v. Union of India* AIR (1981) SC 271.

4 *Sanjeev Coke Mfg. Co. v. Bharat Cooking Coal Co. Ltd.* AIR (1983) SC 293.

5 H.M. Seervai, COMMENTARY ON CONSTITUTIONAL LAW OF INDIA, Vol. 3, 4th ed. 2008.

international law and treaty obligations in the dealings of organized peoples with one another and (d) Encourage settlement of international dispute by arbitration.

Corresponding power of the executive to exercise rights under such international treaties and discharging the obligations under such treaties and agreements have been defined in the Constitution while executive power has come up for consideration in *Ram Javaya*⁶ where it was observed that it may not be possible to frame an exhaustive definition what executive function means and implies. Ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. Article 73 of the constitution deals with executive power of the union which reads as:

“(1) Subject to the provision of this constitution, the executive power of the union shall extend,

(a) to the matters with respect to which the Parliament has the power to make laws and,

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreements.”⁷

Hence, the power of the executive to exercise the power of GoI by virtue of any treaty agreements gets special recognition under Article 73, which enables endorsement of the rights under treaties and agreements, which the executive is obliged to observe as parts of its duties. It would appear that even supplementing legislation, where it is permitted by the local law, may well be consistent with executive power as pointed out in the decision *Amritlal v. Union of India*.⁸ where it was held that in addition to these quasi-legislative judicial functions which are strictly legislative and strictly judicial in character, and in certain instances, powers are exercised which appear to partake at the same moment of legislative, executive and judicial characteristics. In view of the complexity of modern government and the congestion of parliament business, it is probably necessary that the executive should exercise powers of subordinate legislation. Whether it should exercise purely political powers is more open to question.

Article 73 of the Constitution of India while not binding Parliament which is supreme, has the effect of recognizing treaty override when it places limitations on the executives to exercise its right, authority and jurisdiction in consonance with treaty obligations in the light of the fact, that executive and legislative powers are coextensive under the Indian Constitution as was upheld in the case of *Naraindas*⁹ and *Bishamber*.¹⁰ In *Gramophone Company of India Ltd.*¹¹ it was held that the interpretation of domestic law has to be done within the legitimate limits imposed by treaty obligations. It is because Article 73 specifically provides that the executive power of the Union shall extend, inter alia to the exercise of such rights, authority and jurisdiction as are exercisable by the GOI by virtue of

6 *Ram Javaya Kapur v. State of Punjab* AIR 1955 SC 549.

7 P.M. Bakshi, THE CONSTITUTION OF INDIA, ed. 2016.

8 *Amritlal v. Union of India* AIR 1964 SC 648.

9 *Naraindas v. State of MP* AIR 1974 SC 1532.

10 *Bishamber v. State of UP* AIR1982 SC 32.

11 *Gramophone Company of India Ltd. v. Birender Bahadur Pandey* AIR 1984 SC 687.

any treaty or agreement. The Supreme Court in *Kubic Darius*¹² held that parliament has provided for DTAA as part of the IT Act so that ambiguity in interpretation of law would be resolved with reference to the treaty. Courts in different decisions ranging from *CIT v. Davy Ashmore India Ltd.*,¹³ *CIT v. R.M. Muthaih*,¹⁴ *CIT v. VR. S. RM. Firm*¹⁵ and *Arabian Express Lines Ltd.*¹⁶ cases have accepted that provisions of the treaty should override domestic law in different contexts.

The Halsbury Law of England would treat double tax relief as supplementing legislation in view of the fact that such agreements are authorized by the legislation itself with treaty being treated as such supplemented legislation in pursuance of the obligation to implement the double taxation arrangements authorized by the income tax law. However, there is a formality of promulgation of an order in council bringing into effect pro-tanto the relevant provisions as part of the Income-tax act. However, the present position of law, it would appear, is that such is treated as a part of domestic law.¹⁷

Internationally also, it is well established that in most of countries that tax treaties do not impose tax. The Supreme Court of Canada reiterated this principle in the *Melford Developments*- “It is well to remind ourselves in analyzing these statutes and the subtended tax Agreement that the international Agreement does not itself levy taxes but simply authorizes the contracting parties, within the terms of the Agreement, to do so.”¹⁸

Similarly, *Klaus Vogel*, in his treatise on double taxation conventions, states, “It is a widely recognized principle of treaty law that DTCs [double taxation conventions] rather than being capable of creating new tax liabilities, can do no more than restrict existing ones.”¹⁹

A similar domestic tax benefit provision is included in virtually all US tax treaties. In the United States too, the provision has received little attention, although it was applied in one case²⁰ and in a few administrative rulings. Generally, the US literature examining the provision is skimpy. However, in 1992, the American Law Institute (ALI) published a study of US income tax treaties, which enunciated some principles for the application of the provision.²¹

12 *Kubic Darius v. Union of India* AIR 1990 SC 605.

13 *CIT v. Davy Ashmore India Ltd.* (1991) 190 ITR626 (Cal.).

14 *CIT v. R.M. Muthaih* (1993) 202 ITR 508 (Ker.).

15 *CIT v. VR. S. RM. Firm and Arabian Express Lines Ltd.* (1994) 208 ITR 400 (Mad.).

16 *Arabian Express Lines Ltd v. Union of India* (1995) 212 ITR 31 (Guj).

17 S. Rajarathnam and B.V. Venkataramiah, *TREATIES ON DOUBLE TAXATION AVOIDANCE ACT*, 5th ed. 2010, Vol. I, p. 156.

18 *The Queen v. Melford Developments Inc.* 82 DTC 6281, at 6285; [1982] CTC 330, at 335 (SCC).

19 Klaus Vogel, *DOUBLE TAXATION CONVENTIONS*, 1991, pp.75-76.

20 Brian J. Arnold, ‘*The relationship between Tax treaties and the Income Tax Act: Cherry picking*’, (1995), Vol 43 No. 41 no. 4, Canadian Tax Journal, p. 872.

21 American Law Institute, ‘*International Aspects of United States Income Taxation II: Proposals on United States Income Tax Treaties*’, Hugh J. Ault and David R. Tillinghast, reporters (Philadelphia: American Law Institute, 1992), 80-83 (herein referred to as “the ALI study”). My interest in the subject has its origin in the ALI study, and this article relies substantially on the analysis in the study. See also Stephen M. Brecher, ‘*Relationship of, and Conflicts Between Income Tax Treaties and the Internal Revenue Code*’ (April 1972), 24 the Tax Executive pp.175-197.

Existence and Operation of DTAA with reference to OECD and UN Models- The purpose of OECD model is to remove the burden of double taxation, which harms the movement of capital, goods and services, technology and persons as between enterprises, UN model would claim, besides the normal objective of double tax avoidance, the goal of subjective removal of discrimination between taxpayers in the international field and provision of a reasonable element of legal and fiscal certainty as a framework within which international operations can be carried on. It also stresses the objective of co-operation between tax authorities in carrying out their duties, an indication of the joint effort to tackle tax evasion.²² While avoidance of fiscal evasion has been one of the professed objectives, the impediments for exchanging information consistent with the requisite confidentiality, conflicts between domestic laws, absence of a system of unilateral supply of information useful to the authorities in the other country on a reciprocal basis had not brought about any significant impact in this direction. A commentary on UN Treaty Model Tax Convention,²³ the need for a special approach for developing countries was addressed. It is in the approaches as between developing and developed countries, US Model which is intended to be the basis of US treaty negotiations published in 1976, revised in the year 1977, 1981, 1992, 1995 and 1996 holds out as a treaty agreement so that the countries negotiating with US know what is to be experienced from the US in the negotiation.²⁴ One standing example is the reason for delay in conclusion of the agreement as between UK and India mainly on the point of difference as to manner of revenue sharing in respect of tea industry, where tea is grown and processed in India is auctioned in London, both countries laying right to a big share of what they considered to be the basis of accrual of major part of the income or value addition. Shipping and air transport has been a matter of negotiations as between countries, which have a good fleet of ships and aircraft and a developing country, which has not.²⁵

An agreement though signed by the countries would not come into effect until necessary Notifications are issued. In *Narasias Lines (Malta) Ltd. v. Deputy CIT*,²⁶ it was held that in the Article 29 of the agreement, that the agreement shall come into force 30 days after the notification date and only after the first day of April of the calendar year next following that by which the agreement comes into force. The High Court observed that after a crucial and close reading of Article 29(2) of the treaty in question, we are of the view that it gives only one meaning and there is no ambiguity in the wording used. It's clear that in India, benefit in India can be availed of only for the fiscal year starting from April 1, 1996 to March 31, 1997, starting after the first day of the next calendar year 1995. The next calendar year is 1996-97. Hence, benefit can be availed of for the year starting from April 1, 1996. Benefit can be availed of in the fiscal year starting

22 S. Rajarathnam and B.V. Venkataramiah, TREATIES ON DOUBLE TAXATION AVOIDANCE ACT, 5th ed. 2010, Vol. I, p. 107.

23 Kluwer Devonter, COMMENTARY ON UN MODEL TAX CONVENTION BY INTERNATIONAL FISCAL ASSOCIATION, ed. 1979, p. 304.

24 *Ibid.*

25 *Supra* n. 22, p. 108.

26 2005 ITR 268 (Ker.).

from April 1, 1996 i.e. the next calendar year. The words fiscal year in India and in Malta are also explained in the agreement. Further as per normal English grammar, the relative pronoun that will only refer to the nearest proximate subject otherwise it will be an error of proximate and that cannot refer to the fiscal year, but only to a cleaner year next which was used immediately after calendar next refers to fiscal year we are of the opinion that we cannot come to the meaning attributed by the assessee. We cannot rewrite the words in the agreement merely because it is benefitted to the assessee.

‘The powers of the Union of India to enter into various treaties for arrangements and agreements with foreign nations, for bilateral understanding of each other’s scope of operations and the role to play in matters of commerce, trade, industry and finance between the two nations has been rightly pointed out in the case of *Motilal v. Uttar Pradesh Govt.*²⁷ and in the case of *Nirmal v. Union of India*.²⁸

In the case of *Sri Krishna Das v. Town*²⁹ Area Committee in this case the SC explained the concept of double taxation in the context of levying of fees and taxes by different authorities under various legislations to hold that such levy of taxes and fees in other legislations in one case would constitute double taxation.

In another case of *Bhim Sen Khosla v. CIT*³⁰ in this case the court laid down the principle that Income Tax Department is not entitled to tax the same income twice whether for the same year or for a previous year. It was also made clear in the case that the Income Tax Department is under an obligation to relieve the assessee from the effects of double taxation by taking appropriate steps.

In *Rattanlal v. ITO*³¹ in this case also it was emphasized the principle that unless the legislature has expressly or by necessary implication sanctioned imposition of double taxation, the provisions of law cannot be so construed as to impose the burden of tax on the concerned person twice over in respect of the same income .

In a case of the Madras High Court *TNK. Govindrajulu Chetty & Co v. CIT*³² in this case the court observed that the principles to be followed in the matter of applying the rule against double taxation on the assessee. In any taxation system, the residential status of the taxpayer is of crucial significance. Residential status confirms the jurisdiction and the application of taxation accountabilities.³³

The first international initiative regarding DTAA was taken by the Organization for Economic Co-operation and Development. OECD presented the first draft of DTAA in ‘Model Tax Convention on Income and on Capital’³⁴. DTAA was proposed as a tool of standardization and common solutions for cases of double taxation to the taxpayers who are engaged in industrial, financial or other activities in other countries. The double tax treaties are negotiated under

27 *Motilal v. Uttar Pradesh Govt.* AIR 1961 All 257.

28 *Nirmal v. Union of India* AIR 1959 506 (Cal).

29 *Sri Krishna Das v. Town Area Committee* (1990) 183 ITR 401 SC.

30 *Bhim Sen Khosla v. CIT* (1982) 133 ITR 667 (Del).

31 *Rattanlal v. ITO* (1975) 98 ITR 681 (Del).

32 *TNK Govindrajulu Chetty & Co. v. CIT* (1964) 51 ITR 731 (Mad).

33 CA A. K. Jain, ‘Double Taxation Avoidance Agreements’, available at <http://www.tjaindia.com/articles/dtaa.pdf>, (visited on May 30, 2016).

34 *Ibid.*

international law and are governed by the principles laid down under, Vienna Convention on the Law of Treaties.

Origin of Double Taxation Avoidance Agreements

As far as India is concerned, the first concrete step against double taxation was taken in 1939 when the Income tax (Double Taxation Relief) (Indian States) Rules were framed. It also appeared in what is now Germany, as treaties between certain component states of Prussia. The first bilateral DTAA was entered into by Prussia and Austria in 1899. A DTAA was concluded by Hungary and Austria in 1909. However, few DTAAs were entered into from then until the 1920s, when, after World War-I, Germany embarked upon forming a number of DTAAs with its neighbours.

It was felt that the necessity to have a model agreement which can be a good reference in framing double taxation avoidance agreement between two foreign states. That is how The League of Nations introduced the first model bilateral convention in 1928. After that in 1943 the model convention of Mexico and in 1946 the London model convention was getting introduced. Later in 1956 the council of the organization for European economic cooperation established a fiscal committee to formulate a model convention. In 1963 for the very first time the first draft double taxation convention on income and capital was enacted. Finally, in 1977 OECD model convention and commentaries came into existence. In 1992 OECD published model convention.

In 1921, the League of Nations, acting through its financial Committee in response to an appeal by the 1920 Brussels International Financial Conference for action aimed at eliminating double taxation, entrusted a team of four economists from (Italy, Netherlands, United Kingdom and United States of America) with the task of preparing a study on the economic aspects of international double taxation.³⁵

In 1929, pursuant to a recommendation of the General Meeting of Government Experts, the Council of the League of Nations appointed a permanent Fiscal Committee. The latter devoted considerable attention to the question of formulating, for tax purposes, rules for allocation of the business income of undertakings operating in several countries. Within the framework of those activities, a Draft Convention for the Allocation of Business Income between States for the Purposes of Taxation was formulated, first at meetings of a subcommittee held in New York and Washington under the authority of the American Section of the International Chamber of Commerce, and then at the full meeting of the Fiscal Committee in June 1933. The Draft Convention was revised by the Fiscal Committee in June 1935. On 22 February 1928³⁶ Hungary and Yugoslavia concluded a convention for the prevention of double taxation in the matter of direct taxes. The convention is based on the distinction between impersonal and personal taxes, both the terms being interpreted in their ordinary sense.

35 Mitchell B. Carroll, *GLOBAL PERSPECTIVES OF AN INTERNATIONAL TAX LAWYER*, 1978.

36 League of nations fiscal committee, *Report to The Council on the Work of the Second Commission of the Committee*, Geneva, May 22-31, 1930.

As regards the exemption of shipping the committee can mention in addition to article 12 of the above mentioned treaty 7 Agreements between Belgium and Sweden may 31, 1929, Canada and Japan 21 September 1929, Canada and Netherlands September 23 1929, Canada and Greece September 30 1929, Canada and Sweden 21 November 1929, France and Sweden December 19 1929, Canada and Germany 17 April 1930.

The Council of OEEC adopted its first recommendation concerning double taxation on 25 February 1955,³⁷ that recommendation subsequently resulted in the establishment of the OEEC Fiscal Committee in March 1956. In July 1958, the Fiscal Committee was instructed to prepare a draft convention for the avoidance of double taxation with respect to taxes on income and capital as well as concrete proposals for the implementation of such a convention. In the words of the Fiscal Committee: “*Since the work of the League of Nations, the value of a Model Convention has been universally recognized not only by the national authorities but also by the taxpayers themselves.*”

From 1958 to 1961, the Fiscal Committee prepared four reports, published under the title “*The elimination of double taxation,*” in which the Committee proposed a total of 25 articles. After OEEC became the Organisation for Economic Cooperation and Development (OECD) in September 1961, the mandate of the Fiscal Committee was confirmed; the Committee subsequently agreed on a number of new articles and all the articles were embodied in a report entitled “*Draft Double Taxation Convention on Income and on Capital,*” published in 1963.³⁸

In July 1963, OECD, recognizing that the effort to eliminate double taxation between member countries needed to go beyond the field of periodic taxes on income and capital, instructed the Fiscal Committee to work out a draft convention, which would provide a means of settling on a uniform basis the most common problems of double taxation of estates and inheritances.³⁹ The “*Draft Convention for the Avoidance of Double Taxation with Respect to Taxes on Estates and Inheritances*” was published in 1966.

In 1967 the Fiscal Committee- renamed in 1971 “*Committee on Fiscal Affairs*” began revising the 1963 “*Draft Double Taxation Convention*”. That revision was considered necessary in order to take account of experience gained by Member countries in negotiating new conventions or in their practical working and also of “the changes in systems of taxation and the increase in international fiscal relations on the one hand and, on the other, the development of new sectors of business activity and the increasingly complex forms of organization adopted by enterprises for their international activities. The revision of the 1963 ‘Draft Convention’ ultimately led to the publication of the 1977 “*Model Double Taxation Convention on Income and on Capital.*” It has recently undergone revisions in 1992, 1994, 1995 and 1997.

37 League of Nations, Fiscal Committee: Report on the Work of the Tenth Session of the Committee, held in London from March 20th to 26th, 1946 (C.37.M37. 1946.II.A), p. 8.

38 Organization for Economic Cooperation and Development: Draft Double Taxation Convention on Income and Capital: Report of the OECD Fiscal Committee (Paris, 1963), p. 25, para. 49.

39 *Kubic Darius v. Union of India* AIR 1990 SC 605.

As it had done for the 1963 'Draft Convention', the Council of OECD, in a recommendation based on a suggestion by the Committee on Fiscal Affairs and adopted on 23 October 1997, recommended to the Governments of member countries" to pursue their efforts to conclude bilateral tax conventions on income and on capital with those member countries, and where appropriate with non-member countries, with which they have not yet entered into such conventions, and to revise those of the existing conventions that may no longer reflect present day needs, and when concluding new bilateral conventions or revising existing bilateral conventions to conform to the Model.

Law of Conventions and Treaties

To understand the concept of DTAA first we must understand the concept of a treaty as to this will lead us to further understanding the genesis behind the concept of DTAA, as it is a form of a bilateral treaty was signed between two nations. A significant role of a DTAA between two or more countries is to remove the double taxation, which is an impediment to cross-border trade in goods and services, and the movement of capital and people between countries. Many countries have now entered into scores of comprehensive DTAA's with other countries to assist in the avoidance of double taxation. The second purpose of a DTAA is the prevention of fiscal evasion, which can reduce a country's tax base where a taxpayer has economic connections with more than one country.

The domestic laws of most countries, including India, mitigate this difficulty by affording unilateral relief in respect of such doubly taxed income (Section 91 of the Income Tax Act). But as this is not a satisfactory solution in view of the divergence in the rules for determining sources of income in various countries, the tax treaties try to remove tax obstacles that inhibit trade and services and movement of capital and persons between the countries concerned. It helps in improving the general investment climate.⁴⁰

The concept of PE finds its place in domestic laws of many countries. Owing to a paramount importance in the field of taxation worldwide, the concept of PE gained importance and was developed at an international level. The double tax treaties (also called Double Taxation Avoidance Agreements or 'DTAA') are negotiated under public international law and governed by the principles laid down under the Vienna Convention on the Law of Treaties.⁴¹

In a classic judgment in *CIT v. Vishakhapatnam Port Trust*,⁴² the court had referred to the major developments in the field of tax treaties. In this case; the assessee was itself a Government undertaking engaged in the trading transaction with a non-resident German Company. It had undertaken to setup a plant in India and the issue related to the extent of non-residents'.⁴³ Indian income liable to Indian tax and the implication of the Double Tax Avoidance Agreement as between India and Germany, the judgment, incidentally, refers to the

40 DTAA available at, <http://www.TAXGURU.COM/DTAA/DOUBLE%TAX%AVOIDANCE%AGREEMENTS%TAXATION.HTML> (visited on March 13, 2016).

41 *CIT v. VR. S. RM. Firm and Arabian Express Lines Ltd.*, (1994) 208 ITR 400 (Mad).

42 *CIT v. Vishakhapatnam Port Trust* (1983) 144 ITR (AP).

43 Aayushi Jai, *A Critical analysis of the concept of double taxation avoidance agreement under the Income Tax Act, 1961*, available at <http://jlsr.thelawbrigade.com/wp-content/uploads/2015/10/Double-Taxation.pdf>, (visited on May 20, 2016).

development of law on DTAA, which have them gone through various changes. The fiscal committee of the League of Nations first prepared model forms applicable to all countries in 1927. Later they said committee conducted meetings at Mexico during 1943 and in London in 1946 and proposed several minor variations.

Double Taxation Avoidance Agreement

It is an agreement between two sovereign states (separate and distinct political entities). It has the status of a 'treaty' hence, its alternative name of double tax treaty. *"One of the most deeply protected jurisdictions of a country is its fiscal jurisdiction. Therefore, in the era of globalization, double taxation continues to be one of the major impediments to the development of international economic relations. An individual who earned income has to pay income tax in the country in which the income was earned and also in the country in which such person was resident. As such, the liability to tax on the aforesaid income arises in the country of source and the country of residence. The Fiscal Committee of OECD in the Model Double Taxation Convention on Income and Capital, 1977, defines double taxation as 'the imposition of comparable taxes in two or more states on the same tax payer in respect of the same subject matter and for identical periods.' Whereas a tax payer's own country (referred to as home country) has a sovereign right to tax him, the source of income may be in some other country (referred to as host country) which also claims right to tax the income arising in that country."*⁴⁴

The concept of double taxation has been the subject matter engaging the attention of the courts in India and abroad from time to time.⁴⁵ The Supreme Court in *Laxmipat Singhnia v. CIT*⁴⁶ has made it clear that it is a basic rule of the law of taxation that unless otherwise expressly provided income cannot be taxed twice. Again, it is not open to the Income Tax Officer, if the income has accrued to the assessee and is liable to be included in the total income of a particular year, to ignore the accrual and thereafter to tax it as the income of another year based on receipt.

A DTAA is therefore a contract signed by two countries (referred to as the contracting states) to avoid or alleviate territorial double taxation of the same income by the two countries. Any amendment or addition to such an agreement is known as 'a protocol'.⁴⁷ Double taxation avoidance agreements are designed to promote mutual trade and investment between the countries that have entered into such agreements. They aim at ensuring that the same income is not taxed in both countries, in the hands of the same entity.⁴⁸ The basic objective is to promote and foster economic trade and investment between two Countries by avoiding

44 Sarbapriya Ray, 'A Close Look into Double Taxation Avoidance Agreements with India: Some Relevant Issues in International Taxation, International Affairs and Global Strategy', Vol 2, 2011.

45 R. Santhanam, HANDBOOK ON DOUBLE TAXATION AVOIDANCE AGREEMENTS & TAX PLANNING FOR COLLABORATIONS, 5th ed. 2001, p. 455.

46 *Laxmipat Singhania v. CIT* (1969) 72 ITR 291 (SC).

47 'Double Taxation Avoidance Agreements', available at <http://www.ssrn.com/abstract=2036494> (visited on May 31, 2016).

48 Klaus Vogel, DOUBLE TAXATION CONVENTIONS, 1991, pp. 75-76.

double taxation. Double taxation is the levying of tax by two or more jurisdictions on the same declared income, profits, dividend, interest, royalties, etc.⁴⁹

The DTAA is a positive step taken towards the avoidance of double taxation that may be faced by individuals or enterprises, or persons, in general, including companies in another state apart from their state of residence by virtue of a presence, economic and otherwise in such other state.⁵⁰ The initiative of elimination of double taxation was originally taken up by the League of Nations, and was pursued in the OEEC (Organisation for European Economic Co-operation), which is presently known as the OECD (Organisation for Economic Cooperation and Development).

Need for DTAA

The need for Agreement for Double Tax Avoidance arises because of conflicting rules in two different countries regarding chargeability of income based on receipt and accrual, residential status etc. As there is no clear definition of income and taxability thereof, which is accepted internationally, an income may become liable to tax in two countries.⁵¹

In such a case, the two countries have an Agreement for Double Tax Avoidance, in which case the possibilities are: (i) The income is taxed only in one country. (ii) The income is exempt in both countries, and (iii) The income is taxed in both countries, but credit for tax paid in one country is given against tax payable in the other country.

In India, the Central Government, acting under Section 90 of the Income Tax Act, authorises to enter into double tax avoidance agreements (hereinafter referred to as tax treaties) with other countries.⁵² The double taxation avoidance agreement is an agreement, which helps the taxpayer to get relief from double taxation on the same income. If India has signed any double taxation agreement with any foreign country, it has meant that the taxpayer of those countries does not have to pay the tax on the same income in both the countries. In case of claiming relief under double taxation avoidance agreement, two important things are required to find out. These are: (i) The country of residence and (ii) The source country.

Here 'the country of residence' means where the assessee resides and the source country is any foreign country other than where he resides, but the assessee earns some income from that foreign state. In that case if the two countries do not sign any DTAA then the assessee has to pay tax in both the states i.e. the country of his residence as well as the source country, this is why double taxation avoidance is so much important. When an Indian businessman makes a profit or some other type of taxable gain in another country, he may be in a situation where he will be required to pay a tax on that income in India, as well as in the country in which the income was made! To protect Indian taxpayers from this unfair practice, the Indian government has entered into tax treaties, known as Double

49 'Articles of the Model Convention with respect to taxes on income and on capital', available at <http://www.oecd.org/tax/treaties/1914467.pdf>, (visited on May 29, 2016).

50 'DTAA' available at <http://www.ssrn-id2303595.pdf>, (visited on May 29, 2016).

51 Assessment guidelines available at <http://www.caindelhiindia.com/Assets/Guidance/DTAA%202.pdf>, (visited on March 17, 2016).

52 *Sri Krishna Das v. Town Area Committee* (1990) 183 ITR 401 SC.

Taxation Avoidance Agreements. Its basic objective is to promote and foster economic trade and investment between two countries by avoiding double taxation. In general terms it means taxing the same income twice once in the host country and secondly in the home country.⁵³

Under a DTAA, the Contracting States mutually undertake to respect and apply the DTAA provisions. This is one of the fundamental principles of law of DTAA. Yet, it is essential to bear in mind that DTAA may not always override domestic laws. The practice differs from country to country. It is important to understand what the status of the DTAA is under the domestic law and what its relationship with the domestic law is.⁵⁴

There are two approaches to this. Under the first approach, the countries treat both the International Law and the domestic law as part of the same legal system and give International Law precedence over domestic law. Under the second approach, both the DTAA and domestic laws are treated as separate legal systems and in case of a conflict; it is the domestic law, which is given priority by the domestic courts. In *Union of India v. Azadi Bachao Andolan*,⁵⁵ the Supreme Court made reference to the OECD Model Convention, 1977 and the commentaries thereon, where an expression in the agreement before it was adopted from that Convention. Earlier, the AP High Court⁵⁶, had, while referring to various foreign authorities approved observations to the effect that in view of the standard OECD models, an area of genuine 'international tax law' was developing, and therefore, any person interpreting a tax agreement should consider the decisions and rulings worldwide relating to similar agreements. Therefore, the model convention and commentaries may be useful guides when the agreement before the court is similar to the model convention. In contrast, for the purposes of interpretation of another agreement, the Madras High Court, found reliance on the OECD Convention and commentaries inappropriate and unjustified. It noticed a wide range of difference between the Model Convention and the agreement thereon and hence concluded that commentaries on the Model Convention 'can be of no use and utility and cannot also afford a safe or reliable guide or aid for such construction'. A person earning any income has to pay tax in the country in which the income is earned (as Source Country) as well as in the country in which the person is resident. As such, the said income is liable to tax in both the countries.⁵⁷

Where tax relief has been given by one country, the country of residence generally allows credit for the tax so spared, to avoid nullifying the relief. If the rate prescribed in the Indian Income-tax Act, 1961 is higher than the rate prescribed in the Tax Treaty then the rate prescribed in the Tax Treaty has to be

53 'Double tax avoidance' available at <http://www.manupatra.com/roundup/361/Articles/Double%20Taxation%20Avoidance.pdf>, (visited on March 11, 2016).

54 *CIT v. VR. S. RM. Firm and Arabian Express Lines Ltd.* (1994) 208 ITR 400 (Mad.).

55 *Union of India v. Azadi Bachao Andolan* 263 ITR 706.

56 S. Rajarathnam and B.V. Venkataramiah, *TREATIES ON DOUBLE TAXATION AVOIDANCE ACT*, 5th ed. 2010, Vol. I, p. 156.

57 'DTAA' available at <http://www.caindelhiindia.com/Assets/Guidence/DTAA%20.pdf>, (visited on May 24, 2016).

applied.⁵⁸ India has signed double taxation avoidance agreement with 88 countries. These agreements are very effective for the taxpayer who has income in another foreign country other than where he resides. With the help of these agreements protection of taxpayer from giving tax of the same income in two times, can be avoided. The double taxation can be avoided by following manners⁵⁹ (i) The country where the taxpayer resides, can exempt the income that is coming from foreign countries and (ii) The country where the taxpayer resides, grant the credit for the tax paid in another foreign country.

Territorial double taxation obviously discourages international trade.⁶⁰ Traders are better off trading within the state boundaries and suffer tax in one country only. However, it is a widely accepted commercial reality that international trade is economically good for the countries concerned, and that international trade should be encouraged. Thus, countries believing in the benefits of international trade would try to provide a more conducive environment for cross-border trade by putting down rules to avoid or minimise double taxation.

Objectives and Subjects of DTAA

The fundamental principle of law and objectives of DTAA are (i) Protection against double taxation,⁶¹ These Tax Treaties serve the purpose of providing protection to tax-payers against double taxation and thus preventing any discouragement which the double taxation may otherwise promote in the free flow of international trade, international investment and international transfer of technology, (ii) Prevention of discrimination at international context: These treaties aim at preventing discrimination between the taxpayers in the international field and providing a reasonable element of legal and fiscal certainty within a legal framework, (iii) Mutual exchange of information: In addition, such treaties contain provisions for mutual exchange of information and for reducing litigation by providing for mutual assistance procedure, and (iv) Legal and fiscal certainty: They provide a reasonable element of legal and fiscal certainty within a legal framework.

Double taxation occurs mainly due to overlapping tax laws and regulations of the countries where an individual operates his business. In such a case, the two countries have an Agreement for Double Tax Avoidance, in which case the possibilities are: (a) The income is taxed only in one country, (b) The income is exempt in both countries and (c) The income is taxed in both countries, but credit for tax paid in one country is given against tax payable in the other country.

Conclusion

The need for the companies to constantly expand their market share has made the world a global village. The companies prefer to make a sound investment decision and take into consideration all aspect of investments. Taxation of income

58 'DTAA' available at http://www.cainindia.org/news/9_2008/double_taxation_avoidance_agreement_html, (visited on May 24, 2016).

59 'DTAA', available at <http://businesstoday.intoday.in/story/how-treaties-with-foreign-countries-can-help-nrissave-tax/1/194401.html>, (visited on June 2, 2016).

60 CA A.K. Jain, 'Double Taxation Avoidance Agreements', available at <http://www.tjaindia.com/articles/dtaa.pdf> (visited on May 30, 2016).

61 *TNK Govindrajulu Chetty & Co. v. CIT* (1964) 51 ITR 731 (Mad).

earned is also one among the important considerations before making the investment. To come out with the problem of double taxation the countries make tax agreement. The Tax Treaties occupied different positions among different constitutions of the world. For example, in America, treaty is an Act of Legislation and the courts are bound to enforce the same. The American Senate approves the treaty by two third majorities. The scholar in his Ph.D. research thesis examines the approach of Supreme Court in Double Taxation Relief and its effect on the nation. Further to see, whether there is change of the view of the Supreme Court before and after the liberalization era. The Double Taxation Avoidance agreement between India and Mauritius is being abused by the “treaty shopping” for the purpose of fiscal evasion. The SC has interpreted the DTAA and the Income Tax Act 1961 as to encourage mutual economic relations, trade and investment between the contracting countries. The tax treaties in India are not approved by the Parliament. It is also debatable topic that whether tax treaty overrides the domestic law. Tax treaty will deal with the question of the overlapping jurisdiction and resolve the issues concerning the taxation of income based on residence or location. The conflict of interest has to be resolved by the application of treaty provisions.

In order to strengthen economic cooperation and avail the better technology and larger capital, India has entered into DTAA's with many countries. In India, the power of Central Government to enter into an agreement with foreign country has been given under Sections 90 and 91 of the IT Act 1961. The grant of double taxation relief in terms of Sections 90 and 91 of the Income Tax Act 1961 has been an area of controversy. The implementation of Indo- Mauritius DTAA has also come in for criticism on the ground that it encourages tax evasion. The companies not actually based in Mauritius chose to route their investment in India through Mauritius taking advantage of the soft tax laws of that country.

CAN PRAGMATISTS BE CONSTITUTIONALISTS? DEWEY, JEFFERSON AND THE EXPERIMENTAL CONSTITUTION

Shane Jesse Ralston*

ABSTRACT

*At the beginning of the present century, a debate over the compatibility of constitutionalism and pragmatism ignited in the pages of *Administration and Society*, an academic journal in the field of public administration. Several scholars expressed concern that Deweyan pragmatism, or the classic pragmatism espoused by John Dewey and subscribed to by some contemporary philosophers, which might be incompatible with constitutionalism, or the commitment to constitutional order central to the administrative state tradition in public administration. In this article, the issue at the center of this debate in the field of public administration is re-framed more generally for an audience of political philosophers and constitutional scholars: Can pragmatists, and specifically Deweyan pragmatists, be constitutionalists?*

Keywords: John Dewey, Thomas Jefferson, pragmatism, constitutionalism, experimentalism.

Introduction

Our Constitution was framed and the system of government formulated in the later decades of the eighteenth century. Since then inventions have occurred which have produced more social changes in a hundred and fifty years than the world had experienced in a thousand preceding years, but our governmental mechanisms have, relatively speaking, stood still.¹

At the beginning of the present century, a debate over the compatibility of constitutionalism and pragmatism ignited in the pages of *Administration and Society*, an academic journal in the field of public administration. Several scholars expressed concern that Deweyan pragmatism, or the classic pragmatism espoused by John Dewey and subscribed to by some contemporary philosophers, might be incompatible with constitutionalism, or the commitment to constitutional order central to the administrative state tradition in public administration.

In this article, the issue at the center of this debate in the field of public administration is re-framed more generally for an audience of political philosophers and constitutional scholars: Can pragmatists, and specifically Deweyan pragmatists, be constitutionalists? In order to answer this question,

* Associate Professor of Philosophy, Penn State Hazleton, e-mail: sjr21@psu.edu.

1 John Dewey, *Morals and Political Order*, ETHICS, 7 LATER WORKS 352. Citations are to THE COLLECTED WORKS OF JOHN DEWEY: ELECTRONIC EDITION (Larry A. Hickman, ed. 1996), EARLY WORKS (hereinafter 'EW'), MIDDLE WORKS (hereinafter 'MW') or LATER WORKS (hereinafter 'LW').

Dewey's pragmatism is defined in terms of his experimental approach to inquiry and action. An overview of the administrative state debate is presented, where the claim emerges that constitutional limitations offend the experimentalism in Dewey's pragmatism. Next, three typical (though by no means exhaustive) conceptions of constitutionalism are presented as outgrowths of originalism, contextualism and formalism: (i) traditionalism (or that a constitution expresses the traditions or mores of its drafters' society), (ii) organicism (or that a constitution is a living document, the meaning of which evolves with the changing values and norms of each new generation) and (iii) functionalism (or that a constitution functions as an ordering device, both creating and perpetuating legitimate legal-political frameworks). Then, the issue of whether a founding document modelled after each conception can preserve political stability amidst some level of tolerable political change without offending Dewey's experimentalism is considered. In light of Dewey's essay "Presenting Thomas Jefferson," it is asked: Does the acceptability of Jefferson's notion of generational sovereignty have any bearing on the matter of pragmatism and constitutionalism's compatibility? The article concludes with a final evaluation of the extent to which Deweyan experimentalism can accommodate constitutionalism in its various forms.

American Pragmatism and Public Administration

The goal in this first section is to articulate Dewey's experimental pragmatism and then show how its claimed incompatibility with constitutionalism becomes a central issue in the administrative state debate. Before accomplishing these two tasks, though, an examination of a conception of pragmatism in administrative law, a conception comparably thinner or less philosophically robust than Dewey's experimental pragmatism, is in order.

Pragmatism in Administrative Law

U.S. administrative law states the legal boundaries set by Congress on the discretion exercised by officials in administrative agencies. Since administrative agencies did not proliferate in the executive branch until the twentieth-century, especially with the rise of progressivism (and coincidentally, during the zenith of American Pragmatism's influence), the American Constitution is silent on the matter of how to regulate the activities of administrative agencies. So, why should we be concerned with administrative law if it is separable from constitutional law? Some legal theorists argue that judicial intervention in the area of administrative law epitomizes legal pragmatism in action.²

Pragmatism is thought to provide a superior normative framework for judicial decision-making because of its several distinctive features. First, while part of the executive branch, administrative agencies in the United States are

2 See, e.g., RICHARD A. POSNER, *THE PROBLEMATIC OF MORAL AND LEGAL THEORY* (1999); Daniel L. Breen, HENRY J. FRIENDLY AND THE PRAGMATIC TRADITION IN AMERICAN LAW ed. 2002; Sidney A. Shapiro, 'Pragmatic Administrative Law', *ISSUES IN LEGAL SCHOLARSHIP: THE REFORMATION OF AMERICAN ADMINISTRATIVE LAW* ed. 2005, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=653784; John R. Tennert, 'Administrative Law as pragmatism', 29 *Int. J. Pub. Admin.* 1339-1361 (2006); Jessica Wang, 'Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism', 17 *J. Pol. Hist.* 257-293 (2005).

created through legislative enactment by Congress and are subject to judicial review. Though the U.S. Constitution says nothing about administrative agencies, constitutional requirements of due process nevertheless constrain agency exercises of discretion, including administrative rule-making and agency enforcement of those rules. Administrative judges rule on disputes challenging agency policies and decisions in either Congressionally-mandated Article I tribunals or adjudicative bodies internal to agencies which are bound by the administrative law procedures found in the Administrative Procedure Act of 1946. Second, in American law, judicial review of administrative agency decisions is distinct from the normal appeals process, whether in state or federal court systems. For administrative law courts, the scope of judicial review is extremely limited. They can only review the procedural means by which an agency reached its decision, not the decision's acceptability on the merits. In other words, means, not ends, matter. Since pragmatism is widely associated with choosing proper means to achieve pre-given ends (or narrow instrumentalism), administrative law is, therefore, thought to be 'pragmatic'. Third, and lastly, U.S. Supreme Court judge Stephen Breyer's approach to administrative law has been described as having "unmistakably pragmatic foundations."³ Breyer claimed that the intricate problems encountered by legislative and executive bodies when regulating various industries are similar to the problems courts face when regulating the discretion of administrative agencies. All three branches behave pragmatically. So, rather than blindly defer to traditional doctrine, administrative law judges should adapt legal principles to the demands of the regulatory environment, considering the probable consequences of various regulatory and priority-setting methods.⁴

Although administrative law is pragmatic in the everyday sense of the term, it is not pragmatic in the richly philosophical sense. In the vernacular, pragmatism signifies a temperament common to Americans or a generic feature of the American way of life. Robert Westbrook explains: "*In ordinary speech, a 'pragmatist' is someone (often a politician) who is willing to settle for a glass half empty when standing on principle threatens to achieve less. Pragmatists are concerned above all about practical results; they have a "can do" attitude and are impatient with those of a "should do" disposition who never seem to get anything done. Americans are often said to be a particularly pragmatic people, and many Americans pride themselves on a sensibility others are inclined to label shallowly opportunistic.*"⁵

In this vulgar sense, pragmatic has multiple synonyms: practical, expedient, useful, and even entrepreneurial. Etymologically, the Greek root *Pragma* refers to 'things, facts, deeds, affairs' and "*action, from which our words 'practice' and 'practical' come.*"⁶ Roughly equivalent to the vernacular, 'pragmatic' also denotes the activity of matching appropriate means to uncritically accepted ends—that is, a form of narrow instrumentalism. In contrast, the more robust

3 Cass Sunstein, 'Justice Breyer's Democratic Pragmatism', 115 Yale L. J. 1719 (2006).

4 Stephen Breyer, REGULATION AND ITS REFORM, 1984.

5 Robert Westbrook, DEMOCRATIC HOPE: PRAGMATISM AND THE POLITICS OF TRUTH, ed. 2005.

6 H.S. Thayer, MEANING AND ACTION: A CRITICAL HISTORY OF PRAGMATISM, ed. 1968.

instrumentalism endorsed by philosophical pragmatists involves both the evaluation of ends and means. However, it is in this narrowly instrumental sense that administrative law and, specifically, the scope of an administrative law court's review of agency decisions are described as pragmatic.

So, while there is a particular conception of pragmatism operative in administrative law, particularly that exemplified Justice Breyer's approach, it is not a thick or philosophically significant form of pragmatism. Consequently, we can distinguish the vernacular sense of pragmatism at work in administrative law from Dewey's philosophically rich pragmatism. In the administrative state debate, the question, as we will see, becomes not whether pragmatism in administrative law conflicts with constitutionalism, but whether philosophical pragmatism, especially Dewey's experimental version, is compatible with a deep commitment to constitutional order.

Dewey's Experimental Pragmatism

For Dewey, experimentalism manifests in a matrix of knowing and acting events, involving the framing of a problem, operationalizing variables, proposing hypotheses, testing them, observing/measuring results and treating the experimental outcomes as fallible and revisable in the light of future inquiries. Dewey reveals a generic pattern to experimental inquiry that widens its application beyond the domain of experimental science. His five-step method of inquiry was intended to apply to practical problems, or "problems of men," not solely to more specialized problems encountered in the laboratory. Dewey spells out the five stages of experimental inquiry:

Upon examination, each instance [of intelligent inquiry] reveals more or less clearly, five logically distinct steps: (i) a felt difficulty; (ii) its location and definition; (iii) suggestion of possible solution; (iv) development by reasoning of the bearings of the suggestion; (v) further observation and experimentation leading to its acceptance or rejection; that is, the conclusion of belief or disbelief.⁷

Dewey's examples of experimental inquiry include figuring out how to get to an appointment on time, identifying the function of a pole on the front of a tugboat and determining why bubbles go outside and inside of a cup once washed with hot water and placed upside-down on a kitchen counter.⁸ Conspicuously absent from these examples are many touchstone elements of experimental inquiry found in the hard and social sciences: (i) a research design, (ii) a measurement instrument, (iii) a data collection process, (iv) a data analysis technique, and (v) a method of generalizing data to a larger population. Thus, while experimental science is a form of inquiry, inquiry is experimental in a more general sense, that is, involving experimental operations relevant to both common-sense and scientific problems: (i) observation, (ii) analysis, (iii) manipulation and (iv) reflection upon the conditions and consequences of a problematic situation.

Though Dewey identified a generic pattern to experimental inquiry, the five stages do not represent a form of simple proceduralism (i.e., if these stages are

⁷ *Supra* n.1, pp. 6, 236.

⁸ *Supra* n.1, pp. 234-5.

followed, then a successful outcome is guaranteed) or cognitive reductivism (i.e., all successful thinking necessarily reduces to these five stages). Instead, inquiry is a process of reunifying a previously disrupted situation through intelligent problem solving. Since the boundaries of a situation are not limitless, there will always be areas of uncertain or unexplained experience left untouched by experimental inquiry. Though cognitively intense and typically forward-looking, the process of inquiry and experimentation can impart valuable lessons about the content of our felt, had or enjoyed experiences as well as provide backward-looking insight into past practices and traditions (including constitutions that codify them). According to one legal pragmatist, “*far from being unconcerned with the past, [pragmatism] must be particularly sensitive to it.*”⁹

The method of experimental pragmatism is well suited for studying the past in order to resolve or ameliorate present problems. The key idea in Dewey’s experimentalism is that inquiry does not achieve its purpose, whether the production of reliable predictions or the creation of legal norms, by recourse to non-experimental techniques, such as bald appeals to authority. Instead, it achieves its purpose through a process of rigorous observation and testing leading to the resolution of a problematic situation. In the penultimate section, the matter of how norms, and particularly constitutional norms, are experimentally tested in inquiry will receive further consideration.

The Administrative State Debate and Beyond

The issue of pragmatism’s compatibility with constitutionalism emerged in a wider debate within the field of public administration. At the center of this exchange was the issue of whether pragmatism possessed adequate theoretical resources for public administration scholars and practitioners to exploit in reaching a more thorough and actionable understanding of bureaucratic-governmental organizations.¹⁰ Unlike the thin version of pragmatism embraced by many administrative law scholars, though, this debate concerns the compatibility of constitutional commitments with a thick or more philosophically rich version of pragmatism.

James Stever fired the opening volley in the administrative state debate.¹¹ While scholars such as Keith Snider and Karen Evans were able to demonstrate that pragmatism and public administration occupy ‘parallel universes’ the issue of whether the two can be capably integrated what Stever calls public administration’s ‘fusion problem’ remains unsettled.¹² The primary obstacle to

9 Michael Sullivan, LEGAL PRAGMATISM: COMMUNITY, RIGHTS AND DEMOCRACY ed.2007 “Sullivan’s main concern is to refute Ronald Dworkin’s caricature of legal pragmatism as wholly forward-looking”.

10 See, e.g., Geoffrey Greene, PUBLIC ADMINISTRATION IN THE NEW CENTURY: A CONCISE INTRODUCTION ed.2004 “Public administration is that academic discipline concerning the development, institutionalization and reconstruction of bureaucratic-governmental organizations as well as the policies they are tasked to implement” and Shane Ralston, ‘Pragmatism and Compromise’, CIVIC AND POLITICAL LEADERSHIP (Richard A. Couto, ed. 2009).

11 James Stever, THE PARALLEL UNIVERSE: PRAGMATISM AND PUBLIC ADMINISTRATION, ed. 2000, pp. 453-457.

12 *Supra* n. 11, p. 453; Keith Snider, ‘Expertise or Experimenting?’, PRAGMATISM AND AMERICAN PUBLIC ADMINISTRATION, 1920-1950, ed. 2000 p. 329; Karen G. Evans, RECLAIMING JOHN DEWEY: DEMOCRACY, INQUIRY, PRAGMATISM, AND PUBLIC MANAGEMENT, ed. 2000, p. 308.

wedding public administration and pragmatism is the “administrative state tradition” which, starting with Woodrow Wilson’s seminal call for scholars and practitioners to study and compare administrative bureaucracies, has associated the legitimacy of administrative state structures with the existence of a constitution.¹³ In contrast, experimental inquirers in the pragmatist philosophical tradition seek the best instrumentalities in order to address the problem at hand—in this case, how to construct a stable, just and effective administrative apparatus—regardless of the presence or absence of relevant constitutional constraints. Stever infers from these differences that public administration’s pioneers, such as Woodrow Wilson, who embraced the administrative state tradition, would never accept Deweyan pragmatism.¹⁴ Therefore, pragmatism is incompatible with constitutionalism

Stever’s claim that Dewey’s experimentalism and constitutionalism are incompatible is disputed by others. Evans replies that Dewey’s pragmatism can accommodate the administrative state’s commitment to constitutionalism so long as the scope of experimentation is constitutionally limited.¹⁵ Likewise, Snider insists that they are compatible.¹⁶ Where Stever’s two critics disagree is on the issue of whether public administrators or bureaucrats need classic pragmatism to involve citizens in the administrative process. Evans claims that grassroots or participatory policy creation and implementation must be informed by Deweyan experimentalism.¹⁷ Snider, on the other hand, objects that Deweyan experimentalism is optional for citizen involvement in the policy making process.¹⁸ Nevertheless, both agree that there is no feature of Dewey’s pragmatism, including its experimentalism, which precludes a full-blown commitment to constitutionalism.

While the administrative debate serves to frame the issue in a manner suitable for public administration scholars and practitioners, it does little to address a question of greater import for legal practitioners, political philosophers and constitutional theorists, namely, whether pragmatists can be constitutionalists. While acceptance of Snider and Evan’s positions invites a presumption in favour of the thesis that Deweyan pragmatism is compatible with constitutionalism, the administrative debate fails to plumb the depths of Dewey’s writings in order to disclose sufficient evidence of that compatibility. The administrative state debate also presents a very narrow construction of constitutionalism. Indeed, it proves necessary to extract the issue from the administrative state debate in order to advance the inquiry toward a conclusion that captures the complexity of Dewey’s pragmatic experimentalism and expresses pragmatism’s compatibility with more than one variety of constitutionalism.

13 Woodrow Wilson, ‘*The Study of Administration*’, 2 *Poli. Sci. Q.* 1-15 (1886).

14 *Supra* n. 11, p. 457 “*It’s unlikely that Dewey’s casual treatment of constitutions will be acceptable to the contemporary field of public administration.*”

15 *Supra* n. 12, pp. 483-484.

16 Keith Snider, ‘*Response to Stever and Garrison*’, 32 *Administration & Society*, 2000, p. 488 “*Dewey’s [PRAGMATISM] . . . would simply not allow merely experimental or casual treatment of constitutions or any other state institution.*”

17 *Supra* n. 12, p. 484.

18 *Supra* n. 16, p. 488 “*an experimentalist . . . flavor in any movement [to involve citizens in policy planning and implementation] does not necessarily qualify it as pragmatism.*”

Varieties of Constitutionalism

Constitutionalism's core idea is that government authority, in order to be rightfully exercised (whether through legislative, judicial or executive action), must first be properly authorized and constrained by a written or unwritten body of higher-level rules (or laws), properly enacted and recognized as the legitimating source of all lesser rules (or laws) what James Buchanan refers to as "the rules within which ordinary politics proceeds" and H.L.A. Hart (1961, 92-107) calls simply the "rule of recognition."¹⁹ The first section presents the received view of constitutionalism, namely, that constitutional interpretation should be based on the original intent of the Constitution's drafters (Originalism), the logic of a value-neutral system of Constitutional adjudication (Formalism) or the values evident in the social and political context (Contextualism). The drawback of the received view is that it is merely restates and extends three theoretic approaches to legislative interpretation, which were clearly articulated by Tony Honoré, to constitutional matters.²⁰ However, the core idea behind constitutionalism is not limited to how judges interpret constitutions. It also extends to how constitutions operate within polities. In the second section, three constitutional models emerge from the literature which, I claim, better capture the phenomenon of constitutionalism than the received view.

Constitutionalism : The Received View

Theories of constitutionalism have long been associated with theories of constitutional interpretation, which in turn draw upon extant theories of legislative interpretation. Although questions of how to interpret the Constitution are central to the judicial enterprise, I will argue that they do not exhaust the broader meaning of constitutionalism. On the received view, constitutionalism represents three specific approaches to constitutional interpretation: (i) originalism, (ii) formalism and (iii) contextualism.

Originalism-The originalist approach to constitutional interpretation demands that any construction reflects the original intent of the Constitutional founders and, thus, is faithful to the original meaning imputed to the document. According to one of the most well-known contemporary originalists, Robert Bork, a constitution should be interpreted according to its original meaning, that is, according to the intentions of its drafters.²¹ Cass Sunstein distinguishes soft and hard versions of the originalist thesis: (i) the soft version recommends taking the

19 Buchanan, *The Constitutional Way of Thinking*, THE SUPREME COURT ECONOMIC REVIEW (T.J. Zywicki, ed. 2003, p. 154; HLA Hart, THE CONCEPT OF LAW, 1961, pp. 92-107; Geoffrey Brennan and Alan P. Hamlin, 'Constitutional Political Economy: The Political Philosophy of Homo Economicus', 3 J. Pol. Phil. 280-303, 1995, p. 187 "Constitutionalism revolves around the simple idea that political and social life can be broken down into constituent elements--the constitution and the day-to-day actions/interactions of individuals"; Sheldon Wolin, 'Norm and Form: The Constitutionalizing of Democracy', ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY (J. P. Euben, J. R. Wallach and J. Ober, eds.), 1994 p. 35 "Constitutionalism . . . is the theory of how best to restrain the politics of democracy while ensuring the predominance of the social groups and classes represented by the 'best men.'"

20 Tony Honoré, ABOUT LAW, ed. 1995.

21 Robert Bork, A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS, ed. 2008, p. 262 "The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and various amendments."

general purposes and goals of the Constitutional Founders into consideration, as relevant, when interpreting the document and (ii) the hard version, associated with serving Supreme Court Justice Antonin Scalia, insists that “*the particular understandings of those authors and ratifiers are decisive and not merely relevant.*”²² However, most judges, even the most liberal and activist, will admit that they are originalists in the soft sense. Bork is, without a doubt, an originalist in the hard sense. What originalists in both molds share in common is that they conceive tradition as a strong restriction on the scope and quality of judicial decisions. Originalism has its roots in the modality of statutory interpretation known as intentionalism, whereby the text of a statute (or, alternatively, a constitution) is properly interpreted by reconstructing to “*the intention of the author of the text.*”²³ However, originalism suffers from at least two critical defects: (i) its neglect of the current social-political context and (ii) the difficulty of locating a unified will or intention among the multiplicity of authors who originally composed the document.²⁴

Formalism-According to legal formalism, constitutional law is a rational, stable and predictable system. Operating within this closed logical system judges deductively infer legal outcomes by recourse to “*predetermined legal [constitutional] rules without reference to social aims, policies, moral standards.*”²⁵ By separating legal from extra-legal (and especially moral) factors and insisting that only legal factors influence judicial decisions, the legal formalist emphasizes the value-neutrality of constitutional adjudication.²⁶ Abstract categories, such as civil rights and liberties, indicate coherent structures of rules, concepts and principles that judges rely upon in deducing the right judgment in particular legal cases. Though originalism is often identified as a species of formalism, the two are distinguishable. Formalism is especially helpful when textualism, i.e., interpreting a document by recourse to the ordinary meaning of its words, proves unclear, equivocal or insufficient for arriving at a determinate legal outcome.²⁷ Whereas the originalist finds meaning in the intentions of the Constitution’s drafters, the formalist looks for guidance in the logical and conceptual resources left to him by a logical and self-executing system of law. In ‘Logical Method and Law’, Dewey criticized formalist analysis for improperly modelling all legal reasoning after the Aristotelian syllogism. He declared “*the need of another kind of logic which shall reduce the influence of*

22 Cass Sunstein, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO*, ed. 2001, p. 88; see also James Bradley Thayer, ‘*The Origin and Scope of the American Doctrine of Constitutional Law*’, 3 Harv. L. Rev., 1893, pp. 17-25; Antonin Scalia, ‘*Originalism: The Lesser Evil*’, 57 U. Cin. L. Rev., 1995, pp. 849-865; *Ibid.*, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, ed. 1997.

23 *Supra* n. 20, p. 94.

24 Ronald Dworkin, A MATTER OF PRINCIPLE, ed. 1985, pp. 43-57; *Ibid.*, FREEDOM’S LAW: A MORAL READING OF THE AMERICAN CONSTITUTION, ed. 1996, pp. 290-6.

25 HLA Hart, ‘*Positivism and the Separation of Law and Morals*’, 71 Harv. L. Rev., 1958, p. 601.

26 *Ibid.*, p. 25 (Legal formalism and legal positivism overlap with respect to what Hart calls “*the separability thesis*”, or that law and morality can be formally distinguished); see also Shane Ralston, ‘*Legal Imperatives and Just Results*’, 1 *Affirmations* 1-9, 2000, p. 3.

27 *Supra* n. 20, p. 90; see also DAVID M. BEATTY, THE ULTIMAT RULE OF LAW ed.2004; JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS, ed. 1935.

habit, and shall facilitate the use of good sense regarding matters of social consequence."²⁸

Contextualism - Contextualism as a theory of constitutionalism (or more accurately, constitutional interpretation) means that judges consult with the dominant norms, values and goals of the wider society, as well as the pervasive political and moral ideals, for guidance during the process of constitutional exegesis. For instance, in the area of American obscenity law, a court following the Miller test asks whether the work in question offends the contemporary community standards in order to satisfy one prong of the three-prong test to determine whether the work is worthy of First Amendment protection.²⁹ Contextualism is often described as 'antiformalist' because it weakens rule of law values (integrity, certainty and predictability) in a trade-off for greater flexibility in the face of newfound circumstances.³⁰ 'Context' for the constitutional interpreter encompasses the entire social and political milieu. Ronald Dworkin's theory of constitutional interpretation is highly contextualist, concerned with how present decisions both fit with standing precedent (or 'law as integrity' on analogy with a 'chain-novel' that judges jointly author over time) and can improve present legal practice (interpreting it 'in its best possible light' and with reference to 'political morality').³¹ Although contextualism is not identical with the idea of a living constitution, the two notions share a commitment to interpreting the Constitution in a dynamic and forward-looking fashion. When contextualism is reflexively applied to the notion of constitutionalism itself, we soon discover that its significance cannot be limited to the activity of constitutional interpretation. Why? Constitutions are sources of social cohesion and subject to political contestation, and are not merely objects of judicial interpretation. In short, the received view of constitutionalism fails to appreciate the fact that constitutions are themselves embedded within a wider social and political milieu.

Models of Constitutionalism

While the received view of constitutionalism presents three modalities that lawyers, judges and constitutional scholars can use to interpret constitutions, it says little about how constitutional norms emerge in a rich social and political context. At the center of debates about constitutionalism are questions more expansive than how to interpret constitutional language. For instance, how do

28 *Supra* n 1, pp.15, 70 (Dewey argues that the formalists were mistaken in claiming that general principles can by themselves dictate legal judgments in particular legal cases); *see also* JEROME FRANK, *LAW AND THE MODERN MIND*, ed.1963 pp. 30-35 (Similar to Dewey, the legal realist Frank insists that the jurist reaches his conclusion first and then searches for the premises or reasons to support his judgment later, as if they were an afterthought); *Supra* n. 1, p. 15, 72 (While not identical to the experimental method, Dewey's method of legal reasoning involves judgment, "exposition," and the recruitment of reasons: "*Courts not only reach decisions; they expound them, and the exposition must state justifying reasons*"); *see also* Shane Ralston, 'Reconstructing Pragmatist Jurisprudence', *3 Pragmatism Today* p. 63 "*This 'logic of exposition' is both forward and backward-looking, that is, 'aiming to reshape old rules of law to make them applicable to new conditions' and respecting the principle of stare decisis, or treating like cases alike based on authoritative and controlling precedent*".

29 *Miller v. California* 413 U.S. 15 (1973).

30 Robert M. Unger, *THE CRITICAL LEGAL STUDIES MOVEMENT*, ed. 1986, p. 109.

31 *Supra* n. 24, pp. 97-101; RONALD DWORKIN, *LAW'S EMPIRE*, ed. 1986, pp. 225-75.

political actors construe the function and design of constitutions? In what ways do constitutions promote political values, such as fairness, legitimacy and justice? Should constitutions codify a society's traditions and mores or encourage openness and adaptability? What are the political implications of who authors the constitution? Does the constitution make a regime more accountable to a people and vice-versa? Or is there inevitable imbalance when a judiciary declares the legislative priorities of democratic majorities unconstitutional what is typically referred to as the "*counter majoritarian difficulty*"?³² In the following pages, three constitutional models traditionalism, organicism and functionalism are articulated, each attempting to remedy the narrowness of the received view.

Traditionalism-Traditionalism as a model of constitutional order comes in many forms, from the relatively weak and innocuous idea that a stable constitution should reflect the rule of law (Aristotle) to the stronger and more contentious position that a constitution's true meaning is identical with its drafters' original intent (Robert Bork).³³ Starting with Aristotle's idea of a traditional constitution, the discussion then proceeds to Cass Sunstein's critical account of moderate constitutional traditionalism and its more radical cousin: originalism.

For Aristotle (1958, 1269a20), a constitution codifies those normative ideals and traditional values that support the rule of law in a specific society, for it is widely accepted that "*nomos [enacted law] has no power without the force of ethos [custom]*."³⁴ According to Jill Frank, "*Aristotle's constitutionalism . . . treats a constitution as a telos and, as such, as the way of life of a people in a regime*."³⁵ Aristotle's traditional constitution aims to cultivate in a regime's citizens a habit of obedience (closely related to the virtues of *phronesis* and moderation), to check sovereign exercises (and abuses) of political power and to minimize opportunities to change the laws that would threaten regime stability.³⁶

32 Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS ed.1962 (Bickel coined the phrase "*counter majoritarian difficulty*" to describe how judicial review of popularly supported legislation can be deemed "*undemocratic*," when the will of nine justices nullifies the will of a democratic majority or their elected representatives; see also JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW ed.1980; BRUCE ACKERMAN, WE THE PEOPLE 1: FOUNDATIONS ed.1991; *Supra* n. 24, pp. 1-38; and *Supra* n. 9, pp. 98-115.

33 Aristotle, POLITICS, 1269b14, 1312b4, 1319b33 ["*Aristotle*"] (1958) (Aristotle champions two manifestations of the Athenian Constitution, the ancestral constitution and the Constitutions of the Five Thousand: "*The task confronting the lawgiver, and all who seek to set up a constitution . . . is not only, or even mainly to establish it, but rather to ensure that it is preserved intact. (Any constitution can be made to last for a day or two.)*"; see also Jill Frank, '*Aristotle on Constitutionalism and the Rule of Law*', 8 THEORETICAL INQUIRIES IN LAW, ed. 2007, pp. 39-41. *Supra* n. 21, p. 206 (Bork criticizes those constitutional scholars who interpret the First Amendment as a strong prohibition against infringements on political speech, i.e. the libertarian view, rather than appeal to the Founders' intent (i.e. originalism): "*Any such [libertarian] position would have been strikingly at odds with the American political tradition. Our forefathers were men accustomed to drawing a line, to us often invisible, between freedom and licentiousness*").

34 *Supra* n. 33, p. 1269a20.

35 *Supra* n. 33, p. 49.

36 *Ibid.*, p. 42 (According to Frank, Aristotle's account of how citizens cultivate a virtuous habit of obedience can be distinguished from the legal positivist's fact-based account: "*Unlike contemporary legal positivists, who treat citizen compliance as a social fact, then, obedience to the law in Aristotle's view is not a fact but a practice, one that is guided by citizen judgment*"); see also FRIEDRICH VON

Traditionalism implies that there is only slight advantage to a written constitution. Although the United States' constitution is written and Britain's is unwritten, the norms that order Britain's democracy can be found in the broader practices, customs and historical documents (particularly the Magna Carta and Bill of Rights) of the British society. In an Aristotelian spirit, Lawrence Lessig calls some constitutions 'preservative' because their basic design protects time-honoured institutions and customary practices against destabilizing forces.³⁷ The traditional model of constitutionalism does not necessarily obstruct social change or bind future generations to a narrow reading of the document—as, for instance, originalism can. However, it does tell us that constitutional norms emerge from traditional rule of law values. Still, what is unclear is the extent to which the tradition-bound character of constitutional norms would accommodate pragmatic experimentation.

Though critical of traditionalism, Cass Sunstein offers a valuable typology of reasons for privileging tradition in the design, interpretation and revision of constitutions. According to the first rationale, traditions should be preserved in constitutional form so that individual rights reflect 'national and local practices', a statist or parochial alternative to universalist-cosmopolitan (especially Kantian) justifications of rights.³⁸ The second reason is that deference to tradition in interpreting constitutions simplifies legal decision-making. It bypasses appeals to complex reasons and "*independent moral argument*" in favour of "*what has been done before*" simply because past practices are "the best guide to what should be done" today and in the future.³⁹ The third rationale for traditionalism, which Sunstein associates with the political theorist Edmund Burke and contemporary Yale Law School professor Anthony Kronman, states that following tradition is constitutive of what it means to be human—or in Kronman's words, "*We must, if we are to be humans at all, adopt towards the past the custodial attitude that Burke recommends.*"⁴⁰ Thus, constitutional founders, jurists, legislators and enfranchised citizens are no longer human once they stop caring about tradition—however absurd that might sound. The fourth type of reason, and by far the most controversial, is "*that the Constitution should be taken to mean what it meant when the relevant provisions were ratified*" or originalism.⁴¹ However, the meaning of the traditional constitution is not exhausted by the originalist approach to judicial interpretation.

HAYEK, LAW, LEGISLATION AND LIBERTY, ed. 1979 p. 108 (Hayek's argument that constitutional legitimacy depends on a "*background of traditions and beliefs*" is closely tied to Aristotle's idea that a constitution codifies traditional rule of law values); ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT, 1967, p. 128 (Bentley understands constitutions as deriving their authority from habits and custom: "*For constitutions are but a special form of law. They are specially guarded habitual activities of the society, enforcing themselves on all would-be variants*").

37 Lawrence Lessig, CODE AND OTHER LAWS OF CYBERSPACE, ed. 1999 p.86; see also *Supra* n. 33, pp. 1294b14-15, 19 (In his critique of the Spartan constitution, Aristotle argues that if the document was more balanced in its oligarchic and democratic elements, then it would be more effective at preserving the Spartan state and the stability of its institutions).

38 *Supra* n. 22, p. 73.

39 *Supra* n. 22, p. 75.

40 *Supra* n. 22, p. 77.

41 *Supra* n. 22, p. 87.

Organicism-Panel four of the Jefferson Memorial records Thomas Jefferson's vision of constitutional change: "*I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.*"⁴² Jefferson's words capture the spirit of organic constitutionalism, the idea that constitutions are living documents that transform over time in sync with popular thought, imagination and opinion. I start with Jefferson's notion of a living constitution and end this discussion of organic constitutionalism with Bruce Ackerman's very Jeffersonian proposal to revise the amendment process of the United States Constitution (Article-V). Although my treatment of the organic constitution leaps from the eighteenth to the late twentieth-century, there is a bounty of examples of organic constitutional thinking between these two historical periods.⁴³

In spite of Jefferson's denial that he "*advocate[d] for frequent changes in laws and constitutions,*" he argued for a living constitution and generational sovereignty. Jefferson biographer Joseph Ellis dismisses the apparent dissonance and stakes Jefferson's reputation on the organic view: "*Jefferson tended to view it [the Constitution] as a merely convenient agreement about political institutions that ought not to bind future generations or prevent the seminal source of all political-power popular opinion-from dictating government policy.*"⁴⁴ Evidence for this view can be found in a letter from Jefferson to James Madison addressing "*[t]he question Whether one generation of men has a right to bind another.*"⁴⁵ In organic language, Jefferson states the first principle of his inquiry, which he took "*to be self-evident, [namely] 'that the earth belongs in usufruct to the living': that*

42 Joseph Ellis, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON*, ed. 1998 p.98 (Based on a Letter of Benjamin Franklin to Samuel Kercheval, July 12, 1810, it is known that these were not Jefferson's exact words, but were excerpted from the letter which read as follows (emphasis on the words that were removed): "I am *certainly* not an advocate for frequent and untried changes in laws and constitutions. *I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the same coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.*"

43 *McCulloch v. Maryland* 17 U.S. 316 (1819) (In the early nineteenth century, John Marshall, chief justice of the U.S. Supreme Court, defended an organic view of constitutions in the majority opinion: "[A] constitution [is] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."; see also John Patrick Diggins, 'Republicanism and Progressivism', 37 *American Quarterly* (1985) p. 579. (Woodrow Wilson, the twenty-eighth president of the United States, a contemporary of Dewey's and a pioneer of public administration, embraced the idea that constitutions are organic: "*Living political constitutions must be Darwinian in structure and practice. Society is a living organism and must obey the laws of life, not of mechanics, it must develop.*"

44 Ellis, *supra* n. 42, p. 192.

45 Thomas Jefferson, *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776-1826*, (J.M. Smith, ed.), 1995, p. 632 (Jefferson's letter to Madison is dated September 6, 1789, and was written while Jefferson was a diplomat in Paris).

the dead have neither powers nor rights over it." The term 'usufruct' refers to a concept in Roman and civil law that some may derive advantages from the use of something owned by another. In Jefferson's usage, the earth belongs to God but its bounty extends to each living generation (coming into existence about every nineteen years),⁴⁶ not older generations or their long-dead ancestors. Jefferson's initial concern was that one generation would unjustly burden future generations with monetary debt, both public and private. From the radical economic idea that each new generation should be freed from the financial obligations of prior generations, he inferred that "*no society can make a perpetual constitution or even a perpetual law*" for "[t]he earth belongs always to the living generation."⁴⁷ In other words, each generation should be empowered to peacefully revise the constitution, its laws and institutions, thereby ensuring political independence from the prior generation. Thus, every nineteen years, a bloodless constitutional revolution guarantees generational sovereignty, for "*one generation is to another as one independent nation to another,*" unbound by the other's constitutional norms and obligations.⁴⁸ Of course, Jefferson's model is not without its problems, most notably how to maintain *intra*-generational rigidity (e.g., stable protections of minorities against majorities, preservation of fundamental rights even when the opposition is near-unanimous) without entailing *inter*-generational rigidity given the fact that generations overlap.⁴⁹

Consistent with the organic model, Bruce Ackerman proposes a "two-track" theory of dynamic constitutional change or what he simply calls the "*dualist Constitution*."⁵⁰ According to his exegesis of U.S. constitutional history, crises have occurred infrequently during the Founding, the Reconstruction period following the Civil War (when the Thirteenth, Fourteenth and Fifteenth Amendments were passed), and the Great Depression. The people deliberated in mass and with few or no constraints on their ability, using the metaphor of game-playing, to create or change the rules of the game.⁵¹ Indeed, Ackerman's dualist theory distinguishes two varieties of law making, "*constitutional*" and "*normal*," that is, creating or amending the rules of the game (i.e. constitutional law making) and playing the game of electoral-legislative politics under the existing regime of rules (i.e. normal law making).⁵² During periods of instability, prior constraints on normal politics, including on the scope of legitimate political interaction and

46 *Ibid*, p. 633 (Jefferson determines the length of a generation based on actuarial data compiled by the Comte de Buffon, which show that a new generation arrives about every eighteen years and eight months).

47 *Ibid*, p. 634.

48 *Id.*, p. 635.

49 Axel P. Gosseries, *Constitutions and Future Generations*, 17 *The Good Society* p. 33 (2009) (Gosseries explains the problem of *intra*-generational rigidity: "*In a real world however, generations do overlap. [. . .] The overlap thus makes it practically unavoidable that those committed to intragenerational rigidity should accept intergenerational rigidity as a side-effect*"; cf. Wolin, *supra* note 19 p. 55 (Wolin expresses the more pessimistic view that any institutionalization of the democratic ideal in a formal constitution will fix its content and ossify its meaning: "*A political constitution is not the fulfilment of democracy but its transfiguration into a 'regime' and hence a stultified and partial reification*").

50 *Supra* n. 32, p. 296.

51 *Supra* n. 32, p. 288; see also *Supra* n. 19, p. 147 (Buchanan likewise compares constitutional rules to the rules of a game).

52 *Supra* n. 32, pp. 300-302. See also Galston and Galston, '*Reason, Consent, and the U.S. Constitution: Bruce Ackerman's 'We the People'*', 104 *Ethics* (1994) p. 447.

mobilization, are shelved for the sake of imagining a new or reconstructed constitutional order.⁵³ In a Jeffersonian spirit, Ackerman argues that these momentous and infrequent crises spawn “*new beginnings*,” or organic opportunities for constitutional transformation, that are so crucial for “*enhanced legitimacy*” that they deserve institutional support.⁵⁴ In the second book of his three-book series, *We the People*, Ackerman proposes a supportive mechanism in the form of a radical new procedure for amending the U.S. Constitution: “*Rather than aiming for an Article V Amendment [which requires the Congress or a national convention to propose an amendment at the request of two-thirds of the state legislatures, and then for the amendment to be ratified by either three-quarters of the state legislatures or state ratifying conventions] the vehicle for constitutional change should be a special statute that I [Ackerman] will call the Popular Sovereignty Initiative. Proposed by (a second-term) President, this Initiative should be submitted to Congress for two-thirds approval, and should then be submitted to the voters at the next two Presidential elections. If it passes these tests, it should be accorded constitutional status by the Supreme Court.*”⁵⁵

Although the Initiative would make the amendment process excruciatingly long, Ackerman hopes that it would have the effect of leveraging civic engagement and public dialogue about constitutional matters.

Functionalism—On this third account, a constitution is a mechanism, an ordering device that fulfils a specific set of functions. The positions of two scholars, Stefan Voigt and James Buchanan, epitomize this view.⁵⁶ According to Voigt, a constitution is “*a system of rules specifying the allocation of resources used for the provision of public goods within the collectivity called the state.*”⁵⁷ Since it is nearly impossible to supply certain essential and indivisible goods (e.g., defense) through a free market mechanism, the government must employ non-market mechanisms (i.e., contract bidding and taxation) to artificially determine supply, demand and price. Voigt’s intention is to limit the role of the state to providing only these special (public) goods and leave all other activities untouched by government intervention. With such a constitutional mechanism in place, government would not have the authority to redistribute private goods as it sees fits. As a free-market libertarian, it is unsurprising that Voigt would argue that a constitution functions as a mechanism to ensure limited government.

53 There are several critiques of Ackerman’s dualistic reading of constitutional history. For instance, John Dryzek (2004:50) argues that the suspension of constitutional constraints during these momentous and infrequent crises is evidence of a weakness in constitutional orders: “*This [temporary suspension of constitutional constraints] points to a limit to constitutions as sources of order: they cannot cope with great crises.*” Dryzek, ‘*Constitutionalism and Its Alternatives*’, *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY*, (A. van Aaken, et al eds) 2004 p. 50. Also, Michael Sullivan understands Ackerman’s conception of the People as a democratic subjectivity that would be too constrained by normal politics to attempt major breaks during periods of constitutional politics: “[I]ronically, the community subject which sets us free may be largely the product of the normal politics it was meant to regulate.” Sullivan, *LEGAL PRAGMATISM: COMMUNITY, RIGHTS AND DEMOCRACY*, ed. 2007, p. 108.

54 Ackerman, *WE THE PEOPLE 2: TRANSFORMATIONS*, ed. 1998 p.302.

55 *Ibid.*, at 415; see also Peter S. Onuf, ‘*Who are ‘We the People’? Bruce Ackerman, Thomas Jefferson, and the Problem of revolutionary Reform*’, 10 *Constitutional Political Economy* 397-404, pp.401-2.

56 Stefan Voigt, ‘*Pure Eclecticism—The Tool Kit of the Constitutional Economist*’, 7 *Constitutional Political Economy* 177-196 (1996); *Supra* n. 19.

57 *Supra* n. 56, p. 182.

Similar to Voigt, Buchanan's libertarian bias also surfaces in identifying those limited functions that government can fulfil given constitutionally imposed limitations. He believes that government should do no more than encourage citizens to embrace a single constitutional norm—what he refers to as the “*constitutional way of thinking*”: “*This way of thinking is, at base, procedural rather than substantive. At the final cut, what emerges from agreement becomes normatively superior because it emerges and nothing more. Agreement does not emerge because that upon which agreement is reached is exogenously superior.*”⁵⁸ In other words, citizens should think of constitutional agreement as the contractually binding outcome of free deliberations, not in virtue of some independent standard (e.g. a moral principle or scientific finding), but solely with respect to the fact that all parties consented.⁵⁹ Of course, all future generations will be bound by the consent of the original Founders, unless the Constitution is amended in a procedure which requires a super-majority voting rule. In this way, Buchanan's functionalist approach to constitutionalism favors the status quo, stability and the protection of minorities within a democratic society, even in the face of a tyrannical majority.⁶⁰

Dewey on Jefferson and Constitutional Norms

Given John Dewey's extensive writings on democracy, the common association of democracy with experimentalism (think of expressions such as ‘Brandeis’, ‘laboratories of democracy’ and ‘democracy as a grand experiment’) and the similar correlation of constitutionalism with stability, Dewey's credentials as a democrat are considerably more secure than his credentials as a constitutionalist. Nevertheless, statements such as the following might lead us to confidently ally Dewey's views with organic constitutionalism: “*By its very nature, a state is ever something to be scrutinized, investigated, [and] searched for. Almost as soon as its form is stabilized, it needs to be re-made.*”⁶¹ In this section, Dewey's essay on Jefferson as well as his many other writings on constitutional norms receive close scrutiny, in a search for evidence of compatibility between Deweyan experimental pragmatism and one or more of the three models of constitutionalism.

58 *Supra* n. 19, p. 146.

59 T.M. Scanlon, ‘*Contractualism and Utilitarianism*’, UTILITARIANISM AND BEYOND, (A. Sen and B. Williams, eds.) 1982 p. 110, (Buchanan's theory resembles T.M. Scanlon's contractarianism in moral philosophy: “*An act is wrong if its performance under circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis of informed, unforced general agreement*”); Buchanan, *supra* note 19, at 143 (Buchanan also mentions the “*Wicksellian norm for taxation*,” named after Knut Wicksell, who supported changes in voting rules from simple to qualified or super majorities, since the closer the decision rule gets to unanimity the more protected are the minority's interests).

60 Jules Coleman, ‘*Constitutional Contractarianism*’, 1 *Constitutional Political Economy* p.146ff (1990) (Referring to Buchanan, Jules Coleman states that this disregard for “*the [ex ante] fair distribution of holdings*” constitutes “*status quoism of the worst kind*”); see also Anne van Aaken, ‘*Deliberative Institutional Economics, or Does Homo Oeconomicus Argue? A Proposal for Combining New Institutional Economics with Discourse Theory*’, DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY, (A. van Aaken, C. List and C. Luetge, eds.) 2004, p. 3-32, 8ff.

61 *Supra* n. 1, pp. 2, 255.

Dewey Presents Jefferson

Though scholars have spilt more ink connecting Deweyan pragmatism with the thoughts and writings of another American Founder, Benjamin Franklin, Dewey himself showed comparably greater interest in the life and ideas of Thomas Jefferson.⁶² While he is probably best known for drafting the *Declaration of Independence*, Jefferson also exercised immense influence over the creation of the United States' Constitution through his extended correspondence with James Madison during the 1787 Constitutional Convention (since Jefferson was absent, serving as a diplomat in Paris).

In a thirty-page introduction to an edited collection of Jefferson's writings, titled "*Presenting Jefferson*," Dewey portrayed Jefferson as "*a child of the pioneer frontier and of the enlightenment of the 18th century*" and a first-rate political philosopher.⁶³ About half-way through the essay, Dewey grapples with "*the question of French influence*" upon the Founding statesman and one-time French diplomat, insisting that "[e]very one of Jefferson's characteristic political ideas (with one possible exception) was definitely formulated by him before he went to France."⁶⁴ What was the single "exception"? "[It] is found in Jefferson's emphasis upon the moral inability of one generation to bind a succeeding generation by imposing a debt or unalterable constitution upon it. His assertion that the "earth belongs in usufruct to the living; that the dead have neither powers nor rights over it" was general in scope. But his argument (in a letter written from Paris [to James Madison]) closes with a statement of the importance of the matter "in every country and most especially in France." For, as he saw, if the new government could not abolish the laws regulating descent of land, recover lands previously given to the Church, abolish feudal and ecclesiastical special privileges, and all perpetual monopolies, reformation of government would be hamstrung before it got started."⁶⁵

Rather than applaud the revolutionary and organic character of Jefferson's theory of generational sovereignty, Dewey reads Jefferson's letter to Madison, especially the final passage, as limiting its intended application (or 'scope') to the peculiar situation of pre-revolutionary France (a situation of great economic inequality that left to stand would obstruct future political progress and reform). In Jefferson's letters discussing the drafting of the Declaration of Independence, Dewey observes that "*Jefferson was . . . profoundly convinced of the novelty of the action [to declare American independence] as a practical 'experiment'-[a] favorite word of his in connection with the institution of self-government.*"⁶⁶ Just as Jefferson saw the *Declaration* as a test of the colonists' will to revolt and separate from Britain, he also saw the Constitution, as the outcome of the Convention in Philadelphia almost eleven years later, as a grand experiment in

62 James Campbell, '*The Pragmatism of Benjamin Franklin*', 31 *Transactions of the Charles S. Peirce Society* 745-92, 747 (1995); see also WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN PORTRAIT*, 2004 p.491; Shane Ralston, '*Ole Ben Franklin, the Pragmatist? On the Philosophical Credentials of an American Founder*', 7 *The Pluralist*, 2012, pp. 6-26.

63 *Supra* n. 1, pp. 14, 201-24.

64 *Supra* n. 1, p. 211.

65 *Supra* n. 1.

66 *Supra* n. 1, p. 212.

creating a new social and political order. Does Dewey detect a countervailing tendency in Jefferson's thought? Perhaps to our surprise-though not if we appreciate the sincerity of his words on the Jefferson Memorial "*I am not an advocate for frequent changes in laws and constitutions*"-Jefferson was, to some extent, a traditionalist. After studying his letters in detail, Dewey concludes that "[h]e [Jefferson] knew too much history not to know that governments [and their constitutions] have to be accommodated to the manners and habits of the people who compose a given state" in other words, to their traditions.⁶⁷ For Jefferson, traditions were instruments for transmitting values and maintaining intergenerational continuity.

Dewey on Constitutions and Constitutional Norms

Summarizing and interpreting all those views Dewey expressed about constitutions would exceed the scope of this article. So a selection of materials has been made (below) that reveals his pattern of thinking on constitutional norms.⁶⁸

- (i) Dewey approvingly quotes Justice Oliver Wendell Holmes, Jr. (The Constitution is an experiment, as all life is an experiment.), and then provides his own gloss on Holmes' experimentalism: "*According to the framework of our social life, the community, the 'people,' is, through legislative action, the seat of social experiment stations.*"⁶⁹
- (ii) Dewey criticizes those who treated the Constitution as a sacred end, not a tool for realizing the social and political good: "*The constitution of the state is treated not as a means and instrument to the well-being of the community of free self-governing individuals but as something having value and sanctity in and of itself.*"⁷⁰
- (iii) Similar to Plato (1980) in *The Laws* (Bk. IV, Sec. 7), Dewey locates the key to translating the Constitution into "*a flexible political program*" in its Preamble: "*The recovery of the agencies of legislation, administration and judicial decision to serve social ends, which the Preamble to the Constitution declares to be the object of government, translates itself almost automatically into terms of a flexible political program. No commitment to dogma or fixed doctrine is necessary. The program can be defined in terms of direct social needs and can develop as these change.*"⁷¹
- (iv) In the book *Experience and Nature*, Dewey discusses how the relations bound up in what is "*real*" can differ from the "*literal*" perception of a thing, using "*the Constitution of the United States*" as the example: "*Obviously the real constitution is certain basic relationships among the activities of the citizens of the country; it is a property or phase of these*

67 *Ibid.* p. 213.

68 James Scott Johnston, *INQUIRY AND EDUCATION: JOHN DEWEY AND THE QUEST FOR DEMOCRACY*, ed. 2006 pp. 38-40, (Johnston employs this technique of listing a series of Dewey quotes for the sake of locating a pattern of consistent reasoning and correcting "*a tendency in the scholarship of Dewey to invoke passages out of context.*"

69 *Supra* n. 1, pp. 3, 179.

70 *Supra* n. 1, p. 5, 193.

71 PLATO, *THE LAWS*, bk. IV, sec. 7 (T.L. Pangle, trans., Basic Books) 1980; *Supra* n. 1, pp. 6, 176-7.

processes, so connected with them as to influence their rate and direction of change. But by literalists it is often conceived of as something external to them; in itself fixed, a rigid framework to which all changes must accommodate themselves."⁷²

- (v) In *The Public and Its Problems*, Dewey notes that since (during what is often referred to as the Lochner era) the Supreme Court had struck down as unconstitutional state and federal laws to regulate child labor, the Child Labor amendment had been stymied by a difficult amendment procedure and a lack of political will: "*Yet so far, the proposed amendment to the Constitution has not begun to secure the needed support. Political parties may rule, but they do not govern. The public is so confused and eclipsed that it cannot even use the organs through which it is supposed to mediate political action and polity.*"⁷³
- (vi) In the *Ethics*, Dewey (with Hayden Tufts) argues that the American state constitutions and the federal Constitution failed to adapt to new circumstances: "*[T]here are problems, growing out of the fact that for the most part American [state and federal] constitutions were written and adopted under conditions radically unlike those of the present, which have a direct ethical import. [. . .] [O]ur constitutions are full of evidences of distrust of popular cooperative action. They [the founders] did not and could not foresee the direction of industrial development, the increased complexity of social life, nor the expansion of national territory.*"⁷⁴
- (vii) In the revised *Ethics*, Dewey complains that "*[i]n the United States, the tendency to rigidity of interpretation and corresponding fixity of governmental institutions was favored by a written constitution and its provisions.*"⁷⁵
- (viii) On the relationship between democracy and constitutionalism, Dewey laments in *Freedom and Culture* those social conditions under which certain prevalent "*ideas . . . lead us to believe that democratic conditions automatically maintain themselves, or that they can be identified with fulfilment of prescriptions laid down in a constitution.*"⁷⁶

One might infer from these excerpts that Dewey's estimation of the value of constitutions was fairly low. However, a more nuanced reading is that he was critical of constitutional thinking that involves interpretive "rigidity," promotes institutional "fixity" in the face of changing circumstances and treats the constitution as possessing intrinsic "value" or "sanctity."⁷⁷ If this reading is

72 *Ibid.*, p. 1, 65.

73 *Ibid.*, p. 2, 310-1.

74 *Supra* n. 1, pp.5, 428.

75 *Supra* n. 1, pp. 7, 354.

76 *Ibid.*, pp. 13, 87.

77 *Ibid.*, p.14, 216 (Dewey describes Jefferson's view in a way similar to how he characterizes his own view: "In any case, he was no friend of what he called 'sanctimonious reverence' for the constitution"; see also Roger T. Ames, *Tang Junyi and the Very 'Idea' of Confucian Democracy*," DEMOCRACY AS CULTURE: DEWEYAN PRAGMATISM IN A GLOBALIZING WORLD, (S. Tan and J. Whalen-Bridge, eds.) 2008 pp. 180, Ames provides an excellent illustration of the circumstances under which Dewey's experimentalism would conflict with a commitment to constitutionalism: "A

correct, then it can be confidently concluded that Dewey would have rejected the species of traditionalism known as originalism, for it renders an inflexible interpretation of the constitution's meaning.

Was Dewey therefore a perpetual critic of tradition and traditional constitutions? Not entirely. At some places, he positively values “[t]radition and custom,” insisting that they “are part of the habits that have become one with our very being.”⁷⁸ At other places, he acknowledges that customary and traditional ways of life obstruct growth: “Tradition may result in habits that obstruct observation of what is actually going on; a mirage may be created in which republican institutions [e.g. constitutions] are seen as if they were in full vigor after they have gone into decline.”⁷⁹ From a pragmatist-experimentalist perspective, traditional constitutions are flawed insofar as they incorporate rigid or fixed rules that block organic development. In the *Ethics*, “standards and rules of conduct [rooted] in ancestral habit” are distinguished from “appeals to conscience, reason, or . . . thought,” but ultimately, the “difference [is only] in principle,” Dewey notes, for in practice both operate as valuable social norms.⁸⁰ What he laments most of all is the narrow and ingrained channels in which thinking and living flow when traditions restrict social progress. Dewey recommends that “the way to go forward is to get rid of those elements of our heritage from the past which hamper, load down and distort clear and coherent intellectual articulation of the attitudes, interests and movements which are distinctively modern.”⁸¹

However, this critique of traditionalism does not make Dewey an enemy either of tradition or tradition-based constitutions. To the extent that tradition is a source of continuity between past, present and future generations, “[a]s a process, tradition has a wider meaning, being used to cover the entire operation of transmission by which a society maintains the continuity of its intellectual and moral life. As a fact, tradition has of course always been operative.”⁸² Similar to Jefferson, Dewey saw tradition—whether operating in constitutions or in the wider social mores—as an indispensable means for transmitting values across generations. Tradition in the form of long-standing precedent established through the principle of stare decisis, or the treatment of like cases alike, also has value that can trump the need for social experiment and radical change. As mentioned, Dewey in “*Logical Method and Law*” criticized legal formalism rigidly adhering to syllogistic logic. However, he also conceded that a legal system requires the “stability and regularity” that formalists prize: “Another moving force [besides logic in the law] is the undoubted need for the maximum possible of stability and

constitution in a revolutionary America several hundred years ago, for example, might quite reasonably guarantee the right of individuals to bear arms. But this anachronistic right might be a source of coercion in our very different contemporary setting. By perpetuating an ostensibly personal freedom without taking into account changing circumstances, such a right might only serve to empower shameless individuals to dramatically compromise the flourishing community that Dewey takes as a necessary condition for democracy.”

78 *Supra* n. 1, pp. 9, 11.

79 *Supra* n. 1, pp. 13, 102.

80 *Ibid.*, pp. 7, 162.

81 *Ibid.*, pp. 14, 315.

82 *Supra* n. 1, pp. 7, 356.

regularity of expectation in determining courses of conduct. Men need to know the legal consequences which society through the courts will attach to their specific transactions, the liabilities they are assuming, the fruits they may count upon in entering upon a given course of action."⁸³ In other words, constitutional order demands predictability in the application of legal rules, so that citizens act and coordinate their actions based on reasonable expectations about how the law will affect their individual and collective lives.

Still unaddressed is a major difference between Dewey and many constitutional theorists, including Ackerman and Buchanan (not Sunstein). While these constitutionalists insist that constitutional norms are produced *by* meta-level constitutional rule-making under minimal constraints, Dewey believes that constitutional norms emerge *from* within broader and more inclusive set of social and political practices. For Dewey, constitutional politics are continuous with, not privileged over, day-to-day politics. In addition, constitutional norms are the products of experimental inquiry. Though they are comparatively more stable than the norms codified in ordinary legislation, constitutional norms are still contested, fallible and thus potentially revisable through an amendment procedure. Indeed, they are similar to the highly, though by no means absolutely, stable forms that guide inquiry-what Dewey creatively describes as the "*operationally a priori*."⁸⁴ Contrary to the views of most constitutional theorists, the testing of proposed constitutional norms does not occur at a higher theoretical plane-what Ackerman, Buchanan and others eulogistically call the 'constitutional level.' Instead, on an experimental pragmatist's account, norms are tested and determined through inquiry.⁸⁵ According to Larry Hickman, Dewey's "*experimentalism involves active, systematic, and controlled attempts to determine . . . which [norms] . . . are best positioned to achieve the desired balance between goals of freedom and equality.*"⁸⁶ For Dewey, determining the content of constitutional norms is no different than the creation and valuation of other norms; it occurs through observation, analysis, manipulation and reflection upon the conditions and consequences of problematic situations, whether in ordinary or constitutional politics or in what pragmatists simply refer to as "*experience*."⁸⁷

83 *Ibid.*, pp. 15, 73.

84 *Supra* n. 1, pp. 12, 21.

85 *Ibid.*, pp. 285-309 (For Dewey, the acceptability of norms can be determined with respect to three kinds of criteria: (i) naturalistic, (ii) instrumental and (iii) conventional. First, a determination of their worth is based on the satisfaction of a naturalistic criterion of success, that is, whether they cultivate habits that make humans better adapted to their natural and social environments. They can also be assessed instrumentally, that is, in terms of their efficacy or success in achieving favored ends. Since experimental deliberation is abductive (or concerned with hypothesis formation and testing), it is instrumental in the sense of being aimed at experimental confirmation or disconfirmation (relative to tentative, not fixed, standards of acceptability), but not in the sense of satisfying an absolute standard or realizing some final end. Third and last, value judgments can be evaluated conventionally, that is, by recourse to widely approved or potentially approvable community standards).

86 Larry Hickman, '*The Genesis of Democratic Norms: Some Insights from Classical Pragmatism*', DEMOCRACY AS CULTURE: DEWEYAN PRAGMATISM IN A GLOBALIZING WORLD, (S. Tan and J. Whalen-Bridge, eds.) 2008 p. 25.

87 *Supra* n. 1, pp. 1, 18 (In *Experience and Nature*, Dewey defines 'experience' as including "*what men do and suffer, what they strive for, love, believe and endure, and also how men act and are acted upon,*

Conclusion

Dewey's experimentalism is compatible with constitutionalism, however, with a single qualification: Under some circumstances, social progress can require that citizens experimentally test constitutional norms and revise constitutional rules accordingly. For this purpose, almost all constitutions contain amendment procedures-or what HLA Hart terms the '*rules of change*.'⁸⁸ However, many of those amendment procedures, such as Article-V of the U.S. Constitution, prove so difficult to carry out that the possibility of constitutional revision becomes moot (as Dewey discovered in the case of the proposed Child Labor amendment). On experimental grounds, a more dynamic amendment procedure could be initiated, whether in the form of Ackerman's Popular Sovereignty Initiative proposed or a plan such as Jefferson's to convene a new constitutional convention every nineteen years. However, Dewey's narrow interpretation of the radical idea of generational sovereignty reveals his deep-seated reservations about the destabilizing effects of a thoroughly organic constitution. Agreeing with Aristotle (and to some extent, Jefferson), Dewey believed that constitutions should be rooted in tradition, codifying a people's manners, habits, customs and ways of life. Furthermore, Dewey would generally agree with Voigt and Buchanan that constitutions fulfil certain functions; though they would likely disagree on what those exact functions should be. Thus, all three constitutional models (traditionalism, organicism and functionalism) are to some extent compatible with Dewey's experimentalism, so long as they permit average citizens and government officials to test the fitness of constitutional norms for resolving pressing social and political problems (e.g., by enabling states and localities to perform as so-called "laboratories of democracy" and activist judges to, under dire circumstances, intervene and catalyze social change, for instance, in the Supreme Court cases of *Brown v. Board of Education of Topeka I* (achieving racial integration in public schools) and *Gideon v. Wainwright* (giving criminal defendants the right to a public defender).⁸⁹ Hence, Deweyan pragmatism is compatible with a stable constitutional order insofar as the constitution contains an instrument for permitting experimental change (*i.e.* a dynamic amendment procedure) and its constituent rules are tentatively stable, yet fallible and revisable in light of ongoing experience and inquiry or what James Buchanan aptly calls '*relatively absolute absolutes*.'⁹⁰

the ways in which they do and suffer, desire and enjoy, see, believe, imagine-in short, processes of experiencing").

88 *Supra* n. 19, pp. 93-6.

89 *Brown v. Board of Education of Topeka I*, 347 US 483 (1954); *Gideon v. Wainwright*, 372 US 335 (1963).

90 James Buchanan, *ESAYS ON POLITICAL ECONOMY*, ed. 1989, p. 45.

THE RISING FAILURE OF STATE SOVEREIGNTY IN CONTEMPORARY INTERNATIONAL LAW

Shreya Mishra*

ABSTRACT

Sovereignty is one of the four attributes that defines a 'State'. The traditional concept of State sovereignty essentially implies non-tolerance for interference by another State in a State's internal affairs. Since the inception of the concept through the Treaty of Westphalia in 1648, the notion of sovereignty has assumed a different perspective which, apart from domestic affairs, also includes the realms of international and internal politics. The evolution of State Sovereignty has been rather dynamic, with the world witnessing two world wars which were succeeded by a 'Cold War'. New boundaries were drawn and the world underwent a transition, and is still undergoing gradual transformation by forces and factors that determine the existence or non-existence of a State. The article is an analytical study of the emergence of 'Fragile States' and 'Failed States' and their impact on the sovereignty of the States. It takes into account the present geopolitical situation in Iraq, Ukraine, Somalia, Nigeria and similar States in order to gauge whether the four characteristic features elucidated in the Montevideo Convention of 1933 are sufficient to identify a State. The article also accounts for a jurisprudential analysis of the notion of State sovereignty. It also addresses the emerging issues pertaining to State failure on the socio-cultural dimensions and the cascading consequences such as rise in refugee populations, religious persecution, atrocities committed on women and children, risk of trafficking etc. Through the analysis, it attempts to provide suitable suggestions for resolving the international issues involved.

Keywords: *State, Sovereignty, Fragile, Failed, Jurisprudence.*

Introduction

In a series of peace treaties signed in 1648, it ushered the modern international system where States and not kings and dynasties became the arbiters of peace and war. Since then, through two World Wars, innumerable small ones and the age of nuclear weapons, this system has survived.¹ But it is now undergoing a change because in reality, it was an outcome of a special set of circumstances which were different from those prevailing today. They have given rise to a popular post-Cold War concept of failed States which are viewed through

* Assistant Professor of Law, Maharashtra National Law University, Nagpur, e-mail: shreya_mishra91@yahoo.co.in.

1 S. Singh, *Henry Kissinger's Uncertain World*, Mint, Kolkata, January 16, 2014, p. 5.

the same prism as that of failed or failing States.² As the Cold War concluded in the early 1990s, analysts became aware of an emerging international security environment, in which weak and fragile States became conduits for international crimes, nuclear proliferation pathways, and hot spots for civil conflict and humanitarian emergencies.³ These States have emerged in the backdrop of the end of colonization, opening up of new economies, and the period where national boundaries were being carved in many places without considering the sentiments of the people inhabiting them. These States are generally in the state of transition from a 'normal' State to a 'fragile' or 'failing' State, or even worse, a 'failed' State. This transition was described by the former Secretary-General of the United Nations, Boutros Boutros Ghali, in the following words:

A feature of such conflicts is the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, but its assets are destroyed or looted and experienced officials are killed or flee the country. This is rarely the case in inter-state wars. It means that international intervention must extend beyond military and humanitarian tasks and must include the promotion of international reconciliation and the re-establishment of effective government.⁴

There are many features of 'failed' States, but they are not exhaustive. Daniel Thürer, though, describes the phenomenon of the failure of a State as the one involving the implosion of structures of power and authority, a collapse of law and order and the absence of institutions capable of representing the state.⁵ In other words, a failed state though retaining legal capacity has, for all practical purposes, lost the ability to exercise it.⁶ The concept of a 'failed State' generally describes nations that cannot perform their domestic functions or meet their obligations under international law because of the collapse of central government authority, which eventually creates a crisis for the sovereignty of the nation.⁷ Failed States are very different from the States in the Westphalian system, which represent the four characteristics of a State according to the Montevideo Convention (1933): territory, population, government, and sovereignty. In failed States, non-State actors become the 'governing' agents; the government cannot provide public goods; and the economy has usually collapsed, producing famine,

2 N. Caspersen, *Unrecognized States: The Struggle for Sovereignty in the Modern International System*, 2012, p. 7.

3 M. Chossudovsky, *Wiping Countries off the Map: Who's Failing the Failed States*, Global Research, available at <http://www.globalresearch.ca/destroying-countries-transforming-syria-into-a-failed-state/5317160>, (visited on January 14, 2017).

4 N. Akpinarli, *The Fragility of the 'Failed State' paradigm: A Different International Law Perception of the Absence of Effective Government*, 2010, p. 11, available at <https://books.google.co.in/books>, (visited on January 29, 2017).

5 *International Law and the problem of Failed States*, The International Relations and Security Network, ISN ETH Zurich, available at <http://www.isn.ethz.ch/Digital-Library/Articles/Special-Feature/Detail/?lng=en&id=136381&tabid=1451587455&contextid774=136381&contextid775=136377>, (visited on March 13, 2015).

6 *Ibid.*

7 J. Yoo, *Fixing Failed States*, 99 California Law Review 95, (2011) p.100 available at <http://scholarship.law.berkeley.edu/californialawreview/vol99/iss1/3>, (visited on January 14, 2017).

refugee flows, and human rights disasters.⁸ Physical infrastructure decays and living standards decline rapidly. Failed States often are not considered legitimate and are the result of prolonged ethnic, regional or religious rivalries. There is no specific definition of a ‘failed State’, even though the ‘Index of Failed States’ of Foreign Policy magazine listed as many as sixty-five States in 2015.⁹ The existing situation in the world demands what Alan James said-sovereignty, like pregnancy, is either present or absent, never only partially realized.¹⁰

Globalization is a phenomenon which has altered the concept of sovereignty in the present age. The fact that no nation in the world is self-sufficient propels nations to globalise. This has had a huge impact on trade, finance, natural resources and environment of nations. Out of the political vacuum that was begotten in many countries in the aftermath of the wars fought in Asia and Africa, were formed the factions that fought and are still fighting against each other, creating conditions of chaos, barbarism and anarchy. Their acts and omissions have not only affected the immediate landscape, but have also had spillover effects in the neighbouring countries. Thus, instead of nations, regions are getting affected. The phenomenon of globalization has rendered the nations very vulnerable to attacks from militant outfits as well as their offshoots. In the absence of proper leadership, nations are headed towards fragmentation and failure. The origin of ‘failed States’ cannot be viewed in isolation with the factors that have indirectly led to the proliferation of violent non-state actors (VNSAs) such as al-Qaeda, ISIS, Boko Haram,¹¹ etc. These VNSAs have been responsible for both full-fledged attacks on oilfields, airports, ancient pilgrimage sites and other places, as well as for lone-wolf attacks in countries like Bangladesh. As a result, the scourge of ‘ideological terrorism’ that is getting spread through these incidents has petrified citizens the world over. As a result of joint collaborations among nations to counter such incidents and ensure world peace, nations are finding it prudent to give up or ‘surrender’ their sovereignty for a larger and better cause. The concept of ‘global citizenship’ or ‘network citizenship’ has emerged. This has raised a question over the need for and existence of State as a separate sovereign entity. Another question is regarding the definitive elements of a State. In order to find the answers to these questions, this article aims to analyse whether or not the ‘absolutist’ notion of State Sovereignty still holds true; and to present different upcoming scenarios that may elevate or devalue the traditional notion of State sovereignty.

Relevant Facts

Failed States have assumed significance not only from the point of view of the inherent problem itself, but also because of the disastrous consequences for the world over. This could imply manifestations in the form of epidemics that can

8 *Ibid.*

9 ‘*The Failed States Index 2015*’, available at <http://fsi.fundforpeace.org/rankings-2015>, (visited on January 15, 2017).

10 N. Caspersen, ‘*Unrecognized States: The struggle for Sovereignty in the Modern International System*’, 13 (2012).

11 Boko Haram is a Nigeria-based non-state actor group that seeks to overthrow the current Nigerian Government and replace it with a regime based on Islamic law. It is popularly known as “*Boko Haram*,” which means “*Western education is forbidden*”. available at https://www.nctc.gov/site/groups/boko_haram.html, (visited on January 24, 2017).

spread from one part of the world to another, and other manifestations ranging from drug trafficking and/or human trafficking to arms trafficking. All these have serious ramifications on the general health and prosperity of the nations. For instance, the spread of Ebola virus resulted in catastrophic conditions in many countries in Africa. It assumed preposterous proportions, so much so that the mismanagement of the disease became a self-fulfilling prophecy and ultimately led to several people dying, not only in the continent, but also in other regions of the world. In crudest terms, if people are forced to rely upon inferior foods for their survival, instead of healthier products, it reflects a country's progress and development rate to a certain extent; it indicates that the cost of living index is extremely low, and the lifestyle poor, and the people destitute. Survival of the fittest holds true, but it should not be the rule. It should be an exception in the twenty-first century when countries are resorting to advanced procedures and technology. This becomes a vicious circle, where poverty becomes the cause and poverty itself becomes the end-result. But poverty is just one factor which is responsible. As discussed in the previous section, factors can range from unstable political leadership to everlasting warring factions, which is the case in most cases.

It is pertinent to note that when conflicts arise in 'weak' failed States, the results are catastrophic. The presence of a non-decisive government, or the lack of one, can undermine efforts to put conflicts at bay. In the former Yugoslavia, a fragile central government led to a breakup of the different groups-Serbs, Croats, Bosnians, and Kosovars. Serbia's efforts to assert control over the other provinces of Yugoslavia led to ethnic cleansing and population displacement.¹² As Libya handles failed Statehood, many do not stop blaming the NATO for bombing and use it to argue against intervening now in Iraq.¹³ The situation in Iraq is being much talked about. Iraq is now fractured into segments populated by Sunnis in the north and west, Shias in the south, and the Kurds in the northeast. Kurds are leading a war against the Islamic State to assert their independence.¹⁴ Such conditions give rise to questions that will remain unanswered for an uncertain period of time. Boko Haram in Nigeria made a mockery of their act of kidnapping 219 girls by making the announcement that they have been married off or are being used as 'bride slaves'.¹⁵ After Crimean reunification, Russia is focusing attention on Ukraine's humanitarian crisis.¹⁶ As a result, Russia is now host to around a million refugees-all Ukrainian citizens-temporarily settled in different parts of the federation.¹⁷ The Islamic State said in an issue of its propaganda

12 J. Yoo, 'Fixing Failed States', 99 California Law Review 95, (2011) p. 107 available at <http://scholarship.law.berkeley.edu/californialawreview/vol99/iss1/3>, (visited on January 14, 2017).

13 'Obama and the Libya abdication', The Wall Street Journal (09/08/2014), available at <http://online.wsj.com/articles/the-libya-abdication-1407536259>, (visited on January 17, 2017).

14 The Kurds are a culturally distinct people who reside in the mountains of north-east Iraq, northwest Iran and much of eastern Turkey, with a small community in Syria at the Turkish border. The mountains made them hardy and divided them into fiercely independent tribes. Hence, they have never had a homeland of their own. T. Ahmed, *Kurdish crescent on the horizon*, The Hindu 9, Kolkata, August 7, 2014.

15 *Boko Haram denies truce*, The Hindu, Kolkata, November 2, 2014, p. 11.

16 S. Gupta, 'Waging a war on all fronts', The Hindu, Kolkata, October 17, 2014, p. 12.

17 *Ibid.*

magazine *Dabiq* that it revived slavery by keeping Yazidi¹⁸ women and children captured in northern Iraq.¹⁹ As if slavery was not much of an agony, thousands of Yazidis remain trapped under the clutches of the IS, while others belonging to the small community are facing genocide.²⁰ Online images had been earlier shown by the ISIL summarily executing captured Iraqi soldiers, and the UN High Commissioner for Refugees, Navi Pillay, stated that if confirmed, the executions would constitute war crimes.²¹ The most recent example that should be mentioned is that of Yemen, which has been accorded the status of the 'newest' failed State.²² The situation in Yemen is composed of all the elements which define a failed State. The political unrest and the warring factions of the Houthis and Sunnis have destabilised the governance, and created a vacuum. The fact that Yemen is the poorest Arab State only adds to its miseries, because the oil production is expected to end by 2018. The unemployment rate in Yemen at about 40 percent is fairly high, and considering that it comprises a large population that is under the age of 15, the expected results are only going to enlarge the vicious circle. The Qat trees of Yemen need a special mention here. Qat (*Catha edulis*) is an ever green tree/shrub naturally growing in Abyssinian mountains as well as in the other countries of East Africa. It was introduced to Yemen before the Islamic Era, nowadays it is widely cultivated in the mountains of Sanaa and Taiz, because it requires high rainfall and water-intensive conditions for growth. It has been classified by the WHO as a drug of abuse²³ because chewing its leaves produces stimulating effects, similar to those by caffeine. The dark green leaves of Qat are chewed in fresh condition by more than 90% of Yemen people. Thus, the cultivation of Qat trees has not only led to water scarcity, it has also led to deteriorating effects on the health of the Yemen people.

A theme common to all the news pouring in from all over the world is a gross violation of human rights. Such acts definitely call for greater attention from the world community. In the recent times, the international law is proving rather counter-productive to the goal of fixing failed States.²⁴ As far as 'Responsibility to protect'²⁵ concerned is concerned, it still requires Security Council approval

18 The Yazidis represent one of Iraq's oldest minorities, who are predominantly Kurdish. The marginalization that the Yazidis have faced at the hands of IS has been a result of Yazidis' different religious beliefs which have been considered by the IS militants as incompatible with their own beliefs.

19 *IS boasts of reviving slavery*, *The Hindu*, October 14, 2014, p. 12.

20 *Ibid.*

21 *Turning to Iran*, *The Hindu* (18/06/2014), available at <http://www.thehindu.com/opinion/editorial/turning-to-iran/article6123749.ece>, (visited on January 16, 2017).

22 A. Bruno, *Yemen 'The World's Newest Failed State'*, *geopolitical monitor*, available at <http://www.geopoliticalmonitor.com/yemen-worlds-newest-failed-State/>, (visited on January 18, 2017).

23 M.A. Zahran, A. Khedr, A. Dahmash, & Y.A. El-Ameir, '*Qat Farms in Yemen: Ecology, dangerous impacts and future promise*', *1 Egyptian Journal of Basic and Applied Sciences* 1, 2 (2014), available at <http://www.sciencedirect.com/science/article/pii/S2314808X13000031>, (visited on January 20, 2017).

24 J. Yoo, '*Fixing Failed States*', 99 *California Law Review*, 95, 2011, p. 99 available at <http://scholarship.law.berkeley.edu/californialawreview/vol99/iss1/3>, (visited on January 14, 2017).

25 The three pillars of the responsibility to protect include the State's primary responsibility along with the responsibilities of the international community. These responsibilities have been stipulated in the Outcome Document of the 2005 United Nations World Summit.

before an intervention can violate a State's territorial integrity.²⁶ It is disappointing that on one hand, the United Nations brings together the whole world, and on the other hand, many nations exploit the situation in failed States under the garb of humanitarian intervention. It was indeed appalling that the genocide in Rwanda,²⁷ which spilled over to its neighbouring countries like the Democratic Republic of Congo did not attract the attention of the stronger States who had, among various recourses, the abovementioned options. It can be affirmed that nations should not resort to double standards in order to further their vested interests.²⁸ On the contrary, these spillovers are generally seen over in the neighbouring countries, and this ruins the situation. For instance, the exodus of Syrian refugees has resulted in unemployment problems rising in Lebanon.²⁹ A 'failed' State does not take birth as a 'failed State'. It deteriorates into a failed State over a period of time due to many factors. The causes underlying such States depend from region to region, and most importantly, are deeply rooted in the historical background of the contemporary International Law and International Relations.

Causes

The end of the Cold War unleashed three kinds of States.³⁰ One comprised of States like Serbia, Bosnia and Croatia, which were born out of ethnic and religious conflicts. Another set of failed States emerged in Africa and Asia, where decolonization tripled the number of States since the end of World War, many of which were granted the right of self-determination without possessing the ability of self-governance.³¹ The Cold War kept alight nations such as Somalia and Ethiopia, as the superpowers competed for allies in the Third World, but after the collapse of the Soviet Union, the flow of aid was largely disrupted and now they rank high on the index of failed States.³² A third set of failed States includes nations such as Haiti or Afghanistan, which have historically had difficulty supporting a fully functioning government because of tribal rivalries and endemic civil wars.³³

A point to be noted is that most of these 'failed States' have emerged in the Middle East, Africa, and Asia. Presently, the disorder being caused in the world has a few faces, namely the Islamic State,³⁴ Boko Haram, and other offshoots of

26 See The Responsibility to Protect, 'Report of the International Commission on Intervention and State Sovereignty', (2001), available at <http://www.idrc.ca/EN/Resources/Publications/openebooks/960-7/index.html>, (visited on March 11, 2015).

27 Mass slaughter of Tutsi and moderate Hutu by the Hutu majority took place in Rwanda in 1994.

28 See Ayoob, 'Humanitarian Intervention and State Sovereignty', available at <http://kirstenjfisher.com/wp-content/uploads/2013/12/Ayoob-Humanitarian-Intervention-and-State-Sovereignty.pdf>, (visited on January 20, 2017).

29 H. Kalm, 'Lebanon-A Failed State?' 137/138 *Diplomaatia* 1, (2015) p. 1 available at <http://www.diplomaatia.ee/en/article/lebanon-a-failed-state/>, (visited on January 20, 2017).

30 J. Yoo, 'Fixing Failed States', 99 *California Law Review* 95, (2011) p.107 available at <http://scholarship.law.berkeley.edu/californialawreview/vol99/iss1/3>, (visited on January 14, 2017).

31 *Ibid*, at 101.

32 *Ibid* at p. 100, available at <http://scholarship.law.berkeley.edu/californialawreview/vol99/iss1/3>, (visited on January 14, 2017).

33 *Ibid*, p. 101.

34 Islamic State in the Levant (ISIL), the Syria-based extreme Sunni militia (change definition according to the Islamic State). The 'S' in ISIS stems from the Arabic word 'al-Sham' which refers to Levant. Now known as the 'Islamic State'. Sources: *Iraqi forces repulse assault on Samara*, Al Monitor,

large terrorist groups. The Washington based National Intelligence Council (NIC) in its Global Trends report (December 2012) predicted that 15 countries in Africa, Asia and the Middle East will become failed States” by 2030, due to their “potential for conflict and environmental ills.”³⁵

A key reason for the situation in Iraq presently is that in 2003, Iraq’s public and civic institutions underwent a downfall, which led to a civil war between the Shias and the Sunnis, further aggravating the situation.³⁶ The Stanford political scientist, Francis Fukuyama has written a new book titled *Political Order and Political Decay*, which is a historical study of how decent States emerge.³⁷ What these States have in common is a strong and effective State bureaucracy that can deliver governance, rule of law and regular power rotations.³⁸ He argues that there is so much State failure in the Arab world because of the persistence of kinship/tribal loyalties, and a consequential absence of shared values.³⁹ These kinship loyalties have given rise to a fair amount of murky politics in the region, where small groups turn hostile to each other for their vested interests. Apart from that, dictatorial politics results in more young men being denied both jobs and freedom of expression, and this was accounted for in a report (2002) of United Nations Development Programme drafted by Arab scholars and policymakers.⁴⁰

Failed States stand to lose on a lot of accounts, especially if measures are not taken by the international community to uplift them from the clutches of the existing situations. It is indeed difficult for the international community to come up with efficacious solutions to resolve problems, which are mainly internal. It becomes even more problematic when the causes for such an advent are not immediate and cannot be gauged easily. More often than not, they lay buried for many years before they showed up, and like an explosion, they are now engulfing the world, and disturbing its peace. It is, thus, crucial to learn from historical notions and analyse the principles of international relations that distinguished philosophers like Rawls have laid down. Since they claim relevance, it is important for those who know and understand the ‘ideal’ concept, to think in terms of global interests, so that their compassion benefits the ‘non-ideal’ populations. It might be befitting to call these failed States as a realistic conception of the ‘non-ideal’ theory of Rawls.

Institute for the Study of War, Graphic News, Associated Press, The Hindu, (Kolkata June 12, 2014.

35 N. Caspersen, ‘*Unrecognized States: The Struggle for Sovereignty in The Modern International System*’, 2012, p. 13.

36 *Turning to Iran*, The Hindu (18/06/2014), available at <http://www.thehindu.com/opinion/editorial/turning-to-iran/article6123749.ece>, (visited on January 22, 2017).

37 T. L. Friedman, ‘*ISIS, Boko Haram and Batman*’, Mint, October 5, 2014, available at <http://blog.livemint.com/Opinion/IHzMhtqz3wHXdJdKXP125O/ISIS-Boko-Haram-and-Batman.html>, (visited on January 22, 2017).

38 Elie Mikhael Nasrallah, *HOSTAGE TO HISTORY: THE CULTURAL COLLAPSE OF THE 21ST CENTURY ARAB WORLD*, Chapter 4, 2016.

39 *Ibid.*

40 ‘*Organizing Middle East peace*’, Mint, July 3, 2014, available at <http://origin-www.livemint.com/Opinion/5NPXDsgMTyKHuq3eBoOCgl/Organizing-Middle-East-peace.html>, (visited on January 23, 2017).

Jurisprudential Analysis of the Notion of State Sovereignty

John Rawls through the Law of Peoples⁴¹ gave the world an insight into the working of the institutions at microcosmic level, and of the world at a macro level. According to Rawls, ‘no tolerable world State could be stable’.⁴² He asserted Kant’s Statement that a world government would either be a global despotism or beleaguered by groups fighting to gain their political independence. Rawls’ theory has an international element to it, which would enable the societies, institutions, and individuals to interact with each other. Rawls described the main ideas motivating his law of peoples as follows: *Two main ideas motivate the Law of Peoples. One is that the great evils of human history—unjust war and oppression, religious persecution and the denial of liberty of conscience, starvation and poverty, not to mention genocide and mass murder—follow from political injustice, with its own cruelties and callousness... The other main idea, obviously connected with the first, is that, once the gravest forms of political injustice are eliminated by following just (or at least decent) social policies and establishing just (or at least decent) basic institutions, these great evils will eventually disappear. (LP, 6–7)*⁴³

Rawls extended his theory by imagining a ‘realistic utopia’⁴⁴ which affirms that humanity shall not witness the continuity of new and ugly evils. But he also states an important condition for obtaining the stage of realistic utopia: all societies are internally well-ordered: that all have just, or at least decent, domestic political institutions.⁴⁵ Rawls talked about an ‘international basic structure’, the existence of which he justifies by saying that liberal societies are composed of basic structures. He explains this basic structure, the elements of which he postulates as following eight principles:

- (i) Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
- (ii) Peoples are to observe treaties and undertakings.
- (iii) Peoples are equal and are parties to the agreements that bind them.
- (iv) Peoples are to observe the duty of non-intervention (except to address grave violations of human rights).
- (v) Peoples have a right of self-defense, but no right to instigate war for reasons other than self defense.
- (vi) Peoples are to honour human rights.
- (vii) Peoples are to observe certain specified restrictions in the conduct of war.

41 J. Rawls, ‘*The Law of Peoples*’, *Critical Enquiry* 20 (Autumn) 1993, available at <http://nw18.american.edu/~dfagel/Philosophers/Rawls/TheLawOfPeoples.pdf>, (visited on January 23, 2017).

42 *Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/rawls/>, (visited on January 24, 2017).

43 *Ibid.*

44 C. Brown, ‘*The Construction of a ‘Realistic Utopia’: John Rawls and International Political Theory*’, LSE Research Online (2002), available at http://eprints.lse.ac.uk/744/1/Construction_Realistic_Utopia.pdf, (visited on January 24, 2017).

45 J. Rawls, ‘*The Law of Peoples*’, *Critical Enquiry* 20 (Autumn) 1993, available at <http://nw18.american.edu/~dfagel/Philosophers/Rawls/TheLawOfPeoples.pdf>, (visited on January 23, 2017).

- (viii) Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime. (*LP*, 37)⁴⁶

The International Law is composed of almost all abovementioned principles, barring the last one. His theory has become increasingly relevant in the contemporary age not because of the principles that he laid down, but because the behavior of the international community largely contradicts his theory. What we see in the world today is largely comprised of crimes against humanity, against self-defense, and against world peace, in furtherance of vested interests. Smaller 'liberal' societies have, instead of paving the way for a new social world order where everything would be peaceful, resulted in avarice that seems to be prevalent everywhere. Rawls conception of "ideal/non-ideal"⁴⁷ theories imply that once we are aware of what 'should be done', we are supposed to apply the normative aspect to the prevailing circumstances, as in, 'what is being done'. It is because something that ought to be done constitutes elements of an ideal concept. But when we apply the same concept to a realistic plane of application, the ideal concept might fail. And this failure has resulted in the birth of 'failed States', which threaten the notion of State sovereignty at best, and threatens life, at its worst. When smaller interests overtake the larger public interest, societies are destined to be doomed. It has become so common in the world that there are places where the lifestyles of most people contradict the notion of normalcy.

Noted scholars have questioned the immediate effects of such diminishing relevance of sovereignty.⁴⁸ They question whether sovereignty exists as a right or a responsibility. The traditional concept of sovereignty was often expanded into the notion that where sovereignty exists, responsibility exists. But when it comes to failed States, this traditional aspect no longer holds true. The Westphalian concept of nation-State underwent a transformation when the Montevideo Convention (1933) expanded the definition of a 'State' to comprise of four elements: a permanent population, a defined territory, government, and sovereignty. The existence of all the four elements together in such 'failed States' is rebuttable. Firstly, the status quo in most of the 'failing' or 'failed' States is that most of the population is fleeing to areas of security. For instance, there are millions of Syrian refugees that have taken shelter in the bordering areas of Turkey. Also, it leads to destabilizing effects on the population of the sheltering countries as well. Secondly, with the absence of stable political governments in these countries, a political void gets created, which cannot be filled with three or four warring factions who will never unite for peace. Thirdly, sovereignty of a State gets threatened due to the political vacuum and the resultant wars. As such, it becomes a paradoxical situation where securing the rights of the 'permanent' population becomes a responsibility of the very State which does not exist in reality. This is known as sovereignty as responsibility.⁴⁹ Such situations cannot be resolved without the intervention of the international community, in the form

46 *Ibid.*, p. 46.

47 *Ibid.*

48 See D.W. Potter, 'State Responsibility, Sovereignty, and Failed States', 2004, available at https://www.adelaide.edu.au/apsa/docs_papers/Others/potter.pdf, (visited on January 25, 2017).

49 *Ibid.*

of help from the United Nations, or other Intergovernmental organizations, or assistance from countries. It further implies that sovereignty cannot be regarded as something absolute, as per the traditional concept of sovereignty.

One may argue that concept of 'failed States' requires no attention when a concept of something akin to a 'world government' is offered by the existence of United Nations. The logical argument that may follow from it is that all the States which are party to the United Nations assist these 'failed States' in getting fixed, because it will be the next big step towards realizing world peace. But would getting them 'fixed' be the ultimate solution? The next question that may arise is the guarantee of the stability of these States after 'fixing' them. Much of the legal scholarship available tends to put the State on a pedestal because the State is considered to be an 'ideal', or 'static' concept. Contradictory to the popular notion, 'failed States' show the world that the ideal of the 'ideal' State does not exist, and in fact, 'State' is a highly dynamic concept because it depends upon variables such as people, health, economy, education, policies, etc. In the era of globalization, the State cannot be regarded as a mere idea. It is an idea in motion, and in commotion in case of 'failed States'. There are two ends of the spectrum on which the notion of a State largely is spread: one is peace, and the other is chaos. The States which lie in the middle could be known as 'quasi-States'. Depending on the varying degrees of variables, a State could be classified as a 'proper' State or a 'failing' State, or a 'quasi' State, or a 'failed' State.

The next question that arises-what is more important-the existence of a 'State', or the existence of peace in the world? If there are preconditions to the existence of a proper State, apart from those mentioned in the Montevideo Convention, then there are many examples which manifest them. Palestine is recognized by some countries as a 'proper' State, whereas it is not recognized as a State by many others. Although obsolete for the present international circumstances, Article 78⁵⁰ of the United Nations Charter provided for a system of Trusteeship, which required consent. Consent could undoubtedly be given only by a 'State' which was 'sovereign'. Thus, a 'failed State' may still have retained its identity as a 'State' if it were to be a part of the Trusteeship. Thus, it weakens the arguments that have been raised in favour of the traditional concept. There may be submitted two points of view with regard to safeguarding the future of State sovereignty. According to the first view, it can be said that the conditions that aggravate the shape of State sovereignty may give rise to cooperative sovereignty,⁵¹ as a stepping stone to achieving some form of 'World Government'. Nations may decide to cooperate with each other on the issues that are of relevance to the majority, going beyond the traditional concept of sovereignty, and beyond the notion of non- interference. It may dilute the boundaries of States, literally and metaphorically. Thus, it can be said that the whole concept of sovereignty may undergo a change, since it has been evolving from the time of the Treaty of Westphalia. This 'change' may lead to a state of

50 Article 78. "*The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.*"

51 S. Besson, 'Sovereignty in Conflict', 8 European Integration Online Papers 1, 1 (2004), available at <http://eiop.or.at/eiop/texte/2004-015a.htm>, (visited on September 29, 2016).

world peace, similar to the ‘Peace of Westphalia, thus repeating history. This gradual evolvement indicates that customs may play an important role, which is contradictory to Austin’s notion of a sovereign, because he excluded customary law and in particular, public international law from the province of jurisprudence.⁵² Thus, a time may come when State sovereignty shall be recognized by dynamic elements existing outside of a structure.

The second point of view is presented as a culmination of the fallacies of the first. Firstly, there is too much diversity in the world to conceive an ideal ‘World Government’. The governments functioning now in the States fall into various categories: democratic, monarchic, federal, unitary, etc. Secondly, ‘Failed States’ may have their own problems, but they still retain the identity of being States. It is an irony that what may generally be considered as internal strife, or internal conditions of rivalries and tensions escalate into an all-encompassing scenario, because of the presence of multicultural societies, funding from rival nations, and so on. Thus, it can be considered rather analogous to a dormant World War. It is dormant because even though it lacks participation from all corners of the world, it seems like a World War because it involves most of the States in this age of globalization. Iraq is perhaps the best example. Oil reserves have been taken over by the Islamic State (IS) group, and demand for oil has risen in the world. Consequently, prices of crude oil have lowered down to unprecedented levels.⁵³ Saudi Arabia, which has rich reserves of oil, remains a beacon of hope after the siege of Iraq. But Saudi Arabian reserves are expected to last not more than 20 years from now⁵⁴, and considering that many countries, like the United States and India are dependent on imports from the Gulf, it is not impossible predict the future if alternatives are not discovered.

Perhaps the best example of a realm where countries can and do converge to fulfil conditions of both “cooperative sovereignty”, and a ‘World Government’ is that of environment pollution and the resultant climate change. Cooperation has been successful so far in the realm of climate change, if we look at negotiations and Summits that take place, and have taken place in the past. But it takes a backseat when it comes to cooperating beyond the individual coastlines. For instance, the plastic waste floating in the gyres of the Pacific Ocean⁵⁵ is very difficult to remove because it is impossible to attribute the extent of damage to a particular country, unless proven scientifically, since it comprises of garbage originating from many countries. Perhaps this is an area where ‘cooperative sovereignty’ should be more active, because it would mean taking responsibility for actions and/or omissions. The only major problem facing this can be demanding active participation from countries that had nil or negligible

52 J. Rawls, ‘*The Law of Peoples*’, *Critical Enquiry* 20 (Autumn) 1993, available at <http://nw18.american.edu/~dfagel/Philosophers/Rawls/TheLawOfPeoples.pdf>, (visited on January 23, 2017).

53 B. Plumer, ‘*Why oil prices keep falling-and throwing the world into turmoil*’, *Vox*, available at <http://www.vox.com/2014/12/16/7401705/oil-prices-falling>, (visited on January 26, 2017).

54 E. Gosden, ‘*Saudis may run out of oil to export by 2030*’, *The Telegraph* (September 5, 2012), available at <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/9523903/Saudis-may-run-out-of-oil-to-export-by-2030.html>, (visited on November 11, 2016).

55 *Great Pacific Garbage Patch*, available at http://education.nationalgeographic.com/education/encyclopedia/great-pacific-garbage-patch/?ar_a=1, (visited on January 24, 2017).

contribution to the overall negligence. Hence, it becomes imperative to analyse the areas which demand the cooperation of the international community and strive for a peaceful world order.

Conclusion

Mr. Ban Ki Moon, the former Secretary-General of the United Nations believed that “*conquering territory through aerial bombardments into densely populated civilian neighbourhoods is not a victory. Starving besieged communities into surrender is not a victory.*”⁵⁶ Fukuyama argues that in order to tackle the Islamic State barbarism, the Arab world has to tackle its tribalism and sectarianism.⁵⁷

The list of countries in the 2012 NIC report included Afghanistan, Pakistan, Bangladesh, Chad, Niger, Nigeria, Mali, Kenya, Burundi, Ethiopia, Rwanda, Somalia, DR Congo, Malawi, Haiti, Yemen.⁵⁸ According to the Fund for Peace, the failed States are also targets for Al Qaeda linked terrorists.⁵⁹

The United Nations should revive its unity by making sure that ‘fragile’ and ‘failed’ States are given utmost attention to. The later the action takes place, the worse the ramifications will be. Non-State actors and terrorist groups are opportunists at their worse and would exploit any political vacuum that would be created in the absence of a strong leadership. State sovereignty determines the strength of a nation and should not be left vulnerable to such factions. It is imperative that countries take up a united stand against any form of violations. The first step should be formulating an extensive definition of ‘failed States’. Countries should continue to see such disturbances as threat to international peace and security and take adequate measures to prevent such happenings and restore peace. Also, globalization has helped to eliminate barriers, but it has also resulted in vested interests, which are contrary to the sole purpose of globalization. State sovereignty is no more a sacrosanct concept because it is being violated in different forms. The Security Council definitely needs an overhaul and there is a need to amend the provisions of the United Nations Charter, and specifically that of Chapter VII in order to make sure that a situation is not viewed through a political lens, but through a lens coloured by the aim of maintaining world peace and respect for territorial integrity and sovereignty underpinned in the Charter. The membership of Security Council should be truly representative of various geopolitical regions. Also, international law should be made stronger by ensuring that as far as possible, similar rules are followed to resolve a situation are followed by the countries ratifying a treaty.

Apart from the suggested remodelling of the United Nations Charter, especially its provisions in Chapter VII, it is of utmost importance that the International law be given consideration to. Often, international law is considered

56 *For an arms embargo in a conflict zone*, The Hindu, Kolkata, June 27, 2014, p. 11.

57 T.L. Friedman, ‘*ISIS, Boko Haram and Batman*’, Mint, October 5, 2014, available at <http://blog.livemint.com/Opinion/1HzMHtqz3wHXdJdKXP125O/ISIS-Boko-Haram-and-Batman.html>, (visited on January 22, 2017).

58 M. Chossudovsky, ‘*Wiping countries off the Map: Who’s Failing the Failed States*’, Global Research, available at <http://www.globalresearch.ca/destroying-countries-transforming-syria-into-a-failed-State/5317160>, (visited on January 14, 2017).

59 *Ibid.*

a weak law, and the mechanism followed in the treaties and conventions should be strengthened in its totality by cooperation among the member nations. World peace is an aim which requires a concerted effort on the part of the countries of the world, and cannot be acquired in one day. If the States function like 'pseudo-sovereigns', this effort cannot be realised. In pursuit of a peaceful world order, the nations have to carry out the utmost important task of building trust among them.

Secondly, it is high time that the attention got shifted from theory to action. In short, embarking on arriving at new definitions and criteria for determining the existence or non-existence of a failed State is a long process, which falls many steps short of the actual action that is urgently required. It is no small feat that millions of people around the world are getting displaced from their native places, and do not have the basic human rights of access to edible food, drinking water, proper sanitation, and decent housing. It is an ironic shame for any 'sovereign' State that its citizens are born without human rights.

Thirdly, the institutions responsible for joining hands in a concerted effort towards eradicating the spreading menace must show their robustness and dedication. It is not an impossible task to live with each other despite disagreements, but it is important to understand that mature civilizations handle disagreements and sacrifice petty issues that may prove detrimental to the social order. Only then can States become truly 'civilized'. Cold war ushered in an era of nations clamming up to each other, but gradually a phase came when the nations started warming up to each other. It is extremely paradoxical that in the twenty-first century, when the global population should have come a long way from the Treaty of Westphalia, we are still following on the remnants of the bitter past. The emergence of such States has resulted in a new form of international jurisprudence taking shape. It helps to analyse through historical, chronologically arranged discourses and texts, because it helps scholars to analyse why the gradual transformation of States happen.

It is time to take one step backward to understand the situation from a veritable perspective, but it is also time to take two steps forward to eliminate the causes that have penetrated many regions of the world, akin to a disease. That is the reason public opinion cannot be disregarded at all. The conditions in which people dwell provide prior indication of the situation-whether it represents an ominous foreboding or not. They represent the veracity of the analysis and corroborate the statistics. Thus, such measures should never be underestimated. State sovereignty once gave relevance to nation-State, and it has become an extremely delicate concept. The revival of the strength manifested by nation-States would go a long way in establishing a renewed era of world peace. A sovereign State attains its sovereignty when it becomes 'independent', but it maintains its sovereignty only when its citizens think collectively, and not independently.

RHETORIC AND POETICS IN POLITICS AND JUSTICE

Madhukar Sharma* & Sopan B. Shinde^φ

ABSTRACT

Ability of human beings to communicate using language makes them more powerful than rest of the creatures on this planet and acts as a catalyst of socialization. In the process of socialization, those who communicate effectively emerge more powerful than the rest. Effective persuasion is one of the major elements for any communication event to be effective. Since ancient times, Rhetoric existed as a discipline that studied the persuasiveness of language. Beyond the poetic usage of language, Rhetoric has pivotal place in judiciary, statecraft and social organization. Ancient Greek philosophy to contemporary politics, Rhetoric remained a pivotal aspect in construction and transaction of knowledge.

Keywords: *Rhetoric, Poetics, Ethos, Pathos, Logos, Political Rhetoric.*

Introduction

Either as a natural ability or as artistic mastery acquired through experience, men persuade their audience; they uphold their own arguments or in refute those of others. These skills of persuading the audience are considered to be Rhetoric. The use of Rhetoric could be traced to have existed since the very beginning socio-political life itself.¹ Historical evidence suggests that the Rhetoric was much in use in education imparted by the Sophists before and during Greco-Roman times and its journey to the present era has withstood ups and downs to the extent acquiring a derogatory sense of meaning for accusing people of wrongly influencing people.² Quite contrary to this derogatory sense stands the agreement between Socrates and Phaedrus as it concludes on a special power of Rhetoric; the power of *psychagogia*, or leading the soul. This deeper significance of the art of Rhetoric has probably brought about its resurgence in the twentieth century.³

Oxford Dictionary of Politics simply defines, “Rhetoric is the persuasive use of language”⁴In the general sense it is interpreted to refer to the use of language to impress the audience and influence them for or against a certain course of action or a certain way to thinking. Rhetoric, in the twentieth century, came to a further generalized interpretation towards communication wherein people open themselves and become receptive of each other; the way they make sense of the

* Assistant Professor of Political Science, Maharashtra National Law University, Nagpur, e-mail-madhukarcuh@gmail.com;

φ Assistant Professor of English, Maharashtra National Law University, Nagpur, e-mail-sopanshinde108@gmail.com.

1 Aristotle, THE ART OF RHETORIC, ed. 1926, p. 17.

2 James Corosswhite, DEEP RHETORIC, ed. 2013, p. 24.

3 Aristotle, THE ART OF RHETORIC, ed. 1926, p. 17.

4 Iain Mclean and Alistair Mcmillan, OXFORD CONCISE DICTIONARY OF POLITICS, ed. 2009, p. 463.

larger world and make changes their orientation towards the world, and the way they develop relationships with each other through communication: a cultural give and take through communication.⁵ In this sense, the concept of Rhetoric intersects with the cognitive domain of knowledge.

Concept of Rhetoric

The concept of Rhetoric in a cognitive sense is the way we interact with and transcend the world around us; the way we make sense of it and understand how others around us make sense of it. This leads us to 'how we know' and 'how we relate' to the world and 'how we construct and modify our knowledge of things. Taking this view into consideration, organizations like International Baccalaureate have altered the Rhetorical discipline of studies into Theory of Knowledge.

On the other hand, Rhetoric is the way we understand how others make sense of the world. It alters our understating and belief based on how people persuade us through communication or discourse. We experience each other in communicative events, thus, the rhetoric gives our understanding a form and direction by our being with each other and our being with ourselves. The scope of Rhetoric reaches to all non-formal communication, including inward deliberation that is caused by getting persuaded by the means of *logos*, *pathos* and *ethos*.

Thus, reaches the discussion to *Logos*, *pathos* and *ethos* that are the three modes of persuasion introduced by Aristotle in his 'Art of Rhetoric'. Deliberation on these three modes of persuasion should support our understating of the nature and scope of Rhetoric.

Aristotle's Three Modes of Persuasion

(i) **Logos-** The concept of logos existed since the time of Sophists, which they used to refer the art of discourse without much deeper speculation. However, Aristotle used to refer it to reasoned arguments in the field of Rhetoric. This was considered the faculty of human beings that separated them from animals; made them rational to decide between good and bad, just and unjust, advantageous and disadvantageous etc.

The concept of Logs has come to be developed into the modern disciple of logic. However, the Aristotelian doctrine of logos included the fine sense of interaction of human beings with the world and with each other, which is not so much central to the modern interpretations in the area of logic and theory of knowledge. *Logos* base or logical thinking is considered empirical and scientific and an eminent psychologist, Carl Jung contrasted it with *mythical* thinking. Logos demands observable fact, controlled experiments and deductive proofs in explanation that should persuade the audience. For mythical thinking, Jung invented a term called mythos, which is more subjective and comes as individual's transformation in reaction to the stimuli from the world. The field of sciences and logic does not have much space for those subjective ideas in persuasion.

(ii) **Pathos-** represents an appeal to emotions. In communication, the orator or the speaker may arouse emotions of piety, fear, anger, hatred, abhorrence,

5 Aristotle, THE ART OF RHETORIC, ed. 1926, p. 17.

happiness etc. This appeal to emotions of the audience, which are already laying in them, could be aroused through poetic expression, narrative stories or experiences, and metaphoric or personified representation of the world.

In order to arouse specific emotions, the speaker has to know the situation, the audience he is facing and then decide what emotion he wants to arouse with what effect? The state of mind of the audience and similarities and differences among the individuals are the grounds to decide the emotion to arouse. On the part of a speaker, it is important to know a great deal of the past experience of the audience, their affiliations to the ideologies and their misunderstandings or misconceptions in comparison of *logos*, *pathos* and the quality of all human beings.

(iii) **Ethos:** It is the moral character of an orator or participant in the area of rhetoric and the third means of persuasion according to Aristotle's doctrine of Rhetoric. The moral character of a person influences the *logos* and *pathos* that he or she is using as a means of persuasion. *Ethos* shares complimentary relationship with *logos* and *pathos*. The way a speaker has employed *logos* and *pathos* in the past communication events leave impressions among the audience and his consecutive appearance among them have already set some expectations. However, even if one entirely new speaker among the audience he is seeing for the first time, his credentials, professional experiences and the very reasons for his invited presence among his audience could establish *logos*.⁶

Ethos or the moral character evolves through three things:

- (a) *Phronesis*- It is the speaker or orator's practical knowledge about the subject matter he is dealing with.
- (b) *Arte*- It is the virtuous character of the person and the goodness and law abiding life he has practiced so far in the society
- (c) *Eunoia*- is the empathy of the orator; the way he establishes goodwill towards his audience and makes them feel cared for as the result of his Rhetoric⁷.

The three modes of persuasion- *logos*, *pathos* and *ethos*- are central to Aristotle's doctrine of Rhetoric. The study of these three modes of persuasion leaves hardly any space for derogatory interpretations. In fact, this ancient art of persuasive speech has dual advantages in the process of communication. *First*, it offers tools of persuasive speaking with deeper understating of logical or reasoned arguments, ways and methods of emotional appeal to audience and path for the speaker to achieve credibility or establish leverage towards his audience. *Second*, it is a tool of interpretation for the audience. The audience could interpret the speech or oratory, or any piece of articulation in communication in terms of whether it is credible or an abuse of language to attain vile intentions or to lead to false judgments. If the audience is equipped with these tools, the message that would percolate to them would essentially be genuine in its nature.

⁶ *Ibid*, p. 17.

⁷ *Id*.

Rhetoric and Poetics

The connection of Rhetoric to Poetics needs consideration as to reach its real interpretations. Literary theories have demoted Rhetoric for the sake of their love for Poetics, because they considered the former the domain of scientific and rational areas of study.⁸ Literary studies remained unaffected by this move, but Rhetoric was left with jerky patch of journey. What has gone unnoticed during this divorce of the disciplines is the fact that majority of the ancient Rhetoric preserved till date is in the poetic form and majority of ancient literature employ Rhetoric in its poetic engagement of the world.

Quite contrary to this development in literary theory, in ancient times of Greek and Romans, the duo of Rhetoric and Poetics had remained in common association not only in their definitions but also in literary practice.⁹ Odysseus in Homer's legendary *Odyssey* was a famed orator; and so well-known is Achilles' rejection of Achaean commanders efforts of convincing him to win back to war in his *Iliad* in a Poetic Rhetoric—"If I hold out here and I lay siege to Troy, My journey home is gone, but my glory never dies."¹⁰

This association of Rhetoric and Poetics was not accidental, but a rather complimentary development: Rhetoric gave meaning to Poetics as Poetics provided a rhythmic medium to Rhetoric on significant themes of life.¹¹

Ancient Indian literature strengthens this argument further since all philosophical discourse is rhetoric in nature but written in a poetic form. The Vedas are in Sanskrit poetic form. Shri Krishna in *The Bhagwat Gita* employees intriguing Rhetoric to develop profound arguments in the melodious and precise Sanskrit Poetic style to convince Arjuna to be instrumental in the war against his own kith and kin as they are already dead having lost their 'dharma'- the righteousness. Even much modern text of 'Dasbodha' composed by Samartha Ramadasa, is rhetoric in a poetic form of *prakrit* Marathi. Major ancient literature in this way engages Poetics and Rhetoric as complimentary tools.

Because Poetics is precise, engaging through rhythmic composition and Rhetoric is logical, meaningful and leading to persuasion; the separation weakens both in their own respect. Rhetoric in plain prose would be dry and monotonous. Poetics for the sake of Poetics, without engaging in the Rhetoric about the world around, would be meaningless. That is probably how we have plethora of Bollywood songs with myriad tunes composed and released every year, but they score so low in their meaningful appeal, that they seem to disappear in the thin air in a short span of time.

Rhetoric and Justice

Laws are the product of rhetorical reasoning. We as the citizens of our own state have reached to some common understanding through our reasonable

8 Berlin, James A. 'Rhetoric and Poetics in the English Department: Our Nineteenth-Century Inheritance'. *College English*, vol. 47, no. 5, 1985, pp. 521-533, available at <http://www.jstor.org/stable/376886>, (visited on March 10, 2017).

9 *Ibid.*

10 Homer, *ILIAD* (Book 9).

11 Berlin, James A. 'Rhetoric and Poetics in the English Department: Our Nineteenth-Century Inheritance'. *College English*, vol. 47, no. 5, 1985, pp. 521-533 available at <http://www.jstor.org/stable/376886>, (visited on February 11, 2017).

interpretations of the world that truths must not be forced onto us. On the contrary, we exercise our freedom to establish our own truths through our experiences of the world. We have evolved with such collectively established truths and we as states accept them as laws. Thus, any legal issues being faced by our society are to be resolved with rhetorical reasoning and interpretations of the same truths as are in evolving society.

When justice is to be reached with such reasoning and interpretations, subjectivity and objectivity of interpretations could be catastrophically misleading. Justice is concerned with the world on one hand with our transcendence with it, and on the other with ethics, morals and principles already established through the previous generation's transcendence with the world. From the point of view of our Rhetorical transcendence with the world, freedom sought by individuals in a society is concretely in conflict in two ways: concept of freedom for some of the citizens interacts and comes in conflict with others; and concept of freedom for some others clashes with the very legal system in place. It is inevitable part of living in the world together as a society. Thus, the legal argumentation is that the process of resolving such conflicts to provide justice. However, it is quite interesting fact that this argumentation process itself is a communication event, and there are strong and deep rhetorical elements of *logos*, *pathos* and *ethos* that are apparently the means of persuasion even in the courtrooms.

Logos is quite useful in legal argumentation with a logical appeal substantiated by relevant facts. The judges themselves use the previous judgments in order to give solidarity to the verdict they give. The trial procedure relies on logic and rational decision making procedure. Judges are human beings and individuals who are persuaded by use of such logical appeals and on their part, they could see objectively how they are persuaded by the attorney with the understanding of *logos*. Thus, *logos* play a dual and intersecting function: attorneys use it as a tool of persuasion with the judges and the judges use it as a tool of analysis of attorney's arguments.

Good human beings are believed easily if there are complex options or choices to make the possibility that the good would have a better chance of winning the argument than the counterparts. This being good of the attorney (*ethos* or the strong character) may be in the superiority of logic or the *logos* at times. Apart from that, even the personal goodness has a bearing the capacity to persuade. It may not have a great deal of influence on the judges as they are objective in their tasks, and establishing credibility with sound preparation of the case would be valuable. There are several factors of *ethos* that are important on the part of an advocate: position, speech, social status, confidence in presenting arguments, eye contact, body language with posture, gestures, facial and expressions, intelligence reflected to establish trustworthiness etc.

Emotions or *Pathos* too could influence the decision making procedure. Though there is a criticism of the fact that there should be an appeal to the emotions in the court room, there is possibility of it being in influential position due to the fact that the room is filled with human beings. When it comes to what is at stake in the judgment, sympathy, mercy, anger, hatred etc. are likely to have a space in legal logic and imagination. "*I have nothing but pity in my heart for*

the chief witness for the state, but my pity does not extend so far as to her putting a man's life at stake, which she has done in an effort to get rid of her own guilt", says Atticus with a great passion in a closing statement of the trial of his client in Harper Lee's 'To Kill a Mockingbird'. Atticus arouses a feeling of guilt-pathos as means of persuasion and a rhetorical strategy-within the jury. The aim of Atticus is to move the jury in favour of his client. The word choice and the manner in which those words are delivered have a great influence on the audience.

Presentation of facts in the courtroom needs to be made in some style and not as vomiting out the records. Besides being accurate, factual and legally acceptable as well as adequate, the lawyer has to be compelling with absorption and emotional forcefulness. However, one has to maintain balance in using all three modes of persuasion. *Pathos* may not be put forward in relation to *logos* or that would lead to the argument becoming pathetic. *Ethos* is important as far as establishing credibility and relation of giving and taking respect in the courtroom and maintaining higher standards of professionalism, but there has to be a good logical appeal that follows. And as far as concerned to the derogatory sense of rhetoric and its criticism in using the same in courtroom, the judges would use their own rhetorical analysis of three modes of persuasion in objectively attaining the truth.

Rhetoric and Politics

All political movements have rhetorical theme of 'We shall overcome.' During the Indian freedom struggle, the renowned Urdu poet and freedom fighter Hasrat Mohani coined a poetic slogan i.e. '*Inqulaab Zindabad*'. Later, it was treated as the punch line for the entire freedom movement and made revolutionary contribution. "*Sarfaroshi ki tamanna ab hamaare dil mein hai*", which Bhagat Singh, Raj Guru and Sukhdev were humming as they marched the last journey of their lives or *Allama Iqbal's "Saare jahan se achcha Hindustaan hamaara"*, are famous examples of the rhetoric during the Indian's movement for the independence. These expressions were treated as the anthem for the freedom fighters and they appealed to masses for support. In twentieth century Urdu was not only an official and newly evolving but also a very prominent language in Indian subcontinent. The freedom fighters and activists exploited the lucid poetics of '*shero-shayari*' of Urdu Jubaan in establishing and building the feeling of nationalism. Urdu writing and popular folklore also contributed a lot in this revolutionary process, *Soz-e-Watan*, a famous story collection of Premchand, rhetorically emphasizes the importance of the *Watan* (The Nation) for the virtues of patriotism during the freedom struggle of India. In essence, the character or *ethos* of the nation was in making for the first time.

Politics is the art of mass engagement; it starts with the communicating the basic element of the society. The state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life.¹² In the modern era of democratic politics, people's support and their acceptance of the political leaders are the most crucial acknowledgements for a politician. Mahatma Gandhi realised the real situation of the Indian people and opted the most optimal policy of the Satya, Ahimsha, Savinay and Avagya. Although Gandhi was not a

12 Aristotle, POLITICS BOOK-I, ed. 2007, p. 28.

good orator, his words always had a great impact in society because people pursued his philosophy with a great zeal. Gandhi renounced clothes in order to participate in the plight of the people. He generalized the situation of entire India and lived as an idol; he emerged as their real representative by adopting their physical characteristics of limited means. Parallel to the ethos of nationalism, there was also the *ethos* of the father of the nation in metamorphosis as *Mahatma*—a religious personality, a saint. Gandian rhetoric had a huge philosophic value as Mary Beard explained ‘rhetoric starts with that idea, with which people might engage with them, there might be something to think about’ and, if we could bring back just one thing from the ancient world, it would be the art of rhetoric—persuasion through argument.¹³

The concept of ‘*Prarthana Sabha*’ (prayer gathering) was adopted by Mahatma Gandhi to address, engage and encourage through secularly spiritual songs and chants such as “*Raghupati Raghav Raja Ram, Ishwar Allaha tere naam*”. Indians were spiritual and inclined towards living life of high moral principles. In order to develop harmony among the volunteers coming from several sects, he emulated an appeal through “*Vishnava Jana to, Tene Kahiye Je Peed Paraaye Jaane re*”. Apart from the philosophy of Ahimsa, these emotions—the mode of Pathos—were aroused and employed in creating the feeling of oneness, being collective and one nation through heat-changing.

When Gandhi returned from South Africa, he was already renowned symbol as a fighter for civil rights against the regime of the British Colonial Imperialism. In addition, his early writings for Hind Swaraj (Indian Self Rule), the Indian people symbolized him as a prophet for Indian independence. His recognition as a harbinger of Indian independence was nothing more than the *logos* that his achievements in India would logically be of the same stature or even higher than those in his leadership in South Africa. So strong was the sense of *logos* that Gandhi was the right leader for masses due to his achievements and appeal to the masses that simple things like *khadhi* and *Gandhi Topi* (cap) emerged as symbols of Indian nationalism.

Aristotle theorizes an interrelationship between politics and the rhetorical type *deliberativum*, a way of speaking that enhances making good choices within the available possibilities. Modern rhetoricians, discourse analysts and linguists focus on the speaker’s linguistic and meta-linguistic activity. Machiavelli, a realistic thinker and philosopher, advised the Prince that rhetoric is a manipulative tool in the politics to manage the personal interests. In principle, the audience is seen less in rational than in biological terms.

Polito-linguistics has emerged as a modern field of rhetorical application to political discourse. It analyses the political discourses, language of the leaders and slogans. The relations between Politics and Rhetoric can be defined with interplay: Politics as rhetoric, and Rhetoric as persuasive tool in politics.

¹³ Mary Beard, BBC NEWS, available at <http://www.bbc.com/news/uk-politics-3112884>, (visited on January 30, 2017).

Politics as expressed through rhetoric and partially rhetorical criticism deconstruct political discourse by applying rhetorical framework.¹⁴ Influencing the emotions in order to augment the political popularity through inflated ethical commitments are major factors for convincing potential voters logically. Particularly in Indian modern politics, ethnicity and spiritual inclinations of voters as group are exploited to generate vote-banks.

Political campaigns in India are the witness wide use of rhetorical language and arguments. Politician always have a hunch of the folklore rhetoric to address diverse social groups and to attract the critical voters of the rural India. Logical coherence and simplification of the language is an important aspect of modern political rhetoric; although some philosophers advised that political rhetoric and general rhetoric must have some differences.

Speaker's skillful attitude towards composition and presentation created a reasonable cum emotional appeal, that is, by a literate user of language.¹⁵ It also has impact of rhetorical actions as gestures, voice, strength, colour, image, distance, appropriate associations and emotive reactions. In Indian elections campaign, besides the leaders' presentation, there are many audio-video tools used to convince the people and these compositions are usually prepared by the professionals in the context of the hegemonic influential views and deeds of the leader. All regional and national parties produce numerous audio-visual substances in regional languages.

In the general election of 2014, anti BJP parties used a rhetoric that "*Basant me Kamal Nahi Khilta* (Lotus can't be flourished in Spring), whereas BJP and its allies manifested their vote appeal through "*Sabka Sath, Sab ka Vikas*", "*Abki Baar Modi Sarkar*", "*Achche din Aayenge* etc. as the famous counters from the BJP to opposition. Bahujan Samaj Party coined many slogans based on Mayawati's identity as a daughter of the deprived section (*Dalit ki Beti*) and Recently Samajwadi Party coined a new slogan in respect of party Chief Mulayam Singh Yadav, '*Jiska Jalwa Kayam Hai Uska Naam Mulayam Hai*' (Whose glory is enduring, that name is Mulayam). Famous *Dalit* leader, Kanshi Ram, raised a crucial term to popularise Mayawati in 1996, '*Tilak, Taraju or Talwar, Inko Maro Jute Chaar*. On the other hand, the Congress always tried to have slogans emphasizing the values of secularism, democracy and patriotism. A few of them were: '*Congress ko lana hai, desh ko bachana hai*' or '*jati dharma ke jhagre choro, Congress senata jodo*', '*koi jaat, koi biradar, Congress me sabhi barabar*'.

Technology has moved rhetoric beyond an art of persuasion and invoked multiple voices and images of praise and ridicule affecting the formation of electoral political discourse and its power.¹⁶ Laloo Prasad Yadav is well known for his sense of humour; once he urged for support on the basis of caste identity "*Lathi utthavan, tel pilaavan, Bhaajpa bhaghaavan*" (Take your *lathis*, oil them well and chase the BJP out). Leftist party leaders always start their speech with

14 James Crosswhite, DEEP RHETORIC PHILOSOPHY, REASON, VIOLENCE, JUSTICE, WISDOM, ed. 2013, p. 64.

15 Paul E. Corcoran, POLITICAL LANGUAGE AND RHETORIC, 1979, p. 74.

16 Asha Sarangi, RITUAL OF POLITICAL RHETORIC, available at <http://www.india-seminar.com/2004/539/539%20asha%20sarangi.html>, (visited on February 12, 2017).

the extremist point of view and urged for the different freedom and exploitation as rhetoric of *Aazadi*- freedom of various kind. In India regional party leaders like Shiv Sena, DMK, AIDMK and Telugudesham Party are very careful about regional language and use only the regional language of their respective state for making manifestos and speeches. Some agrarian reformists and leaders have heavily bounded with class identity. For example, the renowned farmers' leader Mahinder Singh Tikait always followed a custom to sit with public and never tried to have place on stage; he always tried to carry the symbols of the farmer like *Latti-Hukka*, his way of taking and attitude was much appreciated by framers as established by *Pathos*.

The Prime Minister of the present Government is a renowned for rhetoric in his oration; he got the much success just because having the good convincing aptitude and attracted the masses much larger in size compared to all his competitors. His party presented him as the ambassador of the development on the symbolization of Gujarat Model. They established *logos* in minds of voters that he has better understanding of the public aspirations and always tried to touch the emotions and sentiments of the gatherings through a lay-man approach. Logically, he was presented to be the only leader who will successfully bring about development and in turn employment for the youth.

Barack Obama raised himself to the stature of the president of United States of America by his fine sense of rhetoric. However, compared to Barack Obama, Modi has different rhetorical attire. Obama tried to convince people for a positive energy of “*yes we can,*” but Modi’s rhetoric has to comparative notions. He establishes relationship with the voter audience as he is one of them; he has experience of poverty as he has lived a life of a common man- “*a Chai Wala*” (Tea seller). In addition, he always compared his situation with Congressmen like Rahul Gandhi and called them as king or prince- “*Sahabjade or Rajkumar*”.

Conclusion

All socio-political, literary discourse or day to day communication has the elements of Rhetoric- *logos*, *pathos*, and *ethos* used as modes of convincing. In Indian Parliament, judiciary and politics, there has been a versatile experience of the use of rhetoric. Orators often start their presentation with couplets, poems and Shayari to establish rapport with their audience and earn acceptance. Thus, rhetorical discourse analysis opens special dimensions of understanding with relation to public policy, law and governance. It unlocks several possibilities for practicing lawyers to make their argument more appealing through the modes of persuasion, and judges to see through the arguments of either attorney. As Aristotle had set an expectation on citizens of state to have some understating of rhetoric, modern voters too should be able to read through the alluring speeches during election campaigns.

CONTEMPORARY APPROACHES TOWARDS RESTITUTION OF CONJUGAL RIGHTS : A SOCIO-LEGAL STUDY

Debasree Debnath*

ABSTRACT

With the passing of time the myth of stability and sacredness of marriage bond is gradually wither away, and hence, the increasing ratio of matrimonial litigation all over the country confirms such situation. Matrimonial laws were evolved to protect the rights of the spouses, but it is also true that law cannot enter into the bedroom of individuals. However, the personal law as a subject therefore, has to be understood in the perspective of social conditions. With the development of the society, law is also evolving which results in independence of one's personality, both in terms of social and economy and law deals with the personal relationships between the husband and the wife. Marriage under Hindu law binds two heterosexuals together for life time, except certain exceptional circumstances. Patriarchal mind-set of the people, advance thinking, desire of self-determination--- all these lead to withdraw from the society of the either party to the marriage which may lead to breakdown of marriage. Section 9 of the Hindu Marriage Act 1955 is vehemently used by the spouses while exhibiting their personal choices and/ or comforts and to prove the same before the Courts, they submit numerous reasons to justify their claim. The objective of the study is to address the issues which remain underneath the real picture of the society and to deal with the fundamental rights of the wife as an individual, which are violated in the name of matrimonial right. This study also analyse the active role played by the Indian Judiciary in identifying and highlighting the problems of the issues related to the restitution of conjugal rights.

Keywords : Marriage, conjugal rights, matrimonial home, matrimonial rights, Fundamental Rights.

Introduction

It is said that marriages are made in heaven. The home becomes complete when there is plenty of happiness and understanding between the spouses live together, but it is very unfortunate that sometimes the cheerfulness and understanding between the spouses did not stay for a long time and creates violence among them. Sometimes the situations do not permit them to live together and hence leads to the separation between the spouses, who once remain

* Assistant Professor, Law College Durgapur, Rajband, Rahul Foundation-Rajband (West Bengal), e-mail-debasreedebnath12@gmail.com. The author is grateful to Prof. Vijender Kumar for his continues guidance and supervision during the research on the paper.

as a happy couple. In some cases the situation triggered the breakdown of marriage.

Efforts should be made by the spouses to resolve the matrimonial disputes among them and to bring peace in the matrimonial home. The Court proceedings are made for the benefit of the litigating spouses and not allowing the litigating spouses for taking revenge against each other. Therefore, invoking legal proceeding before the Court of competent jurisdiction should be the last option to be invoked by the spouses. The marriage institution is a sacred in its nature and the relationship between the spouses is sacrosanct, therefore the aim of marriage is fulfilled only when the spouses respect the preservation of marriage and not indulging in breaking of it.

The Hindu law draw certain lines and provides some remedies when the spouses came with conflict in accordance with their matrimonial life. Section 9 of the Hindu Marriage Act 1955 is an example of such matrimonial remedy. It provides substantive right¹ to the spouses. The word restitution of conjugal rights is made of three words, i.e., restitution, conjugal and matrimonial rights. Here, restitution means to restore in previous position, conjugal means consortium,² i.e., the conjugal partnership between the spouses. This right includes other rights also, such as, collaboration and affection of the other spouse in every matrimonial relation. In the words of Lord Reid, “jurisprudentially, consortium resembles ownership for husband and wife who enjoy, a bundle of rights, some hardly capable of precise definition.”³

Concept of Hindu Marriage and Restitution of Conjugal Rights

Manu lay down, Wife is a divine institution given by Gods. One should not think that one has obtained her by choice.⁴ Her unity (with her husband) is established by the Vedas.⁵ A woman is half of her husband and completes him.⁶

Marriage is an essential sacrament for every Hindu and an institution which is recognised by all civilised nations from the very early times. According to *Shastric* Hindu law, marriage is a sacred bond between the husband and the wife and is known as *samskara* or sacrament. The Vedic period affirmed the institution of marriage as a sacred tie and at that time the women are given a high status. The *Dharmasastras* divide the life of a Hindu into four *asramas*- *Brahmacharya*, *Grihastha*, *Vanaprastha* and *Sannyasa*.⁷ During the lifetime of a Hindu he/she remain in one of such *asramas*. *Grihasthasrama*, the life of a house-holder, however, is praised by the *Dharmasastras*.⁸ One of the essentialities for valid performance of Hindu marriage apart from *Saptapadi* was *Kanya Dana*, i.e., gifting the bride to the bridegroom. Section 7 of the Hindu Marriage Act 1955 postulates performance of certain customary rites or religious ceremonies of

1 A right, as life, liberty, or property, recognized for its own sake and as part of the natural legal order of society. It is regarded as having authoritative standing and importance independent of man-made laws.

2 Black Campbell Henry, BLACK'S LAW DICTIONARY, 4th ed. 1968, p. 374.

3 *Best v. Samuel* (1952) 2 All ER 394.

4 Manu Smriti, IX 95; Paras Diwan, LAW OF MARRIAGE & DIVORCE, 6th ed. 2011, p. 14.

5 *Ibid*, Manu Smriti, IX, 96.

6 *Ibid*, Manu Smriti, IX, 26.

7 MN Srinivasan, COMMENTARY ON HINDU LAW, 5th ed. 2011, p. 83.

8 *Ibid*.

either party thereto. Therefore, the necessities *viz.*, *Kanya Dana* and *Saptapadi* remain integral and unchanged for performance of a Hindu marriage, validly solemnised.

Marriage is necessarily the social organization and the foundation of legal rights and obligations. It is the source of every domestic comfort from infancy to old age; it is necessary for the preservation and the well-being of our species; it awakens and develops the best feelings of our nature; it is the source of important legal rights and obligations; and, in its higher forms, it has tended to raise the weaker half of the human race from a state of humiliating servitude.⁹ In Hindu law, there were eight kinds of marriage and among them four were approved form and four unapproved. The approved forms were *brahma*, *daiva*, *arsha*, *prajapatya*. The unapproved forms were *asura*, *gandharva*, *rakshasa* and *paishacha*. Any class of Hindus may marry either in *brahma* form or the *asura* form. Thus, in *Bhaoni v. Maharaj Singh*¹⁰ the Court decided that a *Brahman* may contract an *asura* marriage, and a *Sudra* may contract a *brahma* marriage.

According to statutes, marriage is not defined anywhere, however, the personal laws are clear on the point. It is known to be a process where a man and a woman undergo certain religious and customary practices as recognised by their personal law and live with a status of husband and wife in the matrimonial home. As stated in *Grihyasutra*, marriage is not a contract but a spiritual and eternal union, a holy bond of unity. In *A. Jayachandra v. Aneel Kaur*¹¹ it was held that marriage brings about the union of two souls.

Sections 5 and 7 of the said Act provide the conditions¹² of a valid Hindu marriage and ceremonies¹³ to be observed by the parties to a valid Hindu Marriage. In *Gopal Krishna v. Mithlesh Kumari*¹⁴ the Court held that, marriage between the Hindus are sacrament and a holy union of man and woman, while under Muslim law marriage is considered as a civil contract and all duties and rights between the husband and the wife arise from the said contract. In *Sumitra Devi v. Bhikan Choudhary*¹⁵ the Court decided that to consider a Hindu marriage to be valid, there must be certain religious rites and customary ceremonies which would have to be performed.

9 H.K. Saharay, THE HINDU LAW OF MARRIAGE AND STRIDHANA, 6th ed. 2014, p. 21.

10 (1881) 3 All 738.

11 AIR 2005 SC 534.

12 "A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: (i) neither party has a spouse living at the time of the marriage; (ii) at the time of the marriage, neither party- (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity; (iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage; (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two; (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two."

13 Section 7 (1), "A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. (2) Where such rites and ceremonies include the *saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken."

14 AIR 1979 All 316.

15 AIR 1985 SC 765.

Marriage confers plethora of duties and obligations between the husband and wife. It means after the marriage is solemnised both the husband and the wife have some legal rights and remedies to each other. One of such remedy is restitution of conjugal rights. Conjugal right¹⁶ is a matrimonial right where it includes the right to each other's society. The word 'society' means companionship, cohabitation that is consortium. It is a positive relief which aim to preserve the marriage. Restitution of conjugal rights is a matrimonial suit. It is cognisable in the Family Court. The petition for restitution of conjugal rights is brought to the Court by either of the spouses who lives separate from each other without any reasonable cause. In such circumstances the Court may grant restitution of conjugal rights under the Hindu Marriage Act 1955.

The basis of this concept lies in the dominating thinking of husband over wife. In *R. v. Jackson*¹⁷ the Court held that under the concept of conjugal rights, the husband cannot confiscate and confine his wife. In *Udayachala Rao v. T. Laxminarayan*¹⁸ the Court decided that if the spouses made an agreement that they will live separate after the solemnization of marriage it will be void and hence cannot be put into the effect.

After the solemnization of marriage if either of the spouses has withdrawal from the society of the other without any reasonable excuse the aggrieved party may file a petition for restitution of conjugal rights. The words 'withdrawal from the society of other' means leaving behind all the conjugal relationship, such as denial to live together, rejection of marital obligations and intercourse.

Animus and *factum* are two essential elements for withdrawal from the society by the husband or the wife. It connotes that the spouse who has withdrawn from the society of the other has an intention to put an end to his/her conjugal relation. Only intention to leave the society of the other spouse did not leads to desertion except such intention is coupled with *factum* of detachment by the withdrawing spouse. In *Seema v. Om Prakash*¹⁹ the Court decided that the first aspect means that the spouse who has withdrawn has no rational justification to leave the society of the petitioner. However, if either of the spouses makes the circumstance difficult to reside with him/her; he/she can withdraw from the society of other.

Changing Phase of Marriage

The concept of marriage is changing with the passing of time. Earlier, when the joint family exists there is absence of the concept of restitution of conjugal rights. The Urbanization in society changes the structure of the family. Previously the marriage was considered as a sacred bond but due to the changing pattern of the society it now becomes a social contract.

Due to nuclear family and individual independency every individual are doing his/her job in respective areas and places. Hence, after the marriage, India being a patriarchal country tries to dominate over the wife and want to bind the wife to leave her job and to stay with the husband where he resides and work. It

16 Black Campbell Henry, BLACK'S LAW DICTIONARY, 4th ed. 1968, p. 374.

17 (1891) QB 671.

18 AIR 2004 NOC 257 (AP) (DB).

19 AIR 2007 NOC 2518 (MP).

is only this situation which give birth to this concept of restitution of conjugal rights, because due to live apart from each other after marriage one party may claim his/her marital right, which includes the right to live together and cohabitation.

With the passing of time the perception of marriage has suffered distinctive changes and much negativity. This put rise the conflict between the two spouses which lead to file a petition for restitution of conjugal rights, i.e., to restore the previous position of marriage. Much distress has been witnessed in the social relationships between husband and wife.²⁰

The suit for restitution of conjugal rights is filed by the husband against his wife or by the wife against her husband. As the word restitution of conjugal rights itself depicts it's meaning as to restore the previous position, here also if any of the spouses withdraw from their society without any reasonable ground than the Court order the party to return to the previous position or upon the factual situation of each and every case. In *Dadaji v. Rukmabai*²¹ the Court held that where the marriage is once completed, if either party refuses to live with the other, the remedy is by a suit for restitution of conjugal rights.

In *Sohan Lal v. Smt. Pratibha Mehra*²² it has been observed that where restitution of conjugal rights between parties to marriage has elapsed for a period of one year and respondent did not honour the decree passed under Section 9 of the Hindu Marriage Act 1955 after passing decree for restitution of conjugal rights, the husband was entitled to divorce under Section 13 (1-A) of the Act.

Evolving Concept of Matrimonial Home

India being a country of various tradition and religion includes various cultures and in all legal systems after marriage, the wife comes to the husband's house. Earlier, this is called the matrimonial home. After the marriage has been solemnised preference is given to the husband to provide shelter to his wife. However, due to the changing pace of time the concept of matrimonial home is changing day-by-day. Now-a-days, the women are also become self-defendant and as a result sometimes they live away from the husband. So, it is not possible in every marriage that the wife lives with her husband. For that reason, it is not necessary to live in a common residence to be called as a matrimonial home. In *Sitanath v. Haimbutty*²³ the Court held that, it is the obligation on the part of the wife to submit herself devotedly to the authority of her husband. The Court also decided that, it is the responsibility of the wife to stay with her husband under the same roof.

The Courts are also given many judicial responses accepting the privileges of the husband to make a decision to institute the matrimonial home. In *Tirath Kaur v. Kirpal Singh*²⁴ the Court did not allowed the petition of the wife as she submitted to the Court that she was prepared to hold the marriage tie but she was

20 Nawaz Khan, Nuzhat Rizvi, 'Urbanization and its Effect on Joint Family System in India', Vol. 3, Issue 2 International Journal on recent and Innovation Trends in Computing and Communication, 2015, p. 154.

21 (1886) 10 Bom 301.

22 AIR 2007 NOC 915 Raj.

23 (1875) 24 WR 377.

24 AIR 1964 Punj 28.

not ready to leave her employment. In this case the Court ruled in favour of the husband and held that as the wife was not ready to terminate her job, therefore it amounts to desertion. Thus it would give the right to the husband to file a petition for restitution of conjugal rights.

In 1973, the Punjab and Haryana High Court in *Surinder Kaur v. Gardeep Singh*²⁵ held that, it is the duty of the wife to attend, to be obedient and to respect the husband. The Court further decides that, the wife has a duty to reside with her husband wherever he chooses to reside.

Modern Concept of Matrimonial Home

With the changing phase of time the notion of matrimonial home is shifting to cooperate with the modern thought of equality. Currently the women are entitled to hold on their job away from her husband's residence, that is the wife can also live away from her husband after the marriage was solemnised.

This modern perception is brought by the Courts in the year 1975 for the first time in *Praveenben v. Sureshbhai*.²⁶ In this case the Court held that, in the contemporary viewpoint, both the spouses are uniformly independent to get an employment and retain it. Since the husband and the wife had a mutual understanding between them with regard to the place of the job, it cannot be contended that the wife had deserted the husband.

Again in *N. R. Radhakrishna v. Dhanalakshmi*²⁷ the Court decided that where the income of the wife was sufficient to maintain her own life and the child, the conception of obedience towards her husband and to reside with him under the same roof in all situations is not appropriate.

Historical Evolution of Conjugal Rights under Hindu Law

The concept of restitution of conjugal rights is not derived from the customary practices or from the *Dharmashastras* or *Vedas*. The notion of restitution of conjugal rights was not originated in India. This idea came into being from England. England adopts this perception from Jewish law. Previously in England the matrimonial causes were perceived and decided by ecclesiastical Courts. At that time the King's Courts were gave jurisdiction by the English statutes and these Courts settled the disputes based on the principles of ecclesiastical law. Earlier the guilty spouse was punished by the ecclesiastical Courts and thus the remedy for restitution of conjugal rights was executed.

Restitution of Conjugal Rights : A Socio-Legal Perspective

The concept of restitution of conjugal rights is not derived from the customary practices or from the *Dharmashastras* or *Vedas*. The Vedas recognised the necessity for a son relieves his father from hell called "*Puth*" resulted in the desire for a male offspring for the continuance of the family and for the performance of funeral rites and offerings.²⁸ Consequently, the sacredness of marriage was recognised. The Hindu law in India directed to the married couple

25 AIR 1973 P & H 134.

26 AIR 1975 Guj 69.

27 AIR 1975 Mad 331.

28 Priyanka Priyadarshini, '*The Futility of the Provision of Restitution of Conjugal Rights (As Under Hindu Marriage Act 1955) in the Present Scenario*', Vol. 1 Issue 3 International Journal for Legal Developments and Allied Issues, 2015, p. 101.

to stay together and to have the society of each other. It provides certain rights and duties to both the spouses after the marriage was solemnised.

However, due to the difficulties which sometimes arises after the marriage it become necessary to enact some remedy so as to the married couple live their life happily. One of the important necessities of marriage is that the parties will live together. However, there are no such laws and legislations which compel the married couple to live together against their whims and fancies. Human existence is much more important than law. But, then also there remain the concept of 'necessity knows no law.' It implies that, when there is a dare need of doing something and it cannot be possible without illegal means it is permitted, except prohibited by law.

The concept of marriage is confining between two persons; but it unites two families. People's emotions, happiness, respect for each other, everything is included in the idea of marriage. Therefore, whenever any petition is filed before the Court it must try to give remedies to save the marriage bond.

The law of marriage originally treated the wife as the property of the husband and she is controlled by her husband. At that time the nature of the marriage institution was similar to a contract, where dissolution in terms of property and offences relating to marriage was recognised. However due to the changing pace of time the right of individuality come into picture. Now-a-days, the wives also ask for the equal rights in the family. They become socially and economically independent.

The procedure for restitution of conjugal rights recognised in England by the Ecclesiastical Courts was introduced in our country by the British rulers at least from the time of the decision in *Moonshee Buzloor v. Shumsoonissa Begum*²⁹ considering such actions as a species of suits for specific performance.³⁰

Currently, only the mutual bonding between the spouses and by reduction of the subordinate position can only bind the marital relationship, but due to the patriarchal nature of the society, the husbands never want to give equal rights to the wives.

The petition for restitution of conjugal rights is filed by one of the spouses who feel that the other has left him/her or withdrawal himself/herself from the society of the other without any reasonable cause. The need for this remedy emerged from the changing mind set and because of the transformation of the society from joint to nuclear family. Now-a-days, the controversy between the parties, difficulty to accept the ego battle etc. of the spouses leads to increase the ratio of petition of restitution of conjugal rights.

At present in some of the cases it is observed that this right is used as a legal strategy by the Hindu husbands to refuse the maintenance to their wives. In such cases the husbands take the advantage of their own wrongs committed to the wife. An illustration can describe this situation more appropriately. For example, the wife leaves the matrimonial home due to the cruelty and torture inflicted by the husband and the other members, but the husband file a petition to the Court by

29 (1867) II, MIA 551.

30 Vijender Kumar (rev.), John D. Mayne, TREATISE ON HINDU LAW & USAGE, 17th ed. 2014, pp. 209-210.

writing that he wants to live with the wife but she deserted him and thus the wife is not entitled to get the maintenance. In *Shantaram Dinkar Karnik v. Malti Shantaram Karnik*³¹ the husband files a petition of restitution of conjugal rights against the wife. But the Court found that, it is the husband and the other matrimonial members who ill-treated with the wife and for that reason she is bound to leave the matrimonial home. In such situations the husband cannot take the advantage of his own wrongs and hence is not permitted by the Court of law.

Similarly, in *Bai Jivi v. Narsingh*³² when a wife pleads for restitution of conjugal rights the Court may be in a position to judge whether this relief should be granted or not against the husband and if so on what conditions.

Due to the ego clash and wish for individual independency the concept of ideal marriage comes into trouble as in ideal marriage the concept is to live together and to cohabit.

To file a petition of restitution of conjugal rights the following three conditions must be satisfied:

- (i) The respondent has withdrawn from the society of the petitioner without any reasonable excuse;
- (ii) The Court is satisfied about the truth of the statement made in such a petition; and
- (iii) There is no legal ground why the relief should not be granted.

Matrimonial Rights

Marriage bestows significant rights and requires equivalent duties and responsibility equally on both the spouses. These rights are called the matrimonial rights, which both the parties have to each other. Conjugal right is a matrimonial right. The first condition for matrimonial remedy is the validity or subsistence of the marital knot. It means if either of the spouses is not legally married or the marriage was not subsisting at the time of the petition, no remedy will be given under this section. For example, in *Smt. Ranjana Vinod Kumar Kejriwal v. Vinod Kumar Kejriwal*³³ the husband was already married earlier, as a result the subsequent marriage is considered as a void marriage; hence under Section 9 of the Hindu Marriage Act 1955 no remedy will be given to the husband.

The matrimonial law incorporates the right of consortium of the other spouse and so when either of the spouses has deserted the other with no reasonable and satisfactory cause or just excuse, the aggrieved spouse may enforce restitution of the society through Court. In *Annie Thomas v. Pathrose*³⁴ Paripoornan, J. elaborates the meaning of reasonable excuse. According to him, 'reasonable excuse' or 'rational excuse' depends on the factuality and conditions of each and every case. It has to be sufficiently weighty as well as convincing. It should be more than a mere whim and it is not necessary to fall under one of the grounds as mentioned under Section 33 of The Indian Divorce Act 1869. Even it is accomplished of distinction from the matrimonial offence envisaged by Section 33 of the Act. All the same, "reasonable excuse" means that it should be in accord

31 AIR 1964 Bom 83.

32 (1927) 51 Bom 329.

33 AIR 1997 Bom 380.

34 (1988) 2 KLT 237 para 7 (Ker).

with reason, just and fair, in every factual situations of the case. In *Gurdev Kaur v. Sarwan Singh*³⁵ it was observed that what would constitute ‘reasonable cause’ would differ in every case. The Court also decided that in the changed social conditions it would also have to be applied as they obtained today.

The matrimonial rights under Hindu can be divided into various heads, such as, maintenance, property rights etc. Maintenance is defined under Section 3(b) of Hindu Adoptions and Maintenance Act 1956 as “provision for food, clothing, residence, education and medical attendance and treatment.”³⁶ However, it includes reasonable expenses of the marriage in case of an unmarried daughter.³⁷ In most systems of law, the position of wife in her husband’s household and to maintain by her husband is recognised until the marital knot exists and the wife stays loyal to her husband. Nevertheless, after dissolution of marriage also the obligation to maintain the wife exists.

A woman is not entitled to maintenance when she gets married to a previously wedded man whose marriage is in subsistence.³⁸ According to modern Hindu law a Hindu wife is permitted to be maintained by her husband for lifetime.³⁹ A wife can also file a petition under Section 125 of Cr.P.C. 1973 for maintenance. It is recognised to provide safeguard the interest of the parties at marriage.

The modern Hindu law did not permit maintenance to a wife who has changed her religion and has ceased to be a Hindu. But an adulterated wife can claim allowance from her husband who lives with her husband.

Again a married Hindu woman has her exclusive right on property and maintenance if she is not capable to maintain herself and remain chaste after separation from her husband. In *Mangal Mal v. Puni Devi*⁴⁰ the Court held that, the concept of maintenance to wife must include the condition of residence. It must include the basic amenities of life. However, in *Ram Bai v. Yadunandan*⁴¹ the Court decided that a Hindu female could be in possession of a joint family property in lieu of maintenance.

Impediments/Bars to Matrimonial Remedy

Under the matrimonial law divorce is one of the modes to punish the guilty party. It is a matrimonial offence; hence the guilty party becomes inappropriate for consortium. The offence must be one that is recognised as a ground of divorce, like adultery, cruelty or desertion. This implies the fault theory of divorce. The innocent persons can only knock the door of justice. This theory implies that, the party who come for justice to the Court must come with clean hands. The beauty of this principle is that if one of the parties is a sinner the marriage may be dissolve but if both are sinners then they are condemned to continue to live in sin.⁴²

35 AIR 1959 Punj 162.

36 Section 3(b), the Hindu Adoptions and Maintenance Act 1956.

37 *Thulasi v. Raghavan* AIR 1985 Ker 20.

38 *Abbayolla M. Subba Reddy v. Padamma* AIR 1999 A.P. 19; *Suresh Khullar v. Vijay Khullar* AIR 2002 Del. 373.

39 Section 18(1), the Hindu Adoptions and Maintenance Act 1956.

40 AIR 1996 SC 172.

41 AIR 1969 SC 1118.

42 Paras Diwan, LAW OF MARRIAGE AND DIVORCE, 6th ed. 2011 p. 617.

Earlier, in England there has been a long drawn controversy to either do away with these bars or at least modify these bars. With the coming up of irretrievable breakdown of marriage these bars were abolished, but at the same time some new bars were introduced.⁴³ With the enactment of the Hindu Marriage Act 1955 these bars to matrimonial relief was enacted. These bars to matrimonial reliefs are provided under Section 23 of the Hindu Marriage Act 1955. The Court decided that without satisfying the requirements under Section 23 of the Hindu Marriage Act 1955 and granting an *ex parte* decree was not proper.

In *Vijay Lakshmi Devi v. Gautam Mishra*⁴⁴ the petition was filed by the husband for restitution of conjugal rights. Along with this he also pleads for a decree of divorce on the ground of desertion. In this case the wife did not come to the Court and remain absent, i.e., here the wife remains *ex parte*. The Court held that, the fact that the wife remains *ex parte* would not absolve the husband to discharge onus for making out a case for divorce.

Section 23 of the Hindu Marriage Act 1955 provides that, there are two kinds of matrimonial impediments or bars to matrimonial remedy. They are-

- (i) Absolute impediments; and
- (ii) Ancillary impediments.

Absolute Impediments/Bars

In every marriage there are certain conditions are rituals, the non-fulfilment of which make the marriage null and void. In absolute impediments marriage becomes void. For example, marriage between the parties who belongs to *sapinda* relationship and there is no customary rule that the parties can marry to each other. It is an absolute impediment. It means the marriage is itself barred by the legal provisions.

In such marriages the parties remain free to marry another person and no legal consequence will follow from the previous marriage as that marriage was *void ab initio*.

Ancillary Impediments or Bars

This bar can be removed by the parties to marriage. For e.g., during the time of marriage ceremony if wife was found to be pregnant and after few years husband files a petition for restitution of conjugal rights, in such circumstances husband could not file the petition within the time limit of one year, that means he gives his consent to the marriage and accept the marriage as it is. Therefore, ancillary bar is removable. In such marriages the spouses become regular party to the marriage.

Restitution of Conjugal Rights under Hindu Law

Hindu law connotes that after marriage the husband and the wife become one. According to Hindu *sages* marriage completes a man. Marriage implies the right to consortium and a corresponding duty towards each other. However, this right is not legally enforceable. If at any point of time either of the spouses withdraws from the society of the other without any reasonable cause, the only remedy given to the aggrieved spouse is that he/she can file a petition for restitution of conjugal rights. In India this redress was available from the time of British rule. In India

⁴³ Section 5 of the Matrimonial Causes Act 1973.

⁴⁴ AIR 2010 Pat 56.

by attaching the respondent's property a decree for restitution of conjugal rights can be executed by the Court.⁴⁵

Essential Requisite for Restitution of Conjugal Rights

The first and foremost pre-requisite for filing a petition for restitution of conjugal rights is a valid marriage. It means no petition under Section 9 of the Hindu Marriage Act 1955 can be filed in the Court when the marriage itself is disputed. Thus where the parties are not legally married or the marriage was not subsisting at the time of petition; the question of granting for decree of restitution of conjugal rights does not arise.⁴⁶ In *Laxman Singh v. Kesar Bai*⁴⁷ the Court held that it is for the petitioner to prove the validity of the marriage if it is disputed by the respondent. Only when the marriage between the parties is legal the application for restitution of conjugal rights is permitted by the Court. An application for restitution of conjugal rights can be entertained only when the marriage between the parties is legal. Where the parties are not legally married or the marriage was not subsisting at the time of the petition, the question of granting of decree for restitution could not arise.⁴⁸

In *Santosh Kumar Pandey v. Ananya Pandey*⁴⁹ the Court held that, the parties are entitled to maintain a petition under Section 9 when the parties do not dispute the very existence of marriage between them, otherwise the Court may reject such application.⁵⁰

In *Mallappa Gurulingappa Kameeri v. Neelawwa Malappa Kameeri*⁵¹ the Court decided that the husband cannot file a petition under Section 9 of the Hindu Marriage Act 1955 who has another wife living at the same time.

In the case of *Chitralkha Shibu Kunju v. Shibu Kunju*⁵² another requisite for restitution of conjugal rights was decided by the Court. According to the verdict, where the spouses to the marital knot were not a Hindu, it was not considered as legal marriage under Section 5 of the Hindu Marriage Act 1955. Therefore, no relief could be sought under this Act.

Again in *Sanjeev Kumar v. Priti Kumari*⁵³ the Court decided that in a petition for restitution where the defendant denies the marriage and the plaintiff is not able to substantiate the marriage, the same is liable to be dismissed.

The Court of competent jurisdiction is the last essential for filing a suit under Section 9 of the Hindu Marriage Act 1955. It means a Court where cases are heard and that has the authority to do a certain act or hear a certain dispute.⁵⁴ Jurisdiction refers to a particular geographic area to which a Court has competency to decide the case laws coming before it or it may also be defined as a Court to which a

45 Order 21, Rule 32, Civil Procedure Code 1908.

46 *Parbia Ram v. Thopali* AIR 1966 HP 20.

47 AIR 1966 MP 166.

48 *Jiva Magan v. Bai Jethi* AIR 1941 Bom 535; *Ravinder Kumar v. Kamal Kanta* (1976) HLR 380; *Inder Yash v. Manjeet Kaur* (1980) HLR 251.

49 AIR 2013 Chh 95.

50 *Satyabhama Pradhan v. Sidhartha Sahoo* AIR 2005 Ori 177.

51 AIR 1969 Kant 59.

52 (1998) II DMC 454 (Bom-DB).

53 AIR 2011 Jhar 1.

54 TRANSLEGAL DICTIONARY, available at <https://www.translegal.com/legal-english-dictionary/court-of-competent-jurisdiction>, (visited on December 28, 2016).

particular case can be filed. It is the inherent authority of a Court to hear and to declare a judgement. In the matter of matrimonial cases the Family Court of every State has the jurisdiction to try such cases comes before it.

Meaning of Reasonable Excuse

The term reasonable excuse is not defined anywhere. It depends upon the factual circumstances of each and every case. Whatsoever is the reason, the major thing which needs to consider here is, in every suit there exists certain grounds based upon which the suit for restitution of conjugal rights is filed in the Court. In filing the suit for restitution of conjugal rights no spouses are allowed to take advantage of their own wrongs. In *Bejoy v. Aloka*⁵⁵ the Court held that, in response to the suit for restitution of conjugal rights, the term 'excuse' is not limited to the grounds for divorce or nullity of marriage.

Law confers equal status and equal rights to both the spouses, even one of the spouses is working and another spouse is not working, they remain on equal footing. Therefore, the legislator very wisely used the loose term reasonable excuse and did not contain it in water-tight containment. Reasonable excuse contains educational, social, economic background etc. of each and every family. The excuse may be simple or serious in nature, depends on each and every case.

The conditions which are given under Sections 12 and 13 of the Hindu Marriage Act 1955 must be fulfilled to use the term reasonable ground. In the issue of reasonable excuse the matter is not similar with reasonable ground. So, the term reasonable excuse is more appropriate and suitable.

In *Kanthimathi v. Parameswarayyar*⁵⁶ the Court decided that, the wife cannot desert the husband if the parents of the husband are not creating any such circumstances which are provocative in nature for the wife.

In *Poswal v. Parkashwati*⁵⁷ the Court held that, if it was proved that the husband sought divorce on false allegations and in real he deserted the wife, he was not permitted to a relaxation under Section 9 of the Hindu Marriage Act 1955.

The term reasonable excuse has no particular meaning and it is interpreted differently in many ways depending upon the fact of each and every case. In *Nalini v. Radhakrishnan*⁵⁸ the Court decided that, in the situation where, the wife is not agreeing to reside with his parent's house, but she is ready to live with her husband in his working place, the husband cannot allege this as a ground for restitution of conjugal rights.

In *R. Prakash v. Sneha Lata*⁵⁹ the Court find it justifiable on the part of the wife if the wife refuses to leave her job and reside with the husband who was living in a different place. The Court expressly emphasised the concept of complete equality of the spouses in this regard.

In *Rabindranath v. Promila*⁶⁰ the Court decided that, in the situation where, the wife who is habitually nagged and ill-treated by his mother has a reasonable excuse to withdraw from the husband, whose duty is to protect her. In such

55 AIR 1969 Cal 477 (DB).

56 AIR 1974 Ker 124.

57 1980 HLR 189.

58 (1988) 2 HLR 408 (Ker).

59 AIR 2001 Raj 269.

60 AIR 1979 Ori 85.

situations the husband cannot file a petition for restitution of conjugal rights against his wife.

Reasonable excuse can be of other grounds also. Like wife can desert husband if he is impotent and it is considered as a reasonable excuse for withdrawal from the society of the husband.⁶¹ Similar verdict was decided by the Court in *Khageshwar v. Aduti Karnani*.⁶²

However, in *Pushpa Rani v. Vijay Pal Singh*⁶³ the Court decided that, the allegations made by the wife that the husband was a drunkard and indulged in gambling was held to be a feeble attempt made by her to establish cruelty as a defence for restitution of conjugal rights.

In *Kiran Bala v. Sharan Kumar*⁶⁴ the Court decided that the wife had sufficient cause for living separately from the husband where he was living with the widow of his brother. In such circumstances the husband cannot file a suit for restitution of conjugal rights.

However, on certain grounds the Court may refuse to pass a decree for restitution of Conjugal Rights. Such as, in *Bai Premkuvar v. Bhika*⁶⁵ the husband had loathsome sickness, for example leprosy or syphilis. In this situation, the petition for restitution of conjugal rights was refused by the Court against the wife. Again in *Paigi v. Sheonarain*⁶⁶ the decree for restitution of conjugal rights was refused by the Court on the ground that the husband adopts another religion.

Grounds for Reasonable Excuse

According to the various verdicts given by the Court the following circumstances constitute reasonable excuse to operate like a defence in such area:⁶⁷

- (i) In any marital cause if it is a ground for relief
- (ii) In marital misconduct which did not constitute a ground of marital cause, if adequately serious and grave
- (iii) If it is impracticable for the petitioner to reside with the respondent for any action and behaviour of the respondent.

Withdrawal from the Society

Legitimate marriage vows rights and obligation to both the husband and the wife to live together and abide by the matrimonial law. The term “withdrawal from the society” denotes to put an end to the conjugal relationship, such as denial to cohabit, rejection to confer marital responsibilities. Thus it can be said that, withdrawal from the society means to withdraw from the totality of the marital responsibilities between the spouses. For filing the petition for restitution of conjugal rights there must be total repudiation of cohabitation and there is a desertion by one of the spouses from the other’s society. At this point society signifies the equivalent meaning as consortium.

61 *Jagdish Lal v. Smt. Shyama Madan* AIR 1966 All 1950.

62 AIR 1967 Ori 80.

63 AIR 1994 All 216.

64 2002 (1) HLR 235 (P & H).

65 (1868) 5 Bom HCAC 209.

66 (1886) 8 All 78.

67 ‘Constitutionality of Restitution of Conjugal Rights’, lawlex.org, available at <http://lawlex.org/lex-bulletin/constitutionality-of-restitution-of-conjugal-rights/1580>, (visited on December 31, 2016).

In *Venugopal v. Laxmi*⁶⁸ the Court held that, a petition for restitution of conjugal rights would lie if the fact of the case established that the spouses have not cohabit after the marriage and the intention of the parties is not to cohabit. However, in *Smith v. Smith*⁶⁹ and *Wilkie v. Wilkie*⁷⁰ the Court observed that, where the parties are living together in the same house, but one of the spouses rejects to live a conjugal life, it would amount to withdrawal from the society. In *Mouneer v. Mouneer*,⁷¹ the Court held that, refusal to matrimonial attachment due to certain problems does not lead to withdrawal from the society.

Burden of Proof

The spouse who files a suit in the Court for restitution of conjugal rights, he/she has the burden to prove that the other party deserted him/her, which means the spouse who alleges reasonable excuse has to prove it. In *Smt. Jyothi Pai v. P. N. Pratap Kumar Pai*⁷² the Court held that, the spouse who files a petition to the Court has the burden to prove the allegation. However, if the petitioner can point out the firm grounds concerning the withdrawal from the society of another without reasonable excuse, in such situation the burden shifts on the other spouse to establish rational justification, if any, for withdrawal of society.

The husband who is guilty of mental cruelty cannot ask for restitution of conjugal rights. The physical assault, violence or torture is not essential to prove in such situations.⁷³

Judicial Approach on Conjugal Rights

The concept of restitution of conjugal rights is not a new idea. This concept is contained under Section 9 of the Hindu Marriage Act 1955. A decade ago, there arose a controversy with respect to the constitutional validity of restitution of conjugal rights. This topic is itself very controversial as with the changing pattern of life women are also become self-independent. Marriage did not seize one's fundamental rights given under the Constitution of India; therefore, after the solemnization of marriage also the spouses have their rights. There are many verdicts given by the Supreme Court and various High Courts which discussed this issue several times. Even its constitutionality has been challenged before the Apex Court.

In Mulla's "Hindu Law", it is stated in paragraph 552 that *a wife's first duty to her husband is to submit herself obediently to his authority, and to remain under his roof and protection. She is not, therefore, entitled to separate residence or maintenance, unless she proves that, by reason of his misconduct or by his refusal to maintain her in his own place of residence, or for other justifying cause, she is compelled to live apart from him.*⁷⁴

Restitution of Conjugal Rights and The Hindu Marriage Act 1955

The Hindu Marriage Act 1955 came into force on May 18, 1955. This Act amends as well as codifies the matrimonial law among Hindus. The provision for

68 AIR 1936 Mad 288.

69 (1939) 4 All ER 533.

70 (1943) 1 All ER 433.

71 (1972) 1 All ER 289.

72 AIR 1987 Kar. 241.

73 *S. Jaya Kumari v. S. Krishna Nair* AIR 1995 Ker 139 (DB).

74 Satyajeet A Desai (rev.) D.F. Mulla, HINDU LAW, 22nd ed. 2016 pp. 738-739, 865.

restitution of conjugal rights is also included under Section 9 of the Hindu Marriage Act 1955. It means to restore the previous status as it is. Section 9 of the Hindu Marriage Act 1955 grants statutory recognition to both the couples to have consortium right to each other. Therefore, if the husband or the wife leaving each other without any just and reasonable cause would become a ground for apply a suit for restitution of conjugal rights.

However, Section 9 of the Hindu Marriage Act 1955 makes it clear that even when the conditions stated in that provision are fulfilled it is on the discretionary power of the Judges of the Court whether to pass a verdict for restitution of conjugal rights or not. It is upon the Court to examine each and every aspect of the entire acts of the spouses. Upon considering all the facts and issues of the case the Court will make a decision whether such relief is justified or not on the part of the petitioner or whether such decision is irrational or arbitrary in any appropriate case against the respondent. In *Alopbai v. Ramphal*⁷⁵ the Court observed that a suit for restitution of conjugal rights would be unjustified where the circumstances disclose that there is no possibility of the parties living together even in a state of happiness.

Constitutionality of Restitution of Conjugal Rights and Judicial Approach

In *T. Sareetha v. Venkata Subbaiah*⁷⁶ the Andhra Pradesh High Court struck down Section 9 of the Hindu Marriage Act 1955 as unconstitutional. The single Bench of Choudhury J. has struck down this section on the reason that it violates individual's right to privacy. The Court observed that this section was brutal and inhuman in nature which violates the right to privacy and human dignity guaranteed by Article 21 of the Constitution of India and hence void. It denies the woman her free choice of whether, when and how her body is to become the vehicle for the procreation of another human being⁷⁷ and hence is violative of the right to the privacy guaranteed by Article 21 of the Constitution of India. The suit for restitution of conjugal rights seizes the right of a woman to take her most intimate decisions of her own life.

Article 14 of the Constitution of India provides equal right to both the man and woman and there is no distinction between the two. The decision given in *T. Sareetha's* case illustrate that the provision for restitution of conjugal rights violates Article 14 of the Constitution of India as it did not provide equal treatment to man and woman. He further added that in actual fact, the remedy works only for the benefit of husbands and is oppressive to woman.

Choudhary J. observed that “A decree of restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy. It denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being.”⁷⁸

In addition, the judge also added that the concept of restitution of conjugal rights did not uphold any justifiable public purpose which benefits the whole

75 1962 M.P.L.J. 192.

76 AIR 1983 AP 356.

77 *T. Sareetha v. Venkata Subbaiah* AIR 1983 AP 356, available at, <https://indiankanoon.org/doc/1987982/>, (visited on January 12, 2017).

78 *Ibid.*

community and hence it is unjustifiable and was violative of Article 14 of the Constitution of India.

Right to Equality and Concept of Restitution of Conjugal Rights

Equality is one of the glorious keystones of Indian democracy.⁷⁹ The Court in *Ashutosh Gupta v. State of Rajasthan*⁸⁰ decided that, the doctrine of equality before law is an essential outcome of Rule of Law which pervades the Indian Constitution.

Right to Life and Personal Liberty : Concept of Restitution of Conjugal Rights

Article 21 of the Constitution of India guaranteed right to life and personal liberty against the State act. It provides, “*No person shall be deprived of his life and personal liberty except according to procedure established by law.*”⁸¹ In *Mannv. People of Illinois*⁸² Field J., observed that, the word life is broader in sense and signify more than mere animal existence. Again in *Francis Coralie v. Union Territory of Delhi*⁸³ the same view was taken by the Court and decided that, right to live is not limited only to animal existence. It further indicates something more than just physical survival. It take account of the right to live with human dignity and all that goes along with it, that is to say, the bare amenities of life, for example, sufficient food, clothes, protection, facilities for education and communicate ourselves in varied forms.

Right to Privacy and Restitution of Conjugal Rights

The concept of right to privacy directly flows from Article 21 of the Constitution of India. The suit for restitution of conjugal rights violates such right. The Court in *Govind v. State of MP.*⁸⁴ decided that, the personal intimacies are included in the concept of right to privacy. It itself includes the right to be let alone. Hence, the decree for restitution of conjugal rights snatches away the right to privacy protected under the Constitution of India.

Freedom to Settle Anywhere and to Practice any Profession

There are instances under the restitution of conjugal rights petition where the husband wants the wife to leave the job and settled with him in his place. In these cases the freedom of the wife under Article 19 (1) (e) and Article 19 (1) (g) of the Constitution were violated because as an individual the wife has also her freedom to settle anywhere and to practice any profession. In *Shanti Nigam v. Ramesh Nigam*⁸⁵ and *Pravinaben v. Suresh bhai*⁸⁶ the Allahabad and Gujarat High Court held that mere refusal to resign the job is not adequate enough for getting a suit for restitution of conjugal rights.

Right Against Exploitation and Restitution of Conjugal Rights

Conjugal rights connote two ideas, (a) “*the right which husband and wife have to each other’s society and* (b) “*marital intercourse*”.⁸⁷ Wife being a woman

79 *Indra Sawhney v. Union of India* AIR 1993 SC 477.

80 AIR 2002 SC 1533.

81 Article 21 of the Constitution of India.

82 94 US 113.

83 AIR 1978 SC 597.

84 AIR 1975 SC 1378.

85 (1971) ALJ 67.

86 AIR 1975 Guj 69.

87 Earl Jowitt, *DICTIONARY OF ENGLISH LAW*, 2nd ed. 1977, p. 453.

is always dominated by the man and is likely to be more affected by the decree for restitution of conjugal rights than man.

'Traffic in Human Beings' and 'beggar' and other similar forms of forced labour is prohibited under the Constitution of India.⁸⁸ Under the obligation of the restitution of conjugal rights the wife is also forced to sexual intercourse with her husband, which violates Article 23 of the Constitution of India. This act can cause mental breakdown of the wife which is harmful for her mental as well as physical health. In India there is no remedy available in such situation which gives pleasure to the wife. The topic which is so closely relates to her body along with her life and which is very significant to her, a suit of restitution completely ignores her wishes, hence *ultra vires* the Article 21 and other provisions of the Constitution.

However, the Delhi High Court in *Harvinder Kaur v. Harmander Singh*⁸⁹ the learned single judge, Rohatgi J. took the converse view and held to the contrary. In this particular case the Court observed that Section 9 was not violative of Article 14 and 21 of the Constitution. The Court held that the leading idea behind this relief is preservation of marriage. One of the components which constitute consortium is sexual intercourse, but is not the *summum bonum*.⁹⁰

The controversy forged by these two diagonally opposite viewpoints was regulated by the Supreme Court in *Saroj Rani v. Suudarshan Kumar Chaddha*.⁹¹ In this verdict Sabyasachi Mukherji, J. of the Apex Court held that "*In India conjugal rights i.e. right of the husband or the wife to the society of the other spouse is not merely creature of the statute. Such a right is inherent in the very institution of marriage itself. There are sufficient safeguards in Section 9 of the Hindu Marriage Act to prevent it from being a tyranny.*"⁹²

In this particular case the constitutional validity of Section 9 was upheld and decided that it was not violative of Articles 14 and 21 of the Constitution of India. The leading idea of Section 9 was to preserve the marriage institution. The Court further explained that "*The object of the restitution decree is to bring about cohabitation between the estranged parties so that they can live together in the matrimonial home in amity.*"⁹³

From the above mentioned views one thing is apparent that both the Judges overlook the primary characteristic of family, i.e., while the understanding between the spouses are broken, no remedy will help. The Court before broke such union between the husband and the wife should take into consideration utmost fairness and least amount of bitterness and humiliation.

Execution of Restitution of Conjugal Rights Decree

Under Rules 32 and 33, Order 21 of the Code of Civil Procedure 1908, pecuniary compulsion can still be put into effect for the implementation of the

88 Article 23 of the Constitution of India.

89 AIR 1984 Del 66.

90 The highest good, especially as the ultimate goal according to which values and priorities are established.

91 AIR 1984 SC 1562.

92 *Saroj Rani v. Suudarshan Kumar Chaddha* AIR 1984 SC 1562, available at, <https://indiankanoon.org/doc/1382895/>, (visited on January 19, 2017).

93 *Ibid.*

suit for restitution of conjugal rights. The property against whom such decree is passed can be attached by the Court to enforce such decree. Order 21 Rule 32 and 33 provides financial sanctions against the disobeying party. It talks such about decree as a suit for specific performance. In addition, there is one more form of execution, which is provided under Rule 33, if the petitioner is the wife. Here, in such situations, if the Court thinks fit may decide that if the suit is disobeyed within a definite point of time, the respondent shall make such periodical payments to the petitioner as the Court thinks reasonable.

In a decree of restitution of conjugal rights the party against whom the decree is passed cannot compel the other party to physically restore cohabitation. In *Wily v. Wily*⁹⁴ the Court observed that, “*an offer by the husband to live under the same roof with his wife, each party being free from molestation by the other was not an offer to matrimonial cohabitation.*” Again in *Bartlett v. Bartlett*⁹⁵ Justice Evatt specifically considered whether sex was integrated in an action for restitution of conjugal rights and found that there was authority to support both sides of the question. He concluded that the question of sexual intercourse or ‘mutual society’ cannot be said to be irrelevant to the question of conjugal rights.⁹⁶ It thus follows that, sexual cohabitation is a part of marriage and for filling a decree of restitution of conjugal rights. The consequences of the enforcement of such a decree are firstly to transfer the choice to have or not to have marital intercourse to the State from the concerned individual and secondly, to surrender the choice of the individual to allow or not to allow one's body to be used as a vehicle for another human being's creation to the state.⁹⁷

The initiative taken for the remedy of restitution of conjugal rights is for preserving the marriage as far as possible. Here, the Court takes initiative and enjoin upon the withdrawing party to join the other.

Marriage relation needs faithfulness and freewill to each other. But, if such things are unavailable between the spouses there will be a possibility to infringe the rights of each other. There must be mutual consent between the parties to the marriage. In *Hyde v. Hyde*⁹⁸ the legal definition of marriage was given by Lord Penzance, as a voluntary union between man and women. The decree of restitution of conjugal rights gives the right to the other party to have sexual intercourse against the unwilling party which violates the human rights and human dignity of a person. In *Russel v. Russel*⁹⁹ Lord Herschell observed that, restitution of conjugal rights is barbarous in nature.

In *Syed Shahnawaz v. Bibi Nasrin Bano*¹⁰⁰ the High Court held that it was not denuded of its powers of granting maintenance in a proceeding for restitution of conjugal rights, provided it is satisfied that wife was not in a position to maintain her and contest proceedings so brought against her by husband.

94 (1918) P1.

95 (1933) 50 CLR 3.

96 Renata Grossi, LOOKING FOR THE LOVE IN THE LEGAL DISCOURSE OF MARRIAGE, 1st ed. 2014, p. 44.

97 *T. Sareetha v. Venkata Subbaiah* AIR 1983 AP 356.

98 (1866) LR IP & D 130.

99 (1897) AC 395.

100 AIR 2009 (NOC) 2155 (Pat).

Conclusion

Though the Constitution of India has given equal right to everyone, but the patriarchal nature of our society always try to control the behaviour of the women. However, educated a woman may be a solution within the matrimonial home, as she is always treated unequally to men in India. The concept of restitution of conjugal rights violates the fundamental rights of the woman in many ways and is not a fair concept of justice. Such concept is against the concept of social justice, and hence, being *ultra-virus* and must be declared as unconstitutional.

Marriage creates reciprocal rights and duties among the spouses, but, due to the patriarchal mind-set women are always persist to maintain and observe all the rules and regulations made by the other members of the matrimonial home. When a girl after her marriage went to the matrimonial home it is the duty of the members of the family of marriage also to treat her as a daughter and make a friendly environment for her. But, in reality, the picture remains the opposite in most of the cases and hence, the concept of women empowerment is likely to wither away from the society.

Gender inequality throughout the world is the most subtle forms of inequality. This concept includes all the individuals in a society then also the victims of restitution of conjugal rights are women, even though we live in the 21st century and claim liberal society, we are far from the concept of gender equality and gender equity. No doubt that, things are changing, but, the process is very meagre. Each and every day women become victims of various crimes including matrimonial offences. Their rights are violated in numerous ways. Whenever brutal crime is committed against women, it create shock in the society, but, the heart-breaking reality is that all those shocks burst like bubbles in a very short time and again the violence against women are stated.

Women empowerment urge for the equal right for the women. This concept depends on the various variables, like, education, social status etc. The key element which needs to take into consideration is the lack of implementation machineries and to address the issue of equality and violence against women. Fight for justice does not only mean a struggle against men, it is a struggle and fight in opposition to all the traditions that have chained them. Now, time has come to look into the concept of such rights of the women, which are violated since last few decades. The concept of restitution of conjugal rights curtails the fundamental rights of the women, which are the basic rights. The right to privacy, right against exploitation cannot be infringed in any manner. But, due to this provision the wife remain helpless and have to reside with a husband who tortured her and treated her badly. Such right is a violation of natural law principle.

Women now-a-days are in equal footing with men and in no field they lacks position in comparison with men. The patriarchal structure of the society need to be eradicated and grants women equal right as men, then only the society will develop. In the words of Manusmriti, “*The Lord divided his own body into two parts; half male and half female and thus was created the universe.*”¹⁰¹ Since the inception of the universe the male and the female blending has showed to be the

101 ‘*The Puranic Account of the Creation*’, sacred-texts.com, available at, <http://www.sacred-texts.com/hin/hmvp/hmvp36.htm>, (visited on January 20, 2017).

most important requirement for promulgating global views. Hence, the women should be given equal status to create a balance in the society and to create an institution which is basic unit of the society, i.e., the family.

Marriage is the most important social institution. It needs to be preserved. Laws are there to give remedy to the individuals and help the people in distress. The Family Court hence, tries to re-unite the bonding of the spouses, so that the marriage as an institution is preserved. It is necessary for the development of the human society and to run the civilization as a whole.

TRIBAL CUSTOMARY LAWS VIS-À-VIS WOMEN'S STATUS IN NORTHEAST INDIA : COMBATING CLIMATE CHANGE

Rashmi Patowary*

ABSTRACT

Citing the 2007 Report by the IPCC (Intergovernmental Panel on Climate Change) on Climate Change, the United Nations Economic Social Council (in its March 2008 Report) presents evidence of the increasing regional climate change. Climate change has its effects on all sections of the society. However, differences still prevail. These differences may be in terms of geography, gender, economy etc. The United Nations Development Programme (UNDP) acknowledges the fact that climate change is not gender neutral and women in developing nations are particularly vulnerable. The United Nations Framework Convention on Climate Change (UNFCCC) has also noted that women face greater burden from the impacts of climate change. It also admits that women can play a crucial role in tackling climate change due to their local knowledge and leadership at the household level. Their active participation in decision-making can ensure effective climate-related planning and its proper implementation. In the light of the above, it is pertinent to discuss the status of women in the customary laws of northeast India, a region that is home to the second largest biodiversity hotspot in the world (The Eastern Himalayan Biodiversity Hotspot). This note shall try to discuss and address the various gender issues (circumscribing status of women) embedded in these customary laws. The methodology adopted for the study is doctrinal (wherein secondary sources have been heavily relied upon).

Keywords: Customary Laws, Gender, Climate Change, Northeast India.

Introduction

“Climate change, demographics, water, food, energy, global health, women's empowerment - these issues are all intertwined. We cannot look at one strand in isolation. Instead, we must examine how these strands are woven together.”

- Ban Ki Moon

The urgency to tackle the ever-increasing problem of climate change needs undivided attention of all sections of the society. This ‘sought after attention’ may be limited owing to the role conflicts in the existing institutional structures of the

* Scholar, King's College London, University of London, Brown Street, London, UK, e-mail: rashmi.patowary@kcl.ac.uk / rashmi@nuassam.ac.in.

society; which often hinders individuals from contributing to their full potential. This note dedicates itself to acknowledge and appreciate the role of women in combating climate change. The short note boils down to highlight the opportunities and challenges that the existing societal structures in northeast India has to provide in expanding and narrowing the important role that women has to play. It begins with a brief explanation of how and why climate change matters to women. It also lends an insight as to the acknowledgment by the international regime on climate change being a women's issue. The note then looks into the conflicting and confusing position of women in the north-east society of India and tries to explore how this silent mayhem is a boon as well as bane in women's contribution towards tackling the problem of Climate Change.

Climate Change and Women : Unravelling the Connection

Climate change is one of the formidable issues of this century and demands undivided attention. Climate change affects all aspects of the society. However, the degree of impact is defined (or influenced) by various factors, such as; social status, economic status, gender etc. The United Nations Development Programme (UNDP) acknowledges the fact that climate change is not gender neutral.¹ Thus, influenced by plethora of factors, women occupy the position of a prominent stakeholder with regard to climate change. The relationship between women and climate change can be well appreciated under two broad heads – (a) Women as one of the worst sufferers of the impact of climate change and (b) Women as one of the key agent in combating climate change.

The Executive Secretary of the United Nations Framework Convention on Climate Change (UNFCCC), Christiana Figueres has in a crisp manner condensed the aforesaid interconnection, "*Women are disproportionately affected by climate change, the most vulnerable, and women are the strongest key agent of adaptation. On both sides because of the vulnerable and potential to contribute they are one of the most important elements here.*"²

Women as the worst sufferers of Climate Change-Women are tremendously affected by the impacts of climate change. Ranging from loss of biodiversity, threat to food security, increasing water scarcity; women are surrounded by an array of complex issues. Some of the noteworthy reasons are as follows³:

Across the globe, women are the primary caregivers⁴ in their family. In the developing nations, women's livelihood depends on availability of natural

1 United Nations Development Programme: *Overview of linkages between gender and climate change* (Policy brief 1) at p. 02, available at <http://www.undp.org/content/dam/undp/library/gender/Gender%20and%20Environment/PB1-AP-Overview-Gender-and-climate-change.pdf>, (visited on July 16, 2016).

2 '*Why women are key to tackling climate change*' Climate Home (March 8, 2016) available at <http://www.climatechange.news.com/2016/03/08/why-women-are-key-to-tackling-climate-change/>, (visited on July 2, 2016).

3 Christiana Figueres, '*Why women are the secret weapon to tackling climate change*' CNN (July 6, 2014) available at <http://edition.cnn.com/2014/03/06/world/why-women-are-the-secret/>, Visited on July 2, 2016. Also refer: Kate Stringer, 'Why Fixing Climate Change Is Women's Work' Yes Magazine (March 29, 2016) available at <http://www.yesmagazine.org/planet/why-fixing-climate-change-is-womens-work-20160329>, Visited on July 2, 2016; Australian Red Cross: Guidance Note – Gender and Climate Change <http://www.redcross.org.au/files/2014_Gender_and_Climate_Change.pdf> (visited on July 2, 2016).

4 Women farmers currently account for 45-80 per cent of all food production in developing countries

resources. With the drying of water sources and loss of biodiversity, women have to travel to remote areas in search of food, fuel and water for their families. This puts them in the risk of being victims to various forms of violence. As seasons become erratic and traditional sources of food become insufficient and contaminated, women suffer from poor health and are sucked further into the vicious cycle of poverty.

Socio-cultural norms leave them ill equipped to handle crisis and take informed decisions. For instance, societal norms among various communities pull women away from access to education or encourage them to take sacrificial steps. Prevalence of cultural stigmas does not allow women to learn survival skills or develop a proactive attitude. They are also under-represented in decision-making process of their communities. This limits their potential of protecting themselves and their families from the adverse impacts of climate change.

It is important to note that the aforementioned reasons are interlinked and act like a vicious cycle. It is pertinent to note that, women in developed countries also face the threat of climate change, however at a different level.⁵

Women as the Ambassador for tackling Climate Change-As women are one of the worst sufferers of climate change, they shall be the best care giver. "A 2014 EU study found that women are consistently more concerned about climate change than men, and are more willing to make sacrifices to reduce emissions. Women are even statistically more likely to 'believe' in climate change."⁶ There are numerous instances,⁷ wherein it has been found that when women are empowered to exercise leadership roles within their communities, they were able to respond better to overcome the impacts of climate change (such as preparation and coping towards natural disasters). Since, women are in the close nexus with

depending on the region... In poor communities in most developing countries, women and girls are responsible for collecting traditional fuels, a physically draining task that can take from 2 to 20 or more hours per week... All over the developing world, women and girls bear the burden of fetching water for their families and spend significant amounts of time daily hauling water from distant sources. [Refer to, United Nations Women Watch: *Factsheet - Women, Gender Equality and Climate Change* (2009) available at http://www.un.org/womenwatch/feature/climate_change/downloads/Women_and_Climate_Change_Factsheet.pdf, (visited on July 5, 2016).

- 5 Women in wealthier nations may not experience the effects of climate change with the same immediacy, but they are similarly worried. A 2015 Pew research study found that while the concern over climate change is equal between genders in so-called developing countries, women in wealthier nations are more likely than their male counterparts to see climate change as a real and pressing personal threat... In developed countries, women make an average of 79 cents for every dollar made by men. That means women-especially single mothers-may be more likely to feel the effects of increased food and energy prices. Women head Eighty-four percent of single-parent households in the United States, and 36 percent of those women live below the poverty line, according to the U.S. Census Bureau [Refer to, Kate Stringer, *Why Fixing Climate Change Is Women's Work* Yes Magazine (29/03/2016) available at <http://www.yesmagazine.org/planet/why-fixing-climate-change-is-womens-work-20160329>, (visited on July 2, 2016).
- 6 Georgie Johnson, *Why Climate Change is a Gender Equality Issue* (March 2016) available at <http://energydesk.greenpeace.org/2016/03/08/why-climate-change-gender-equality/>, (visited on May 1, 2017).
- 7 World Bank '*Gender and Climate Change-3 Things You Should Know*', available at <http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1232059926563/5747581-1239131985528/5999762-1321989469080/Gender-Climate-Change.pdf>, (visited on July 5, 2016).

the natural resources, their representation in the decision making process of their communities and societies (at all levels) ensure better framing of policies.

A study found that women in South Asia displayed enormous strength and capacity throughout the entire disaster cycle: preparing for hazards, managing after a disaster and rebuilding damaged livelihoods. Activities included ensuring food and water for the family, securing seed and other productive material and taking care of the sick and elderly.⁸

Recent studies reveal that not only women's participation is important but also how they participate and how much. And because women often show more concern for the environment, support pro-environmental policies and vote for pro-environmental leaders, their greater involvement in politics and in nongovernmental organizations could result in environmental gains, with multiplier effects across all the Millennium Development Goals.⁹

Women and the International Climate Change Regime: A Brief Overview- The acknowledgement of this inter-linkage between women and climate change has been slow. The Conference of Parties (COP) has met 21 times since 1995, yet women have not been *explicitly* recognized as important stakeholders in the issue of climate change in the key treaties that formed the foundation of climate change negotiations, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol. However, the picture is not so dull¹⁰-

- (i) Convention on Biological Diversity and the Convention to Combat Desertification explicitly beckon for full participation of women.
- (ii) COP 7 and COP 10 called for increased participation of women and attended to the fact that the disproportionate impact of climate change on women should be addressed in future decisions.
- (iii) 1995 Beijing Declaration and Platform for Action specifically recognized the need for women's participation in the decision-making process to effectively combat, mitigate, and adapt to climate change. This established gender as a permanent agenda item for all future COPs.
- (iv) After COP13, the Global Gender and Climate Alliance (GGCA) was created by the United Nations Environment Programme, United Nations Development Programme, International Union for Conservation of Nature, and Women for Environment and Development. It has been a key proponent for women's inclusion has fostered framing of gender-responsive policies.
- (v) At COP 20, The Lima Work Programme on Gender decision aimed to advance gender balance in climate policy-making bodies. It also sought to promote gender sensitivity in developing and implementing policies to address climate change.

8 United Nations Development Programme: *Overview of linkages between gender and climate change* (Policy brief 1) at p. 02, available at <http://www.undp.org/content/dam/undp/library/gender/Gender%20and%20Environment/PB1-AP-Overview-Gender-and-climate-change.pdf>, (visited on July 16, 2016).

9 *Ibid*, at p. 1.

10 Mayesha Alam et al., 'Women and Climate Change: Impact and Agency in Human Rights, Security, and Economic Development', Georgetown Institute for Women, Peace and Security (2015) [https://giwps.georgetown.edu/sites/giwps/files/Women%20and%20Climate%20Change .pdf](https://giwps.georgetown.edu/sites/giwps/files/Women%20and%20Climate%20Change.pdf), (visited on August 4, 2016).

Despite these significant strides in the past years, it is sad to note that only 40% of the 160 parties of the COP21 made gender references in their Intended National Determined Contributions (INDCs)-none of whom were from the industrialized countries.¹¹

Women Status in Tribal Customary Laws of Northeast India : The Paradox Within

There are about 12 percent tribal out of 80 million who live in the northeast region of India. Their distribution is uneven in the seven States, with proportion as high as 94.5 percent in Mizoram and as low as 12.4 percent in Assam.¹² There is this popular belief that the northeast being matrilineal dominant and 'dowry free zone', women enjoy freedom and stature equal to men. This illusion of equality has been duly noted by various authors¹³, who have through their studies reached conclusions that reveal otherwise.

For instance, tribes such as *Khasi*, *Garo*, *Jaintia* are matrilineal societies only in theory. In practice, it is the men who occupy the significant positions in the tribe. They are the decision makers. Studies¹⁴ done on the *Khasi* tribe have noted that, it is the *Dorbar Shnong* (an assembly constituted by all adult males), which is responsible for the discipline and welfare of the people. They give all the instructions with regard to the customary practices of the tribe. In their families, it is the uncle who holds important stature, taking all the legal and religious decisions. The popular view that in a matrilineal society, it is the women who is at the helm of decision-making thus stand thwarted. Furthermore, studies¹⁵ have also shown that, in matrilineal societies of *Garo* and *Khasi*, though a woman is highlighted as the heiress of the family's property. In reality, she merely occupies the position of a guardian. It is the male members who takes decisions as to how the property shall be utilized. In other words, the societies are matrilineal and there is female inheritance but the control over the property is patriarchal in nature. However, "*Majority of the domestic affairs is in her hands. The lady of the house is the first to witness the dawn and the last to retire at night.*"¹⁶

11 'Gender and Climate Change Policy after COP 21' (University of Copenhagen) available at <https://ccafs.cgiar.org/blog/gender-and-climate-change-policy#.V6c9LyN95FU>, (visited on July 7, 2016).

12 National Commission for Women, 'Chapter-1-Tribal Customary Law and Women's Status: An Introduction', at p. 05 available at <http://ncw.nic.in/pdfreports/Customary%20Law.pdf>, (visited on July 1, 2016).

13 Kamei Pamei Roselima, 'Customary Law and Women in North East India' International Research Journal of Social Sciences (2014) Vol. 3(9), pp. 59-62 available at <http://www.isca.in/IJSS/Archive/v3/i9/9.ISCA-IRJSS-2014-163.pdf>, (visited on July 16, 2016).

14 Laloo N.M., 'Political Structure of the Khasis: With special reference to the Nongthymmai Dorbar Pyllun', (IOSR-JHSS) (2014) Vol. 19(4).

15 Khatso V., 'Customary Laws and The Gender Issues', N.E.I, Bull. of Assam Inst. of Res, for Tribals and SC, Guwahati (2005) & Walter Fernandes et al., 'Tribal Customary Laws in Northeast India: Gender and Class Implications', North Eastern Social Research Centre (2008) cited in Kamei Pamei Roselima, 'Customary Law and Women in North East India' International Research Journal of Social Sciences (2014) Vol. 3(9), pp. 59-62 available at <http://www.isca.in/IJSS/Archive/v3/i9/9.ISCA-IRJSS-2014-163.pdf>, (visited on July 16, 2016).

16 Horam. M., Naga Polity. Delhi: Low Price Publication, 47 (1975) cited in Kamei Pamei Roselima, 'Customary Law and Women in North East India' International Research Journal of Social Sciences (2014) Vol. 3(9), pp. 59-62 available at <http://www.isca.in/IJSS/Archive/v3/i9/9.ISCA-IRJSS-2014-163.pdf>, (visited on July 16, 2016).

Therefore, though a woman is given much less importance and she may not be able to assert her opinion in the decision making process, within the family she has a vital role to play, which cannot be undermined.

Education, which is an important factor for the growth and development of any community, is equally imparted to both men and women. The *Angami Nagas* believe that imparting education to both girls and boys is beneficial. They believe that the education given to their daughters is a kind of gift, which they shall take with themselves after their marriage.¹⁷ However, this equality in education is visible up to the primary level. Meaning thereby, for higher education, boys are given more preference.

In the agricultural fields, it is women folk who are actively engaged in farming. From *jhum* fields to the kitchen gardens, the women play an active role in producing the yield and supporting their families. However, they have less access to the produce when it comes to selling it in the market. They also have little say in deciding the nature of the produce. It is the men folk who are engaged in the monetary exchange and in taking the decisions associated with it. However, this cannot be generalized for there are markets, (such as *Khwairamand bazaar*¹⁸) which has been run by women since time immemorial.¹⁹ There are other numerous customary practices and taboos that limit the freedom of women and clearly show that the tribes overtly breathe patriarchal ethos and norms. Since, the men are the decision makers in the tribe (as stated earlier), many a times their customary laws and practices are interpreted in a manner that favor men.

Challenges and Opportunities

It is clearly visible from the above discussion that, the position of women in the northeast is ironic. They have a prominent position but it is not formally acknowledged. They play an important role in grooming their families (their kids) and they are respected and supported for the same. However, they are not allowed to take the important decisions of their community.²⁰ They have access to the fields and natural resources. Their experiences and knowledge let down to them by their elders is a storehouse of rich traditional knowledge. But, they do not have control over the economic benefits earned from them. And it is an undeniable fact that in today's worlds, economic security is strongly desired for greater control over one's needs. The above scenario though confusing and satirical offers both challenges as well as opportunities in how northeast women can play a key role in tackling the issue of climate change.

17 *Ibid*, at 15.

18 Khwairamand bazaar or the popular name Ima market or Nupi Keithel is the world's only all-women marketplace...a tradition 100 years old. [Refer to, Mithu Choudhury, 'Unique women's market at Keithel, manipur' available at <http://northeastnewsportal.blogspot.in/2013/04/unique-womens-market-at-keithel-manipur.html>, (visited on August 7, 2016).

19 Kamei Pamei Roselima, 'Customary Law and Women in North East India' International Research Journal of Social Sciences (2014) Vol. 3(9), pp. 59-62 available at <http://www.isca.in/IJSS/Archive/v3/i9/9.ISCA-IRJSS-2014-163.pdf>, (visited on July 16, 2016).

20 This conclusion can be further supported through the following secondary sources - <http://morungexpress.com/tribal-customary-laws-and-womens-equality/>; <http://morungexpress.com/women-reservation-versus-naga-customary-law-dialectical-approach/>, (visited on May 1, 2017).

From the literature reviewed so far, it is evident that one of the strongest challenges would be the lack of women's voice in the communities' decision making. If women are given an equal opportunity to voice their concerns and opinions in their respective tribes decision-making process, effective mitigation and adaptation strategies to climate change can be adopted and executed. Women shall also be able to offer effective solutions given the fact that they are chief holders and transmitters of traditional knowledge. Customary practices and taboos that restrict women from being financially independent and maintaining good health is another challenge that needs to be conquered. The lack of control over the property that women inherit and over the monetary earnings from agriculture makes women financially less secure than men. This too can pose a significant challenge.

Rome was not built in a day! Women to secure equal voice in the decision-making process and eradication of sexist practices will take time. It shall be a gradual process, which will demand equal participation of men. However, given the fact that time waits for none, the threat of climate change escalates with time and thus, needs quick redress. The opportunities are small and hidden but they can have significant impact. It is a boon that women in this region have equal access to education. Education can be a game changer. Women in their domestic spheres have control on the choices that can significantly reduce the carbon footprint (for example the choice of fuel, agricultural practices, consumption patterns of family members, educating their children etc.). If through education, women are made aware about climate change, their role, the ways and methods of adapting and mitigating the impacts of climate change, a significant change can be brought. Education shall also ensure that the traditional knowledge is conserved and preserved, which is a vital source of solutions to the problem of climate change. Women's role in the fields (as the farmer) and in the domestic sphere (as the caregiver) shall be enhanced. Eventually, this will also have a trickledown effect, wherein through awareness women will be empowered to take decisions for their community with regard to climate change.

Conclusion

One need not move to far away regions to look for examples to justify the important role that an educated and empowered woman can play in solving grave global issues such as climate change. A nine-year-old Ridhima recently filed a lawsuit against the Indian Government for failing to take adequate action to mitigate the effects of climate change.²¹ India's INDC takes into account its commitment to gender equality and women empowerment for its 1.2 billion people in the recently concluded Paris Agreement. Respecting this commitment, it is an onus on the legislators, the policy makers, the administrators and the judiciary that women are empowered. The customary laws and practices of the northeast India will have to be filtered and moulded to ensure that women in the region are made independent, self-reliant and self-sufficient in all aspects. It is

21 'Girl sues Indian government over inaction on climate change' available at http://en.radiovaticana.va/news/2017/04/07/girl_sues_indian_government_over_inaction_on_climate_change_/1304195, (visited on May 1, 2017).

only then, that they shall be able to effectively contribute towards steps for coping climate change.

Concluding with the words from Leonardo DiCaprio's, 2016 Oscar Acceptance Speech -climate change is real, it is happening right now. It is the most urgent threat facing our entire species, and we need to work collectively together and stop procrastinating. We need to support leaders around the world who do not speak for the big polluters, but who speak for all of humanity, for the indigenous people of the world, for the billions and billions of underprivileged people out there who would be most affected by this. For our children's children, and for those people out there whose voices have been drowned out by the politics of greed...Let us not take this planet for granted.

INTERNATIONAL CRIMINAL COURT AND UNITED NATIONS SECURITY COUNCIL : DECIPHERING THE POWER POLITICS

Saptarishi Dash* & Megha Purohit^φ

ABSTRACT

The road to the formation of the International Criminal Court was a long and a hard one and has been embroiled in many controversies. There is one specific point which in particular sparks most of the friction; i.e., the relationship between the Court and the United Nations Security Council. The ICC is expected to be the primary mechanism for the delivery of international criminal justice. But its functioning is riddled with power-politics. This is especially true in the context of its intricate relationship with the United Nations Security Council. Under Articles 13 and 16 of the Rome Statute, there are provisions of referral and deferral. This has the effect of vitiating the proceedings under ICC as it empowers the UNSC to block, delay and keep the proceedings in abeyance. There have been many instances where the UNSC has impeded the functioning of the ICC as can be seen in Resolutions 1422(2002), 1487(2003), 1497(2003) and 1593(2005). The failure to provide justice in the wake of serious atrocities in Darfur, Libya, Syria and Kenya is an eye opener for the international community. The power-politics at the international level has led to the “selective trial” of cases by ICC. This will be captured in this paper. The paper shall attempt to trace the genesis of the ICC and establish its intricate relationship with the UNSC. It will also try to highlight how power politics has impeded the functioning of the ICC and prevented international justice from materialising into reality.

Key words: Referral, Deferral, UNSC Resolutions, power-politics.

Introduction

Edmund Burke, one of the most famous British Parliamentarians, had noted in 1770 that “All that’s necessary for the forces of evil to win in the world is for enough good men to do nothing.”¹

* Scholar, National School India University, Bangalore, Karnataka (India), e-mail: saptarshidas@nls.ac.in.

φ Scholar, National School India University, Bangalore, Karnataka (India), e-mail: meghapurohit@nls.ac.in.

1 Shimon Shetreet, ‘The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical Conceptual Challenges’, 10(1) Chicago Journal of International Law, (2009) p. 287.

International Criminal Court (hereinafter referred to as ICC), which breathed life in Rome in 1998 and became functional in 2002, is a reflection of decades of struggle of humanity. In 1945 people have made promise; “*for unspeakable horrors of the World War II to repeat never again, yet cruelty of crimes committed worldwide in the years since that wishful promise, surpassed even the darkest moments of the Nazi-era concentration camps.*”²

The growing demands for international criminal justice no longer fell on deaf ears, and bold steps were taken, upholding the legacy Nuremberg Tribunal; ad hoc tribunals like International Criminal Tribunal for Yugoslavia 1993, International Criminal Tribunal for Rwanda 1994, Special Court for Sierra Leone etc.

The essence of adopting the Rome Statute of the International Criminal Court in 1998 was an affirmation “*that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.*”³

This idea was not nascent, but it was a manifestation of a renewed hope of people around the world to assassinate the culture of impunity and faulty justice delivery mechanism.

The importance of ICC lies not only as a harbinger that the gross atrocities which the 20th century witnessed would be eradicated, rather it was the enlargement of jurisdiction; i.e. “*unlike the International Court of Justice (ICJ), which has jurisdiction only over states, the ICC has jurisdiction over individuals.*”⁴

The Conjoint Responsibility of ICC and UNSC

Article 5 of the Rome Statute provides for the jurisdiction of the Court and is enunciated as—“*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression*”⁵

The United Nations Security Council (UNSC) is undoubtedly the most pivotal and potent organ of the United Nations for executing its objective of maintaining peace in the world. It is evident from Article 1 which states “*To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or*

2 Hans Kochler, ‘Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice’, International Progress Organization Online Papers, 7 (2009), available at www.i-po.org/koechler-ICC-politicization, (visited on November 23, 2016).

3 Preamble to the Rome Statute, 1998; available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, (visited on November 23, 2016).

4 Article 25(1) of the Rome Statute 1998.

5 Article 5 of the Rome Statute 1998.

situations which might lead to a breach of the peace."⁶ Article 24 of the Charter grants the Council "*primary responsibility for the maintenance of international peace and security*"⁷

When the International Criminal Court was formed, it was intended to be a "credible, independent judicial body, able to adjudicate the most serious of international crimes fairly and impartially, where national judicial systems have failed."⁸ The same can be elucidated from Article 2(1) of the Relationship Agreement between the UN and the ICC, which was entered into force in October 2004, "*recognized the Court as an independent permanent judicial institution which (...) has international legal personality.*"⁹ Article 2(2) declares the principle that "*The United Nations and the Court respect each other's status and mandate.*"¹⁰

Negotiated Relationship Agreement between the International Criminal Court and the United Nations 2004 - This agreement was brought into force via Article 2 of the Rome Statute, 1998 which states that; "*The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.*"¹¹

This agreement mandates that the relationship between the Security Council and ICC be cordial; so that they can materialise into reality international peace and security and that justice is meted out to all the war crime victims. Perhaps the two most important articles are Article 15 which deals with General provisions regarding cooperation between the United Nations and the Court and Article 17 dealing with "*Cooperation between the Security Council of the United Nations and the Court.*" Article 15(1) provides that "*With due regard to its responsibilities and competence under the Charter and subject to its rules as defined under the applicable international law, the United Nations undertakes to cooperate with the Court and to provide to the Court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Statute.*" Article 17 is perhaps one of the most important articles of the agreement and captures the crux of Articles 5, 13 and 16 of the Rome Statute 1998 which will be discussed in the subsequent chapters.

The UNSC and ICC : Inherent 'Power Politics'

The Existence of a Paradox-There seems to be a paradox as pointed out by Phillip Kastner, "*On the one hand, a closer relationship between the power-politics of the UN Security Council and the ICC diminishes the quality and legitimacy of justice; On the other hand, without cooperation between the UN*

6 Article 1 of the Charter of the United Nations 1945.

7 *Ibid*, Article 24.

8 Arash Abizadeh, '*Introduction to the Rome Statute of the International Criminal Court*', 34(2) World Order, 20 (2002), available at <http://profspolisci.mcgill.caabizadehPDFs/ICC.pdf>, (visited on December 3, 2016).

9 Preamble to Negotiated Relationship Agreement between the International Criminal Court and the United Nations 2004.

10 Article 2(2) of the Charter of the United Nations 1945.

11 Article 2 of the Rome Statute, 1998, available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, (visited on December 3, 2016).

Security Council and the ICC, or in other words, without pursuing justice through power-politics, some of the worst international crimes would never be tried."¹²

A common question which always crops up is as to what can be the implications when the UNSC refer matters to the ICC. Scholars purport that during the discussions at Rome to establish ICC, the most vociferous voices who were in support of establishing the Court wanted to make sure that the ICC would not be plagued by the "*power-politics of the UN Security Council.*"¹³ Henceforth, there was materialisation of a compromise which entitled the Court's Prosecutor three modes by which he can initiate an investigation: "*by state referral, Proprio motu (through the Prosecutor's own volition) and by UN Security Council referral.*"¹⁴

But many States were skeptical of this and dubbed this as a costly compromise. Many States and human rights organizations vehemently argued that there must be clear demarcation of politics and justice for attainment of justice. Geraldine Coughlan noted that "*The so-called Trias Politica—the separation of power between politicians and the judiciary is more absent than present in international criminal law.*"¹⁵

Similarly, Louise Arbour, who was the former chief Prosecutor for the ICTY and the ICTR, pointed "*...international criminal justice cannot be sheltered from political considerations when they are administered by the quintessential political body: the Security Council. I have long advocated a separation of the justice and political agendas, and would prefer to see an ICC that had no connection to the Security Council. But this is neither the case nor the trend.*"¹⁶

Accordingly, Prof. Benjamin Schiff very imaginatively described the referral as the Court's "*second poisoned chalice*".¹⁷ Their argument is clear as well as sensible; i.e., for international criminal justice to be credible and legitimate, its need for separation from politics is urgent.

Lack of Cooperation and Non-Enforcement of Arrest Warrants - A standout amongst the most vital variables central for the best possible working of the ICC is the participation of states and authorization of choices by the Security Council. Since the ICC does not have any authorization forces of its own, participation of States is the quintessential component that enforces the Court's decisions. The difficulties of participation are multifaceted, including the referrals of the

12 Phillip Kastner, '*The ICC - Savior or Spoiler? Potential Impacts of International Criminal Justice on Ending the Darfur Conflict*', 2007, available at <http://digitool.library.mcgill.ca/thesisfile18691.pdf> (visited on December 25, 2016).

13 Shimon Shetreet, '*The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical Conceptual Challenges*', 10(1) Chicago Journal of International Law, (2009) p. 287.

14 Silva Kantareva, '*How Does the United Nations Security Council Affect International Justice?*', 2009, available at <http://hausercenter.org/jhr/2009/07/23/on-international-justice-and-the-united-nations-securitycouncil/> (visited on December 16, 2016).

15 *Ibid.*

16 Mark Kersten, '*The ICC and the Security Council: Just Say No*', 29 Justice in Conflict, 27 (2012), available at <http://justiceinconflict.org/2012/02/29/the-icc-and-the-security-council-just-say-no/>, (visited on December 12, 2016).

17 *Ibid.*

Security Council and subsequent follow up which are pivotal to enforcing the Court's decisions.¹⁸

Inconsistency of Article 13(b) with Customary International Law

Article 13(b) of Rome Statute states the following “*The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.*”¹⁹

The referral by the UNSC is glaring in the context of international customary law. This can be understood by the objectives of the UNSC. Article 25 of the United Nations Charter specifies that the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. The Members of the United Nations accept the decisions of the UNSC because it acts on their behalf in carrying out its “*responsibility for the maintenance of international peace and security.*”²⁰

However, the UNSC does not override customary international law and it is guided by its precepts. In this context, it is to be examined whether the referral contemplated in article 13(b) is in conformity to the customary international law.

For a new international customary law to be begotten, it must conform to criteria laid down in the landmark case of *Germany v. Denmark and the Netherlands*,²¹ colloquially known as the *North Sea Continental Shelf* cases. It means that the referral by the UNSC requires a settled practice that is accompanied by the *opinio juris sive necessitates* “*an opinion of law or necessity*”.²² So now the question arises as to whether the referral subscribes to this test. But this practice of UNSC does not amount to a settled practice because it can be vetoed by one of the permanent members. The relationship between the ICC and UNSC is startling because of the five permanent members; only Great Britain and France have ratified the Rome Statute, while the others; namely; the USA, Russia and China, have not. What provides more credence is the fact that USA has entered into “*impunity or bilateral agreements*” with 73 countries, by which no United States citizen may be surrendered to the ICC.²³

This manifest circumvention to the Rome Statute highlights that the Statute is “*not generally accepted practice and is not part of general international law.*”²⁴ So, it can be stated that the Security Council's relationship with the functioning of the ICC, is intricately linked with the actions of the permanent members.²⁵ It is also pertinent to note that that 60% of the permanent members are not parties to the Rome Statute.

18 *Ibid.*

19 Article 13(b) of the Rome Statute 1998.

20 Article 24 of the Charter of the United Nations 1945.

21 *Germany v. Denmark and the Netherlands* [1969] ICJ 1.

22 Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 1st ed. 2003 p. 10.

23 Daniel D Ntada Nsereko, ‘*Triggering the Jurisdiction of the International Criminal Court*’, 4 *African Human Rights Law Journal*, 2004, p. 261.

24 *Ibid.*

25 Abass, Ademola, ‘*The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*’, *Texas International Law Journal*, 2007, p. 23.

In the case of *United Kingdom v. Norway*,²⁶ popularly known as the Anglo-Norwegian Fisheries case; Norway contended that Norway cannot be bound by rules which were not rules of general international law. These rules could not be obligatory for Norway as long as Norway unequivocally and manifestly objected to them.

In this context, it is permanent that in the Darfur referral; Sudan objected to the rules of Rome Statute. In addition; the African Union, the Arab states and the Organisation of the Islamic Conference have refused the indictment and the arrest warrant. Also; scholars state that; “*by no chance this will amount opinio juris sive necessitatis particularly many writers are doubtful about the integrity of the Court and other scholars consider the court is politicized and was designed for Africa as a new era of colonialism.*”²⁷

Article 13(b) of Rome Statute affects the sovereignty of a non-State party to the Statute. Sudan is not a signatory party to Rome Statute. So, it can be said that exercising jurisdiction over Sudan is in violation of the Vienna Convention on the Law of Treaties of 1969, and for this reason, violates international law and the principle of *pacta sunt servanda*, pacts must be respected.²⁸ Since international law is founded on the principle on the equality of states; then the resolution contradicts the doctrine of *par in parem non habet imperium* “*for an equal has no authority over an equal*”.

Article 16 and Independence and Autonomy of ICC

Threat to The International Peace and Security - The Charter of the United Nations under Chapter VII clearly states that it is the prerogative of the Security Council to determine whether a particular situation is satisfying the requirements of Article 39 of the UN Charter. So, a question can be raised as to whether the ICC “*could undertake a separate assessment of the validity of a deferral resolution under Chapter VII, given the requirements of Article 16?*”²⁹

If one peruses the *ratio legis* of Article 16, it is impossible to contemplate the contingency of the ICC having the power to challenge the UNSC determination. If the power to challenge the UNSC determination is granted to the ICC, it would negate the basic essence of Article 16 because it would then empower the Court to investigate whether or not the conditions set up in Article 16 are satisfied. This is a glaring example of the ensuing power politics in the international sphere.

Temporal Scope and Length of the Deferral - Another issue which makes the UNSC’s deferral highly controversial is its temporal scope. The words used in the provision of Article 16, i.e., “*no investigation or prosecution may be commenced or proceeded*” is a clear indication that when the other conditions are met, the UNSC has the prerogative to invoke Article 16. The Statute does not define investigation and prosecution. However, a conjoint reading of Articles 15(3) and 53 (1) highlights that an investigation is initiated when the Prosecutor considers that there is a reasonable basis to do so. So, it can be stated that it is vividly clear that if the Prosecutor takes steps during a preliminary

26 *United Kingdom v. Norway* [1951] ICJ 3.

27 Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 1st ed. 2003, p. 10.

28 Article 26 of Vienna Convention on the Law of Treaties of 1969.

29 Robert Cryer, ‘*Sudan, Resolution 1593, and International Criminal Justice*’, 19 *Leiden Journal of International Law*, 2006, p. 196.

examination, *i.e.*, prior to the initiation of an investigation; it cannot be prevented by the UNSC.

In this context, the first uses of Article 16 deferral were pre-emptive and abstract as no investigation was initiated or initiation was not even imminent. This was the situation with Resolutions 1422 (2002) and 1487 (2003). So, Article 16 was vaguely used by the UNSC.³⁰

Independence of ICC - The more glaring fact is that Article 16 can be used to *suspend* an investigation or a prosecution. The UNSC; being an international executive body has the power to interfere with the judicial proceedings and is a clear manifestation that Article 16 is a stumbling block for the independence of the Court.

Analysis of United Nations' Resolutions

Resolution 1593 of 2005 - Resolution 1593 the UNSC was pervaded with incoherency under three broad heads:

(i) Ambiguity of Chapter VII - Firstly; it was not crystal clear as to under which provision or provisions of Chapter VII of the United Nations Charter was the UNSC was acting. The Resolution simply mentioned that the UNSC was acting under Chapter VII of the United Nations Charter.

(ii) Imputing Liability on Non-Party States - Secondly, Paragraph (2) of the Resolution stated "*the Government of Sudan and all other parties to the conflict in Darfur are required to cooperate fully with and provide any necessary assistance to the Court and to the international prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.*"³¹

By virtue of Article 86 and subsequent provisions of Part IX of the Statute which relates to International Cooperation and Judicial Assistance, only State parties to Rome Statute are under obligation to cooperate with the Court. But the inclusion of all states in Paragraph 2, the referral has imputed liability on non-party States to cooperate with the court.³² Though this might have the effect of advancing the cause of international justice, but at the same time it makes no distinction between parties and non-parties to the Convention.

Contradiction of Article 115 of the Rome Statute - Thirdly, in terms of paragraph 7 of the Resolution, the UNSC decided that, "*the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, will not be borne by the UN.*" Though this may act as deterrence to other countries; but it is in contravention of Article 115 of the Rome Statute which states "*The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:.....b) Funds provided by the United Nations, subject to the approval of*

30 Andrew T. Cayley 'The Prosecutor's strategy in seeking the arrest of Sudanese President Al Bashir on Charges of Genocide', 6(5) Journal of International Criminal Justice, 2008, p. 830.

31 Resolution 1593 of 2005, available at <https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>, (visited on December 30, 2016).

32 Peter Quayle, 'Syria and the Arab Spring: International Criminal Law after a UN Veto', 20 Justice in Conflict, 2012, p. 17.

the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.”

United Nations Security Council Resolution 1422 (2002)

This resolution was adopted unanimously by the Security Council on 12 July 2002. The Security Council granted immunity from prosecution by the International Criminal Court (ICC) to United Nations peacekeeping personnel from countries that were not party to the ICC.³³ It was a highly controversial resolution as it was passed at the insistence of the United States, which had threatened to veto the renewal of all United Nations peacekeeping missions (including the renewal of the United Nations Mission in Bosnia and Herzegovina passed the same day) unless its citizens were shielded from prosecution by the ICC.³⁴ The Council noted that “...*If a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting July 1, 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.*”³⁵

United Nations Security Council Resolution 1487 (2003)

The Council granted one-year extension for immunity from prosecution by the International Criminal Court (ICC) to United Nations peacekeeping personnel from countries via this resolution, that were not party to the ICC, beginning on 1 July 2003.³⁶ The resolution was also passed at the vociferous insistence of the United States. It was entered into force July 1, 2003 for a period of one year. It is worth noting that France, Germany and Syria had abstained from voting, arguing there was no plausible justification to renew these measures. But, the Security Council refused to renew the exemption again in 2004 after pictures emerged of U.S. troops abusing Iraqi prisoners in Abu Ghraib, and the U.S. withdrew its demand.³⁷

United Nations Security Council resolution 1497 (2003)

This Resolution was adopted on August 1, 2003, after expressing concern at the situation in Liberia, the Council authorised a multinational force to intervene in the civil war to support the implementation of a ceasefire agreement using all necessary measures.³⁸ The resolution was adopted by the Security Council by 12 votes to none. The three absentees were France, Germany and Mexico. The

33 For some scholars, Resolution 1422 is not only controversial and politically motivated, but it is also invalid and illegal because it violates the UN Charter, many UN treaties as well as the international customary law including *jus cogens*. Aly Mokhtar, *The fine art of arm-twisting: the US, Resolution 1422 and Security Council deferral power under the Rome Statute*, 3 International Criminal Law Review, (2003) p. 343.

34 Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, available at <http://ejil.org/pdfs/14/1/410.pdf>, (visited on December 21, 2016).

35 Paragraph 1, Resolution 1422(2002) of the United Nations Security Council, available at <http://www.amicc.org/docs/SCres1422.pdf>, (visited on December 25, 2016).

36 Paragraph 1, Resolution 1487(2003) of the United Nations Security Council, available at <http://www.amicc.org/docs/1487.pdf>, (visited on December 29, 2016).

37 Eric Donnelly, *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES*, 1st ed. 2004, p. 420.

38 Ademola Bass, *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*, Texas International Law Journal (2005).

reason was that the three countries albeit affirmed the intervention but at the same time were opposed to the demands of the United States in the earlier resolutions of 1422 of 2002 and 1487 of 2003 that exempted soldiers from countries not party to the Rome Statute of the International Criminal Court (ICC) from its jurisdiction.³⁹

The Security Council stressed the need to create a secure environment with respect for human rights, humanitarian workers and the well-being for civilians, including children. It recalled the obligation of the Liberian parties to the ceasefire agreement signed in Accra, Ghana on 17 June 2003 and of demands contained in Resolution 1343 (2001) to prevent armed groups from using the territory of states to attack others and destabilise the border regions between Guinea, Liberia and Sierra Leone.⁴⁰ Acknowledging that the prevailing conditions in Liberia posed a threat to international peace and security, the Council appreciated the efforts of the Economic Community of West African States (ECOWAS).⁴¹

Double Standards Approach of UNSC

It is often stated that UNSC follows a double standards approach and it can be said that this approach is migrating into the functioning of the ICC. The Israel-Palestine conflict led to perpetration of massive war crimes in the Gaza strip. Amnesty International stated on 30 June 2006 that deliberate attacks by Israeli forces against civilian property and infrastructure in the Gaza Strip violate international humanitarian law and constitute war crimes.⁴² John Dugard in an address to a special session of the United Nations Human Rights Council confirmed that the Israeli actions are in violation of the most fundamental norms of humanitarian law and human rights law.⁴³ But, the UNSC has given a deaf ear to it and has neither referred the situation in Gaza to the Court nor has the Prosecutor initiated investigation against Israeli war criminals.⁴⁴ If we view this from the North-South divide, Mahmood Mamdani questions the fact that the unarmed people killed in Darfur is labelled with genocide and the killing of civilians in Iraq under the pretext of 'War on Terror' is not.

Jean Ping, the former African Union Commission Chairman expressed the position of the AU as follows "*African Union's position is that we support the fight against impunity, we cannot let crime perpetrators go unpunished. But we say that peace and justice should not collide, that the need for justice should not*

39 *Ibid.*

40 UN Security Council, '*Resolution 1487 of 2003*'; available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20SRES%201497.pdf>, (visited on December 30, 2016).

41 Hans Köchler, '*Double Standards in International Criminal Justice: The Case of Sudan*, International Progress Organization', (2005) p.1, available at <http://i-p-o.org/Koechler-Sudan-ICC.pdf>, (visited on December 23, 2016).

42 *Ibid.*

43 Daniel D Ntanda Nsereko, '*Triggering the Jurisdiction of the International Criminal Court*', 4 African Human Rights Law Journal, 2004, p. 261.

44 Hans Köchler, '*Double Standards in International Criminal Justice: The Case of Sudan*, International Progress Organization', (2005) p.1, available at <http://i-p-o.org/Koechler-Sudan-ICC.pdf>, (visited on December 23, 2016).

*override the need for peace.*⁴⁵ He pointed out the fact that Africa was being selectively targeted by the Court. He said that what we see is that international justice seems to be applying its fight against impunity only to Africa as if nothing were happening elsewhere, (such as) in Iraq, Gaza, Colombia or in the Caucasus.⁴⁶ A vivid example is that of The Prosecutor filing an arrest warrant for Al-Bashir, and the international responses to his decision, which demonstrates both the politicising of the crisis and the ‘selectiveness’ of international law.

The power politics and inability of the ICC to punish all war criminals frustrates the purposes and principles of the UN Charter itself. The UN was founded on the principle of equal rights and self-determination of people, and to take other appropriate measures to strengthen universal peace.⁴⁷ Moreover, the UN is based on the principle of the sovereign equality of all its Members. Nevertheless, the Court and the countries of the north opt for impinging on the sovereignty of the countries of the south.

Security Council Declination to Defer Investigations

Kenyan Investigation - Kenya had implicitly affirmed to the ICC’s jurisdiction by ratifying the Rome Statute. There was an International Commission of inquiry which was formed by the government of Kenya to take cognizance the atrocities during the December 2007 Presidential election. The said International Commission recommended establishment of a special tribunal to prosecute the perpetrators of the alleged violations.⁴⁸ When the deadline consented by the Government of Kenya and the ICC Prosecutor for Kenya as the date to initiate prosecutions lapsed in September 2009; as a result of the Parliament’s failure to formally institute a tribunal, the Prosecutor started the ICC investigation on the basis of the evidence that he had gathered. This was a landmark occasion as it was for the first time an investigation was commenced independently; i.e. without a referral from the government of a country or from the Security Council. Starting at the end of 2010, Kenya wanted the Security Council to defer the investigation under Article 16 of the Rome Statute, arguing that such cases could be adjudged by a credible local mechanism. This proposal was also supported by the African Union in January 2011, and resulted in the Council engaging in a dialogue with Kenya on 18 March, 2011, and a subsequent informal discussion on 8 April, but did not yield any fruitful conclusion and the Council did not take any action.⁴⁹

Kenya adhered to the required procedure of challenging the admissibility of ICC investigation under Article 19 of the Rome Statute claiming the ground of potential domestic prosecution, but this was openly rejected by an ICC Pre-Trial

45 Charles Chernor, ‘*An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC*’, Institute for Security Studies, 5 (2010), available at www.iss.co.za/uploads/positionpaper_icc.pdf, (visited on December 7, 2016).

46 *Ibid.*

47 Preamble to the Charter of the United Nations 1945.

48 David Scheffer, ‘*The Security Council’s Struggle over Darfur and International Justice*’, Jurist Legal News and Research, 2008, p. 17.

49 Charles Chernor, ‘*An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC*’, Institute for Security Studies, 5 (2010), available at www.iss.co.za/uploads/positionpaper_icc.pdf, (visited on December 7, 2016).

Chamber in May 2011. The Pre-Trial Chamber then subsequently permitted the ICC trials to be initiated against four indicted Kenyan political leaders.⁵⁰

The glaring example of Syria - A glaring example is the Council's refusal to refer the grave situation in Syria to the ICC, despite the existence of all the requisites that were prevalent in Darfur and Libya. Starting in March 2011, protestors have been killed in thousands by Syrian security forces, with the number of people who were detained and tortured sky-rocketing. A special session of the United Nations Human Rights Council (HRC) in April 2011 condemned the use of lethal violence against peaceful protesters by the Syrian authorities and mandated the Office of the High Commissioner for Human Rights (OHCHR) to initiate an investigation.⁵¹

A presidential statement by the Security Council on 3 August condemned the widespread violations of human rights and the use of force against civilians by the Syrian authorities and said those responsible for the violence should be held accountable.⁵² After perusing the report of the OHCHR mission, the High Commissioner urged the Security Council in the month of August, 2011 to refer the situation in Syria to the ICC. There were States who were drafting a Security Council resolution on Syria in August and they initially proposed a reference noting the recommendation of an ICC referral, but this was vetoed by Russia and China in October.

Way Forward : Opportunities and Strategies for Action

Some robust steps are needed to improve the working relationship between the ICC and the Security Council. These steps are mostly procedural. Taken together, these won't just fortify the ICC and advance the goal for international justice, but will also clarify the policies of the Security Council and increase its leverage vis-à-vis the threat or actual use of international accountability mechanisms such as the ICC.⁵³

Arrest Strategies - The domain where the Security Council can seemingly give the most powerful support to the ICC is the 'enforcement of arrest warrants'. In the circumstances when the Security Council has referred to the ICC, what is startling is there are hardly any arrests. Sudan has blatantly defied the directions of the ICC. The Sudanese government has not arrested the persons implicated in the commission of atrocities in Darfur, and President Omar al-Bashir has been visiting many nations; including countries who are parties to the ICC and who are therefore, legally obliged to implement the ICC arrest warrants. However, it is to be noted that the Republic of Malawi in the year 2012, acknowledged its commitments under the Rome Statute and denied Omar al-Bashir entry into its territory.⁵⁴

50 John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', 11(2) Pace International Law Review, 1999, Vol.11, Issue 2, p. 364.

51 Ginsburg, Tom, 'The Clash of Commitments at the International Criminal Court', Chicago Journal of International Law, 2008, p. 10.

52 Kurt Mills, 'Bashir is Dividing us: Africa and the International Criminal Court', 34 (2) Human Rights Quarterly, 2012, p. 444.

53 Jennifer Rahan, 'The Relationship between the International Criminal Court and the UN Security Council: Parameters and best practices', 24 Criminal Law Forum, 2013, p. 433.

54 *Ibid.*

The other side of the coin : Security Council support to ICC - The difficulties standing up to the ICC transcend the topic of arrest warrants. It is a general requirement for soundness in the strategies of Security Council on inquiries of international responsibility and accountability and the ICC. Being the international authority; in any event in the circumstances that a referral has been made to the ICC by means of Chapter VII of the UN Charter; the Security Council is in charge of guaranteeing that the ICC can complete its work. Beyond the arrest warrants, the Council can utilize the plethora of diplomatic and coercive instruments available to it.

Action outside of the Security Council - The vast majority of the proposals that have always been mooted are solely focused at the Security Council. Be that as it may, a considerable measure should be possible from the outside looking in to ensure these suggestions are executed. It is improbable that they will be acknowledged without a conjoint effort by all stakeholders; including civil societies, states parties, and the court itself.⁵⁵

Requirement of a Follow up - There is an urgent need for a 'Follow-up' by the Security Council once a referral has been made. When the Security Council does not utilize the forces available to it to propel the reason for equity, the justice which the ICC can accomplish when left to its own instruments is extremely constrained. The absence of progress in the circumstances in Darfur and Libya show these difficulties practically speaking, especially as to non-authorization of capture warrants. At the point when Prosecutor Fatou Bensouda presented the sixteenth report of the ICC to the Security Council on the conditions in Darfur, she voiced her disappointment at the absence of support from the Council that "*My Office and the Court as a whole have done their part in executing the mandate given by this Council in accordance with the Rome Statute. The question that remains to be answered is how many more civilians must be killed, injured and displaced for this Council to be spurred into doing its part?*"⁵⁶

The referrals by the Security Council also narrowly define the requirements for states to cooperate with the court in a way that is analogous to the aspects of jurisdiction and financing. The reality is that Security Council decisions which refer cases to the ICC must be passed under Chapter VII of the UN Charter. All things considered, the decisions are final and binding for all the UN state parties.

The independence and the autonomy of the ICC is in a quagmire because of alleged selective practice⁵⁷ executed by the UNSC, via its system of referrals and deferrals. The temporal scope of article 16 should be reduced so as free the ICC proceedings from UNSC interferences on the commencement of the trial.

In order to avoid the perception of double standards principle, an effort to secure more ratification should be attempted.

55 Neha Jain, 'A separate Law for Peacekeepers: The clash between the Security Council and the International Criminal Court', 16(2) The European Journal of International Law, 2005, p. 254.

56 Fatou Bensouda, 'Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, Pursuant to UNSCR 1593 (2005)', speech delivered to the Security Council, December 13, 2012, available at www.icc-cpi.int/iccdocs/PIDS/statements/UNSC1212/UNSCDarfurSpeechEng.pdf, (visited on January 2, 2017).

57 Daniel D Ntada Nsereko, 'Triggering the Jurisdiction of the International Criminal Court', 4 African Human Rights Law Journal, 2004, p. 261.

Conclusion

For international justice to be materialised, the ICC should be free from power politics. As long as the power politics plays a role in the UNSC's practice of referral and deferral; international justice will not be materialised into reality.

As already pointed out in the previous chapter, there needs to actions outside of the UNSC and there is an urgent need for follow-up. A deferral cannot be in abeyance for *ad infinitum*. There has to be concrete actions in order to ensure that the trials can be conducted smoothly without any backlog or delay.

The UNSC, instead of being engrossed in the power politics should devise an accountability strategy which is coherent, should apply uniform standards and should utilise the plethora of diplomatic tools which are at its disposal. Finally, the UNSC should be apt in executing the arrest warrants. The UNSC should not circumscribe the jurisdiction of the ICC but rather aggrandize it by enabling it to enforce its decisions.

At the same time, it is the responsibility of the ICC to ensure that the justice delivery mechanism is not vitiated by the UNSC's practice of referrals and deferrals. Only if the UNSC and ICC duly perform their conjoint responsibility; only then can international justice can be materialised into reality. So, only with the conjoint function of the ICC and UNSC can international justice be materialised to reality.

OBSCENITY AND FREEDOM OF SPEECH AND EXPRESSION

Niharika Behl* & Gargi Singh^φ

ABSTRACT

Freedom of speech and expression is a God's gift to mankind, a natural right, which it acquires on birth. Reasonable restrictions under Article 19(2) can be imposed on this fundamental right when the subject matter or contents are found to be obscene in nature in other words, against decency and morality. Decency and morality are very subjective and shall only be imposed by the courts on case to case basis after deeply scrutinizing the facts and circumstances of each case. Obscenity as defined by Supreme Court is the quality of being obscene which means offensive to modesty or decency; lewd, filthy or repulsive. Obscenity is often confused with nudity, indecency and sex. A vulgar writing or nudity is not necessarily obscene in nature. An author's work is not considered to be obscene until the impugned matter appeals an unhealthy, inordinate person having perverted interest in sexual matters. Freedom of expression is of inestimable value in a democratic society based on the rule of law and has to be judged from the standards of reasonable strong minded, firm and courageous man. In this paper an earnest attempt will be made to explain how obscenity is different from indecency and morality and how nudity and vulgarity are not necessarily obscene in nature. It will be explained that how Indian courts have interpreted the term Obscene and what test is applied before declaring a piece as obscene. It will highlight the fact that the society should broaden its spectrum and inculcate unpopular views.

Keywords- *Vulgarity, nudity, morality, obscenity, reasonable restrictions*

Introduction

A bar to freedom of speech and expression comes from obscenity. Most of the times, the word obscenity is misinterpreted. Obscenity as per psychology has a tendency to deprave the human mind to such an extent that it leads to an overt misbehavior. Obscenity is punished because by its very nature it prepares a ground for 'mens rea' requisite in other offenses or it jeopardizes the moral texture of a society which is essential for the progress of any country.¹ In nutshell, it can be said that obscenity is punished on amount of its grossly offensive nature

* Student, University of Petroleum and Energy Studies, B.A.LL.B.(Hons.), e-mail-niharikabehl3@gmail.com.

φ Student, University of Petroleum and Energy Studies, B.A.LL.B.(Hons.), e-mail-singh.gargi0496@gmail.com.

1 Inder S. Rana's LAW OF OBSCENITY IN INDIA, USA and UK, 1st ed. 1990.

and it is productive of feelings of shock, disgust, shame and revulsion.² The Supreme Court has defined obscenity as the quality of being obscene which means offensive to modesty or decency; lewd, filthy or repulsive.³ A publication is said to be obscene when on being read as a whole, it has a tendency to deprave and corrupt the minds of individuals and generate prurient feelings among individuals.

The statutes which put a bar on the freedom of speech and expression on the grounds of indecency and immorality include-

- (i) Section 292 and 293⁴ of Indian Penal Code makes obscenity a punishable offense.
- (ii) The Cinematographic Act 1952⁵ censors the content which is indecent or immoral.
- (iii) The Dramatic Performances Act 1876⁶ prohibits obscene public performances.
- (iv) Section 11 of the Customs Act 1962⁷ empowers the government to control import and export of goods on grounds of morality and indecency.
- (v) Section 67 of Information and Technology Act 2000⁸ penalizes publication of obscene material on the internet.
- (vi) The Young Persons Act 1956⁹ prevents publication of material which could corrupt a young person or a child and induce him to commit a crime, cruelty, etc.
- (vii) Section 20 of the Post Office Act¹⁰ prevents transmission of any obscene material and The Indecent Representation of women Act prevents any indecent representation of women through advertisements, social media, etc.

These are the most prevalent statutes through which a bar on obscenity is put. The subject matter of obscenity is very extensive in nature but the main objects include literature, cartoons and photography, films, pornography and other erotic material. The Indian courts have held that obscenity confers a strict liability on an individual. It was observed in the case of *Ranjit D. Udeshi*¹¹ that proof of knowledge of obscenity is not necessary. Even though there was no direct evidence of the requisite '*mens rea*' on the part of the bookseller, he was held guilty and convicted for selling obscene content.

The Obscenity Tests

There is no uniform test which has been adopted by the Indian courts and it all depends on the case to case basis i.e. on the facts and circumstances of each case. The court has though with the help of various judgments laid down certain

2 *Ibid.*

3 *Ranjit D. Udeshi v. State of Maharashtra* AIR 1965 SC 881, para 7, p. 885.

4 Sub-section(s) 292 and 293, the Indian Penal Code 1960.

5 The Cinematographic Act 1952.

6 The Dramatic Performances Act 1876.

7 Section 11, the Customs Act 1962.

8 Section 67, the Information and Technology Act 2000.

9 The Young Persons Act 1956.

10 Section 20, the Indian Post Office Act 1898.

11 *Ibid.*

guidelines and parameters with the help of which a certain publication is labelled as obscene. The various tests include:-

- (a) **Hicklin's test** - The oldest case of obscenity *i.e.* *Ranjit D. Udeshi*¹² was decided on the basis of the very old English test called the Hicklin's test. The Hicklin's test was laid down in the case of *R v. Hicklin*¹³ where something is termed as obscene when it has a tendency to deprave the minds of those people in whose hands the matter is likely to fall. In *Samaresh Bose v. Amal Mitra*¹⁴ while applying the test the court observed that the judge should place himself in the position of a reader of every age group in whose hands the book is likely and should try to appreciate what kind of possible influence the book is likely to have in the minds of the reader. The subjectivity became visible when the Supreme Court, in the case of *C.K. Kakodar v. State of Maharashtra*,¹⁵ applied the Hicklin Test. To identify the obscenity in the story, it examined the theme of the story, the main protagonists, and the 'artistic merit' in it.

The other test that has been used by the court is the likely audience test.

- (b) **The Likely Audience Test** - The Hicklin test was replaced by the likely audience test in which the test was what kind of effect the publication is going to have on the likely audience and not what effect it's going to have on the person in whose hands the book is likely to fall. In *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*,¹⁶ the SC observed that Contemporary and moral standards as well as the effect on viewer, especially young and adolescent are the relevant factors, in determination of obscenity. A film has to cater to the tastes of different kinds of people and thus, different topics are covered, before the film ends. Therefore, the ultimate reaction when the film ends and whether it offends any strata of the society are the two crucial factors to be considered while pointing out obscenity.
- (c) **Ruth/Miller test** - In *Roth v. United States*,¹⁷ Court applied a new test for obscenity, which was whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest. This is known as Ruth test of obscenity. The Roth test was further expanded when the Court decided *Miller v. California*¹⁸ case. It is commonly known as Miller test. Under the Miller test, a work is obscene if it would be found appealing to the prurient interest by an average person applying contemporary community standards depicts sexual conduct in

12 *Ibid*, at 8.

13 (1868) 3 QB 360.

14 (1985) 4 SCC 289.

15 (1969) 2 SCC 687.

16 *Ibid*.

17 *Roth v. United States* 354 US 476 (1957 Supreme Court of the United States).

18 Community Standards, Class Actions, and Obscenity under *Miller v. California*, 88 Harvard Law Review 1838, 1874(1975), available at <http://www.jstor.org/spicework.dn.upes.ac.in:2048/stable/1340209>, (visited on October 10, 2016).

a patently offensive way and has no serious literary, artistic, political or scientific value.

These tests indicate that the text or the publication should be seen in its entirety and the same view has been taken in the Cinematograph Act where it prescribes under section 3(1) that the film shall be observed in its entirety in order to point out obscenity.

(d) **Prudent ordinary man test** - The test of obscenity should be done out of a prudent and sensible man and not out of a hypersensitive man. This test was laid down in the case of *S. Rangarajan v. P. Jagjivan Ram*¹⁹ where the stress was laid down on the point that the content should be of such a nature that it depraves the ideologies of a prudent man and not a hypersensitive man.

These are a few tests which have been performed by the Indian courts while interpreting obscenity out of which some of the tests failed. Towards the end it can be concluded that the interpretation differs on the basis of facts and circumstances of each case.

Decency and Morality : Exceptions to Article 19(1)(a)

Obscene publications are considered to be indecent and immoral and are against public policy and hence put a bar on freedom of speech and expression. Concepts of morality and indecency are relative in nature and are very vague to define. Morality as per Merriam Webster is defined as beliefs about what a right behavior is and what a wrong behavior is. The definition itself talks about two things: - (a) belief or set of beliefs (b) behavior. The system of belief and set of beliefs is truly a relative concept if we refer to any psychological jurisprudence but when we come to behavior it is dependent upon those belief systems that are so determined by us in our own mental psychological state of mind. Hence if set of beliefs are itself relative then actions upon it will also be relative in the concept.

Immorality by itself is not a ground of constitutional challenge and it obviously cannot be, because morality is a subjective concept, except in so far as it may be reflected in any provision of the Constitution or may have crystalized into some well-accepted norm of special behavior. Morality and decency are behavioral norms and differ from one society to another and the same viewpoint was taken in the case of *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*,²⁰ where the Hon'ble SC observed that 'notions of morality vary from country to country depending on the standards of contemporary society'. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book²¹. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries.²² Even the outlook of the judge may differ from another judge on the question of obscenity in as much as even in the matter of objective assessment the subjective attitude of the judge hearing the matter is likely to influence though

19 1989 SCC (2) 574.

20 (1969) 2 SCC 687.

21 (1969) 2 SCC 687.

22 *Ranjit D. Udeshi v. State of Maharashtra* AIR 1965 SC 881, para 7, p. 885.

unconsciously his mind and his decision on the question.²³ As the society is dynamic in nature, its norms and standards change from time to time. Something that is acceptable today might not have been acceptable in the past. For instance in the past, Mrs. Annie Besant and Mr. Bradlaugh were convicted for advertising contraceptives in order to initiate family planning.²⁴ There was a very interesting case called *Nandini Tewari v. Union of India*²⁵ wherein while dealing with a Public Interest Litigation seeking direction, inter alia, to the respondent to delete the word “fanny” from everywhere it appears/ed in the film ‘Finding Fanny’ on the ground that it will hurt the feelings of citizens of India, have inter alia held that if any such restrictions were imposed, the same could affect the constitutional right of the film maker and that our society is a very mature society and that there is no need to be so sensitive about such a thing. The PIL was filed on grounds that the word Fanny has a very indecent meaning in the English dictionary, but the court observed that in the developing country like India, their live mature people and there is no need to be sensitive on just a word. Further the Supreme Court in *S. Khushboo v. Kanniammal*²⁶ observed that ‘Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as ‘decency and morality’ among others, we must lay stress on the need to tolerate unpopular views in the socio-cultural space. The Framers of our Constitution recognized the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance in the political sense, we must also promote a culture of open dialogue when it comes to societal attitudes.²⁷ This can be summed up by making a reference to a line said by D.H. Lawrence where he said that “*what is pornography to one man is the laughter of genius to the another.*”²⁸

Obscenity, Nudity, Right to Know and Article 19(1)(a) : With Respect to Restrictions

Nudity and right to know with reference to Article 19(1)(a)- Mere reference to sex and sexual implications though may be nude but might not always amount to obscenity. Pornography is totally different from a movie containing nude sense. The nude scenes may or may not generate prurient feelings and can be for awareness per se but pornography in contravention to this generates prurient and lascivious feelings and possesses a tendency to deprave and corrupt the mind of the person viewing it. Similar view was taken in *Maqbool Fida Husain v. Raj Kumar Pandey*²⁹ where it was observed that the contention that the legal test of obscenity is satisfied, it is said so only when the impugned art / matter can be said to appeal to a unhealthy, inordinate person having perverted interest in sexual

23 *Ibid.*

24 *Exparte Jackson*, 96, U.S .727(1878).

25 WP(C) No.6053/2014.

26 (2010) 5 SCC 600.

27 *Ibid.*

28 *Pornography and Obscenity*, 3 Critical quarterly 99, 99 (1961), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8705.1961.tb01150.x/abstract>, (visited on October 11, 2016).

29 *CrI. Revision Petition No. 114/2007.*

matters or having a tendency to morally corrupt and debase persons likely to come in contact with the impugned art and once it is found that the piece of art is neither lascivious nor appeals to the prurient interest and it is found that the person who is likely to view the impugned art would not tend to be depraved or corrupted, though some might feel offended or disgusted, the test of obscenity is not satisfied. Further, it was rightly pointed in *Ranjit Udeshi v. State of Maharashtra*³⁰ that it may, however, be said at once that “*treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angels and saints of Michelangelo should be made to wear breeches before they can be viewed. If the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the book-shops would close and the other half would deal in nothing but moral and religious books which Lord Campbell boasted were the effect of his Act.*” *Bobby Art International v. Om Pal Singh Hoon*³¹ was another case where the SC drew a distinction between nudity and obscenity. The petition was filed by a member of the Gujjar community seeking to restrain the exhibition of the film *Bandit Queen* on the ground that the depiction in the film was abhorrent and unconscionable and a slur on the womanhood of India’ and the rape scene in the film was suggestive of the moral depravity of the Gujjar Community. The court rejected the petitioner’s contention that the scene of frontal nudity was indecent within Art. 19(2)³² and § 5-B of Cinematographic Act ³³ and held that the object of showing frontal nudity of the humiliated rape victim was not to arouse prurient feelings but revulsion for the perpetrators. Therefore, from this case it could be clearly understood that if a particular script, movie or publication talks directly of sex or showcases nude scenes but does not generate vulgarity or prurient feelings but is there to create awareness and provide knowledge, then that content won’t be termed as obscene.

The Hon’ble Supreme Court of India, in *KA Abbas v. Union of India*,³⁴ held that “*the standards that we set for our censors must make a substantial allowance in favor of freedom, thus leaving a vast area for creative art to interpret life and society with some of its follies along with what is good; we must not look upon such human relationships as banned in to and forever from human thought and must give scope for talent to put them before society; the requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal form and that line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value.*” The Constitution protects the right of the artist to portray social reality in all its forms. Some of that portrayal may take the form of questioning values and mores that are prevalent in society. From the above judgment the SC made it clear that one cannot cut from the realities of life and a wider scope of interpretation should be laid down while

30 AIR 1965 SC 881.

31 (1996) 4 SCC 1.

32 Article 19(2), the Constitution of India.

33 Section 5-B, the Cinematographic Act 1952.

34 (1970) 2 SCC 780.

interpreting art and literature. There were times when discussing about sex and menstruation was a taboo in the society but these days the norms are changing and today such issues are widely discussed and sex education is made mandatory in schools. In another case, A German magazine by name 'STERN' having worldwide circulation published an Article with a picture of Boris Becker, a world renowned Tennis player, posing nude with his dark-skinned fiancée by name Barbara Feltus, a film actress, which was photographed by none other than her father. The Art. states that, in an interview, both Boris Becker and Barbara Feltus spoke freely about their engagement, their lives and future plans and the message they wanted to convey to the people at large, for posing to such a photograph. Art. pictures' Boris Becker as a strident protester of the pernicious practice of "Apartheid". Further, it was stated that the purpose of the photograph was also to signify that love champions over hatred. It was observed that the picture has no tendency to deprave or corrupt the minds of people in whose hands the magazine Sports World or Anandabazar Patrika would fall. The picture should be seen with the knowledge it wants to convey to the outer world. The picture was not considered to be obscene. In a recent case on the movie KA BODYSAPES³⁵ it was observed that mere reference to homosexuals did not amount to obscenity. The movie was made to provide knowledge and discuss the rights of homosexuals and hence was within the ambit of Article 19(1)(a).³⁶

Further, from this it can be observed that if the content of the publication has a nude or sexual effect to it, it is not considered to be obscene until it depraves or corrupts individuals.

Reasonable Restrictions and Article 19(1)(a)

Freedom of speech and expression is a right guaranteed by the constitution which is subjected to reasonable restrictions. It cannot be made absolute in order to protect social order. Accordingly, under Article 19(2)³⁷ of the Constitution of India, the State may make a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression "in the interest of the public on certain grounds. In this context, it was observed in the case of *Gopalan v. State of Madras*³⁸ that The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and morals of the community. What the constitution attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control. Art. 19³⁹ of the constitution gives a list of individual liberties and prescribes in the various clauses the restraint that may be placed upon them by law so that they may not conflict with public Welfare or generation. One such restriction comes from obscenity. In *Shiv Sena v. Sanjay Leela Bhansali Films Pvt. Ltd.*⁴⁰ It was held that freedom of expression is of inestimable value in a democratic society based on the rule of law and that the effect of words, title and scenes in a film has

35 (2016) SCC Online Ker 4530.

36 Article 19(1)(a), the Constitution of India.

37 Article 19(2), the Constitution of India.

38 (1950) SCC on line Mad 88.

39 Article 19, the Constitution of India.

40 2013 SCC on line Del 4085.

to be judged from the standards of reasonable strong minded, firm and courageous man and not from that of a weak and vacillating mind. Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people. The fundamental freedom guaranteed under Art. 19(1)(a)⁴¹ can be reasonably restricted only for the purposes mentioned in Art. 19(2)⁴² and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Freedom of speech and expression is a very important right which is available to every individual and only reasonable restriction is posed. Open criticism of government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself.⁴³ In the case of *Central Board of Film Certification v. Yadavalaya Films*⁴⁴, a Division Bench of the Madras High Court observed as under: “Freedom of expression and speech has been recognized as one of the pre-eminent rights in a democratic government, the touchstone of individual liberty.” Justice Cardozo of the US Supreme Court characterized it as “the matrix of the indispensable condition of nearly every other form of freedom.” Article 19(1)(a)⁴⁵ of the Constitution of India guarantees to every citizen the fundamental right to the freedom of speech and expression.⁴⁶ In the case of *Picture International v. Central Board of Film*⁴⁷ that artists, writers, playwrights and film makers are the eyes and the ears of a free society. They are the veritable lungs of a free society because the power of their medium imparts a breath of fresh air into the drudgery of daily existence. Their right to communicate ideas in a medium of their choosing is as fundamental as the right of any other citizen to speak. Our constitutional democracy guarantees the right of free speech and that right is not conditional upon the expression of views which may be palatable to mainstream thought. Dissent is the quintessence of democracy. Hence, those who express views which are critical of prevailing social reality have a valued position in the constitutional order. History tells us that dissent in all walks of life contributes to the evolution of society. Those who question unquestioned assumptions contribute to the alteration of social norms. Democracy is founded upon respect for their courage. Any attempt by the State to clamp down the free expression of opinion must hence be frowned upon.⁴⁸ It is true that the Constitution does accommodate restrictions to be made to freedoms of speech and expression, but these restrictions have to be judiciously extended to strike a balance between creative liberty and what can only be seen as puritanical notions of public morality.⁴⁹ This can be clearly understood from the 2015 case of *Devidas*

41 Article 19(1)(a), the Constitution of India.

42 Article 19(2), the Constitution of India.

43 *Ibid.*

44 (2007) 2 MLJ 604.

45 Article 19(1)(a), the Constitution of India.

46 Article 19, the Constitution of India.

47 AIR 2005 Bom. 145.

48 *Ibid.*

49 Pratiek Sparsh Samantara and R. Srimukundan, ‘Revealing’ *The Judicial Ambivalence on Obscenity: A Case Comment on Aweek Sarkar v. State of West Bengal*, p.132.

Ramachandra Tuljapurkar v. State of Maharashtra,⁵⁰ the magazine named ‘Bulletin’ published a poem titled “*Gandhi Mala Bhetala*” (‘I met Gandhi’) for private circulation amongst the members of All India Bank Association Union. The issue was whether under the “*conception of poetic license and the liberty of perception and expression, using the name of a historically respected personality by way of allusion or symbol is permissible.*” Court held that freedom of speech and expression must be put within the ambit of absoluteness but freedom of speech and expression by way of symbol, allusion, painting or writing does not give liberty to offend. When community standards test is applied concerning the name of the historically respected personality then concept of ‘degree’ comes in and the test is applicable with more vigour.⁵¹

An individual has a right to express himself freely and this right is guaranteed to him by the constitution. An artist, filmmaker, publisher, etc. through his content has the freedom to freely express his views on various issues subject to reasonable restrictions. Justice Hidayatullah on Article 19⁵² had quoted, “*That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge.*”⁵³

Conclusion

So, from all the cases cited and the discussion held above it can be clearly observed that each and every person holds freedom of speech and expression which is backed up by certain reasonable restrictions. Obscenity is a very vague term and does not have a very précised and straightjacket definition. Justice Brennan in *Paris Adult Theatre I v. Slaton*⁵⁴ also spoke about vagueness in the definition of obscenity. Obscenity has been interpreted by the courts by applying various tests and has been identified from case to case basis. Morality and indecency are tools which define obscenity but then they keep on changing with changing norms of the society. There was a time when the infamous views of individuals were challenged but now the time has changed and indifferent views of individuals are identified. Nudity and sexual implications are not considered obscene if they do not generate prurient feelings. Indian society has gradually started embracing rapid changes around them and the same can be observed in the judicial interpretations from *Ranjit Udeshi v. State of Maharashtra*⁵⁵ till *Jayan Cherian v. Union of India*.⁵⁶ Obscenity is circumscribed and judged quantitatively whereas morality has disentangled itself from confinement of narrow mind set and respected subjectively. Ambiguity pertains as per the ‘definition’ of obscenity but exceptions exist in the form of art, literature, scientific fact or imparting of knowledge. Obscenity includes “*what shouldn’t be*” not “*what it is*”. Now the problem that the Indian Court is required to tackle is while deciding whether a

50 Case Summary: *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*, Law Mantra (Think Beyond Others). available at <http://lawmantra.co.in/case-summary-devidas-ramachandra-tuljapurkar-vs-state-of-maharashtra/>, (visited on October 17, 2016).

51 *Ibid.*

52 Article 19, the Constitution of India.

53 AIR 1965 SC 881 (885) (paras 7 and 8) : (1965) 1 SCR 65; (1965) 2 Cr. LJ 8.

54 *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), Supreme Court of the United States.

55 1965 AIR 881 1965 SCR (1) 65.

56 WP(C) No. 27418 of 2016 (B).

particular material is obscene or not. There is no particular statute governing the same which throws a light on the ambiguity that exists in this sphere. There's a dire need for the legislature to enact a law which entirely focuses on obscenity in order to eliminate the confusion and unreasonableness that exists.

STATE OF TAMIL NADU v. K. BALU

V.P. Tiwari *

ABSTRACT

In modern times, it is widely accepted that the right to life, liberty and property is the essence of a free society and that it must be safeguarded at all times. The framers of our Constitution are aware of the importance of these rights and hence they have not only entrenched them in the Constitution, but also made them justiciable and empowered the apex court to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the protection and enforcement of any of the fundamental rights. It is a matter of great satisfaction that the Supreme Court of India has played a key role in protecting these rights and perhaps become one of the most active courts with great reputation, independence and credibility. Expanding the horizon of Right to Life guaranteed under Article 21 of the Constitution of India, the apex court has held that Right to Life may include any aspect of life which makes it dignified but not that which extinguishes it and, therefore, any act or activity inconsistent with the continued existence of life shall be constitutionally void. It has been proved through statistics that main cause of road accidents, which cause loss to life, liberty and property not only of affected individuals, but also of all those who are dependent on him, is drunk driving. The existence of liquor vends; advertisements and sign boards drawing attention to the easy availability of liquor lures even those who are not habitual drinker and thus pose threat to life, liberty and property and hence, the apex court held, these vends must be closed. This is a humble effort of author to critically comment on the judgment of State of Tamil Nadu v. K. Balu.¹

Keywords: Habeas Corpus; Quo warranto; road accidents; liquor shop; National highway.

Introduction and Background

Road accidents are now globally recognised as a serious public health problem. The problem is much more serious in our country where close to 500,000 road accidents caused nearly 146,000 deaths and left more than thrice than that number injured.² Over the years 2005 to 2015, total number of road

* Associate Professor of Law, Maharashtra National Law University, Nagpur, e-mail-tiwarivp@gmail.com.

1 CIVIL APPEAL Nos .12164-12166 of 2016.

2 From the forward dated 25.05.20 written by Mr. Sanjay Mitra, Secretary, Government of India, Ministry of Road Transport and Highways while presenting annual report of TRW on 'Road Accidents

accidents, killings and injuries has increased by 14.2 per cent, 53.9 per cent and 7.5 per cent respectively.³ The analysis of road accident data 2015 reveals that about 1,374 accidents and 400 deaths take place every day on Indian roads which further translates into 57 accidents and loss of 17 lives on an average every hour in our country.⁴

Drivers' fault has been revealed as the single most responsible factor for road accidents, killings and injuries on all roads in the country over a long period of time. Drivers' fault accounted for 77.1 per cent of total road accidents during 2015 as against 78.8 per cent during 2014. Within the category of drivers' fault, road accidents caused and persons killed due to exceeding lawful speed/over speeding by drivers accounted for a share of 62.2 per cent (2,40,463 out of 3,86,481 accidents) and 61.0 per cent (64,633 out of 1,06,021 deaths) respectively.⁵ Accidents and deaths caused due to "Intake of alcohol/drugs" within the category of drivers' fault accounted for 4.2 per cent (16,298 out of 3,86,481 accidents) and 6.4 per cent (6,755 out of 1,06,021 deaths) respectively. However, taking into account the total road accidents and total road accident killings, the share of intake of alcohol/drugs comes to 3.3 per cent (16,298 out of 5,01,423 accidents) and 4.6 per cent (6,755 out of 1,46,133 deaths) respectively.⁶

The Public Interest Litigations were filed in these High Courts to seek removal of liquor shops from national as well as state highways including in respect of those stretches of the national or state highways which pass through the limits of any municipal corporation, city, town or local authority. Also prayers were made to issue for directions for introduction of necessary safeguards to ensure that liquor vends are not visible or directly accessible from the highway within a stipulated distance of 500 metres from the outer edge of the highway, or from a service lane along the highway. It would not be out of place to mention that the Government of Haryana had appealed to the apex court for the fact that they were not satisfied with the order of Punjab and Haryana High Court directing them to ensure in its liquor policy that no liquor vend shall be located along the national/state highways and that liquor shops are not accessible or visible from those highways or from the service lanes running along such highways. On the other hand, the Madras High Court was seized with a public interest litigation seeking the removal of retail outlets for liquor on national and state highways. The Madras High Court by a judgment and order of its Division Bench dated 25 February 2013 granted time only until 31 March 2013 for the relocation of existing liquor shops being run on national/state highways, as against the request for six months' time by the State and hence appeal by them. It needs to be mentioned that the proliferation of liquor shops on state highways (1731 shops over 9520 kilometres in Tamil Nadu and a stretch of 291 kilometres on the

in India – 2015' available on <http://pibphoto.nic.in/documents/rlink/2016/jun/p20166905.pdf>, (visited on February 1, 2017).

3 'Road Accidents in India-2015' Govt of India, min of India available at <http://pibphoto.nic.in/documents/rlink/2016/jun/p20166905.pdf>, p. 8, (visited on February 1, 2017).

4 *Ibid.*

5 'Road Accidents in India-2015' Govt of India, min of India available at <http://pibphoto.nic.in/documents/rlink/2016/jun/p20166905.pdf>, p. 2, (visited on February 1, 2017).

6 *Ibid.*, p. 3.

Panipat-Jalandhar section of NH-1, there are as many as 185 liquor shops) indicates the easy availability of liquor on the state highways. Evidently within a distance of a few kilometres a liquor shop is available to cater to the demand of the users of the highways. Surprisingly, many of the liquor shops have encroached on national highway land.⁷

Policy of the Government on Road Safety

In regulating the use of national and state highways, the safety of the users of the road is of paramount concern. In order to ensure the safety of the travellers on the highways, the Union Government had formulated for consideration and adoption by the states a document titled “*Model Policy/taxation/act/rules for alcoholic beverages and alcohol*”. The Model Policy inter alia made general provisions relating to liquor vends. Para 92(2) of the Model Policy provides that:

(2) No licence for sale of liquor shall be granted to a retail vend selected within a distance of 100 metres from any religious or educational institution or hospital or outside the inhabited site of village /town/city or any Office of the State/Central Government or Local Authorities or within a distance of 220 metres from the middle of the State/National Highways.

Explanation – *For the purpose of this rule : (a) “National Highway” or “State Highway” shall not include such parts of the National Highway or State Highway as are situated within the limits of Municipal Corporation, City or Town Municipal Council or such other authority having a population of twenty thousand or more.*⁸

The material which has been placed on record before Hon’ble Supreme Court of India for deciding this case indicates that⁹ :

- (i) India has a high rate of road accidents and fatal road accidents – one of the advisories states that *it is the highest in the world with an accident occurring every four minutes*;
- (ii) There is a high incidence of road accidents due to driving under the influence of alcohol;
- (iii) The existence of liquor vends on national highways is in the considered view of the National Road Safety Council and MoRTH—expert authorities with domain knowledge—a cause for road accidents on national highways;
- (iv) Advisories have been issued by Union Government to the State Governments and Union Territories to close down liquor vends on national highways and to ensure that no fresh licences are issued in the future. The reason why these advisories are confined to the national highways is because of the distribution of legislative competence between the Union and the States under the Seventh Schedule to the Constitution. State highways fall under the domain of the states.

⁷ Para 21 of the original Judgement dated December 15, 2016.

⁸ Para 14, *Ibid.*

⁹ Para 09 *Ibid.*

Directions of the Supreme Court

Using wide powers given under Article 142¹⁰ of the Constitution of India to do complete justice, the apex court passed following directions and orders.¹¹

- (i) All states and union territories shall forthwith cease and desist from granting licences for the sale of liquor along national and state highways;
- (ii) The prohibition contained in (i) above shall extend to and include stretches of such highways which fall within the limits of a municipal corporation, city, town or local authority;
- (iii) The existing licences which have already been renewed prior to the date of this order shall continue until the term of the licence expires but no later than 1 April 2017;
- (iv) All signage's and advertisements of the availability of liquor shall be prohibited and existing ones removed forthwith both on national and state highways;
- (v) No shop for the sale of liquor shall be (i) visible from a national or state highway; (ii) directly accessible from a national or state highway and (iii) situated within a distance of 500 metres of the outer edge of the national or state highway or of a service lane along the highway.

*Provided that "In the case of areas comprised in local bodies with a population of 20,000 people or less, the distance of 500 metres shall stand reduced to 220 metres"*¹² However, the sale of liquor should be from a point which is neither visible from a national or state highway or which is directly accessible from a national or state highway.

(vi) All States and Union territories are mandated to strictly enforce the above directions. The Chief Secretaries and Directors General of Police shall within one month chalk out a plan for enforcement in consultation with the state revenue and home departments. Responsibility shall be assigned inter alia to District Collectors and Superintendents of Police and other competent authorities. Compliance shall be strictly monitored by calling for fortnightly reports on action taken.

Critique of the Judgment

India is a welfare state and Supreme Court of India is considered to be sentinel of the Fundamental Rights of its citizens. Judiciary, as has been stated in various judgments, has not only the responsibility, but a constitutional duty to

10 Article 142. Enforcement of decrees and orders of Supreme Court and orders as to discovery etc. (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe (2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

11 Para 24 of the original Judgement dated December 15, 2016.

12 Added vide para 22 of the judgment pronounced on March 31, 2017 in response to the applications (nearly 68) basically for (i) extension of time for compliance, in certain cases; or (ii) modification or, as the case may be, recalling the judgment delivered by Supreme Court on December 15, 2016 on the subject.

vigilantly guard the Rights of the citizens. The Supreme Court of India is perhaps one of the most active courts when it comes into the matter of protection of Rights of not only the citizens but also of non-citizens. It has great reputation of independence and credibility. The judgment delivered by Hon'ble Justice Dr. DY Chandrachud is another feather in the cap of apex court. The orders passed and direction issued under this case reminds me a Hindi story written by Munshi Premchand 'Panch Parmeshwar', where he equates judges to God. Even in this case, the decision is going a long way in saving hundreds and thousands of innocent human lives, which could have brutally ended on highways due to drunk driving. The decision is going to help not only the individuals and families from irreparable losses and sufferings, but will also contribute to the society in safeguarding and promoting its social and economic capital. Hon'ble Justice Chandrachud has rightly held that 'Human life is precious'¹³ and the apex court must enforce their constitutional right to lead not only a life, but with dignity and self-worth. The researcher is tempted to quote a paragraph from the judgment, which is depicting the turning point, where we stand today, and our lives becomes more meaningful on this occasion, when we are developing at a rapid speed. To quote: -

*"...As the road network expands in India, road infrastructure being an integral part of economic development, accidents profoundly impact on the life of the common citizen. For a nation on the cusp of economic development, India can well avoid the tag of being the accident capital of the world. Our highways are expanding, as are the expressways. They provide seamless connectivity and unheralded opportunities for the growth of trade and industry and for the movement of goods, persons and capital. They are the backbone of the freedom of trade and commerce guaranteed by Article 301 of the Constitution. Our highways are dotted with sign boards warning of the dangers of combining speed and alcohol. Together, they constitute a heady cocktail. The availability of liquor along the highways is an opportunity to consume. Easy access to liquor shops allows for drivers of vehicles to partake in alcohol, in callous disregard to their own safety and the safety of others. The advisories of the Union government to the states are founded on a logical and sound rationale and hence would equally apply to state highways"*¹⁴

The Apex Court has quoted following justifications in support of above directions: -

- (i) Usually first and foremost, it is trite law that in matters of policy, in this case a policy on safety, the court will defer to and accept a considered view formed by an expert body.
- (ii) Secondly, the policy of the Union Government is to be supported for the fact that this is based on statistics and data which make out a consistent pattern year after year.

¹³ Para 10 of the original Judgement dated December 15, 2016, p. 8.

¹⁴ Para 10, *Ibid*, p. 8.

- (iii) Thirdly, the existence of liquor vends on highways presents a potent source for easy availability of alcohol. The existence of liquor vends; advertisements and sign boards drawing attention to the availability of liquor coupled with the arduous drives particularly in heavy vehicles makes it abundantly necessary to enforce the policy of the Union government to safeguard human life.
- (iv) Fourthly, the Court is enforcing the right to life under Article 21 of the Constitution based on the considered view of expert bodies.
- (v) Fifthly, if the liquor ban is enforced on National Highways and not State Highways, it would be violative of Article 14 of the Constitution of India. The apex court held that 'No distinction can be made between national and state highways in regard to the location of liquor shops. In regulating the use of national and state highways, the safety of the users of the road is of paramount concern. It would defy common sense to prohibit liquor shops along national highways while permitting them on state highways. Drunken driving as a menace and as a cause of road accidents is a phenomenon common to both national and state highways. Nor, is it a plausible defence to urge that while it is impermissible to drink and drive on a national highway, it is permissible to do so on a state highway.'¹⁵
- (vi) Sixthly, the sale of liquor should also be prohibited on stretches of National and State Highways which fall within the limits of municipal or local authority because there is no rational basis to exclude stretches of national highways and state highways which fall within the limits of a municipal or local authority (with a population exceeding a stipulated figure) from the ambit of the suggested prohibition. Where a national or state highway passes through a city, town or through the area of jurisdiction of a local authority, it would completely deny sense and logic to allow the sale of liquor along that stretch of the highway. Such an exclusion would defeat the policy since the presence of liquor shops along such stretches of a national or state highway would allow drivers to replenish their stock of alcohol, resulting in a situation which the policy seeks to avoid in the first place. Once it is an accepted position that the presence of liquor vends along the highways poses a grave danger to road safety an exception cannot be carved out to permit the sale of liquor along a stretch of the highway which passes through the limits of a city, town or local authority. Such an exception would be wholly arbitrary and violative of Article 14.¹⁶
- (vi) Court also held that that the power of the states to grant liquor licences is undoubted, but it should be done in a manner that would ensure that the consumption of alcoholic liquor does not pose dangers to the lives and safety of the users of national and state highways.¹⁷

15 Para 20 of the original Judgement dated December 15, 2016 p. 17.

16 Para 14 of the original Judgement dated December 15, 2016, p. 13.

17 Para 13 of the original Judgement dated December 15, 2016, p. 17.

- (viii) The court further held that though, excise duty is an important source of revenue to the states, a prohibition on the grant of liquor licences to liquor shops on the national and state highways would only regulate the grant of such licences¹⁸.
- (ix) The prohibition is also justified because the State is Directed by Article 47 of the Constitution of India to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.¹⁹
- (x) The prohibition is also justified for the fact that there is no fundamental right under Article 19(1)(g) to trade in liquor as has been held by the apex court in a number of cases including *State of Bihar v. Nirmal Kumar Gupta*.²⁰

The Supreme Court of India has further clarified that:

*“....this Court while exercising its jurisdiction has neither formulated policy nor (as we shall indicate) has it assumed a legislative function. The basis and foundation of the judgment delivered on 15 December 2016 is (i) the policy of the Union Government, formulated by the Union Ministry of Road Transport and Highways (MoRTH); (ii) the decision of the National Road Safety Council (NRSC), which is an apex body for road safety established under Section 215 of the Motor Vehicles Act, 1988; (iii) advisories issued by the Union Government to the states over a period of one decade; and (iv) the Parliamentary mandate of zero tolerance for driving under the influence of alcohol, evident in Section 185 of the Motor Vehicles Act, 1988. The judgment of this Court extensively reproduced the statistics on road accidents from official data released by MoRTH in its Transport Research Wing, the decisions of NRSC and the advisories issued over the previous decade by the Union Government. The judgment of this Court has inter alia adverted to the decision taken in a meeting held thirteen years ago by NRSC to the effect that licences for liquor shops should not be given along the national highways. Besides this, the Court has also relied upon advisories issued by MoRTH to the States and Union Territories on 26 October 2007, 1 December 2011, 18 March 2013 and 21 May 2014. Section 185 of the Motor Vehicles Act is indicative of a Parliamentary intent to penalise driving under the influence of alcohol. The conclusions which have been drawn by this Court in paragraph 9 of its judgment, which we extract below are hence based, on the considered policy of the Union Government.”*²¹

18 Para 13 of the original Judgement dated December 15, 2016, p. 17.

19 Article 47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

20 (2013) 2 SCC 565, Para 12 of the original Judgement dated December 15, 2016, p.10.

21 Added vide para 14 of the judgement pronounced on March 31, 2017 in response to the applications (nearly 68) basically for (i) extension of time for compliance, in certain cases; or (ii) modification or, as the case may be, recalling the judgment delivered by Supreme Court on December 15, 2017 on the

However, it has been widely reported that India's highway liquor ban has forced some of the most prominent hotel chains in the country such as the Taj, Oberoi, Hyatt and Accor groups to stop serving alcohol to guests at key locations from April 1, 2017, threatening an estimated toll of Rs.65,000 crore in revenue foregone by state governments and the hospitality industry.²² The move could lead to states losing overall tax revenue of Rs.50,000 crore, restaurants and pubs taking a hit of Rs.10,000-15,000 crore and 100,000 people going out of work. People believe that this ban is going to add more fury to already struggling Indian youths with the problem of unemployment. The world has become a global village and India has become destination to many foreigners, who come here for tourism or for business (including diplomats for meetings etc.). In their culture, liquor is considered to be part of their meals. They would really find it very difficult to live without liquor. Under these circumstances, they will try to fetch it from outside, or some illegal vends. The liquor is being banned because it causes accidents on roads. But, the poor truck drivers cannot afford to take liquor from five star hotels, which are very costly and which are meant to cater to a different segment of people, basically corporate people, for whom it becomes important to take a few pegs as a relaxant to enable sound sleep. Small vendors can easily shift their shops to some other places, but the five star hotels cannot be shifted due to huge investment. After talking to various stakeholders, visiting various places to assess the real situation, the researcher feels that it would have been just for Hon'ble Supreme Court of India to carve some exception in favour of three / five or seven star hotels just like it has created three exceptions in favour of:

- (i). In the case of areas comprised in local bodies with a population of 20,000 people or less, the distance of 500 metres shall stand reduced to 220 metres
- (ii). In the case of those licences for the sale of liquor which have been renewed prior to 15 December 2016 and the excise year of the concerned state is to end on a date falling on or after 1 April 2017, the existing licence shall continue until the term of the licence expires but in any event not later than 30 September 2017; and
- (iii). In so far as the States of Meghalaya and Sikkim are concerned, it would suffice if the two states are exempted only from the application of the 500 metre distance requirement provided in paragraph 24(v)(iii) of the judgment of this Court on 15 December 2016.²³

Evaluation

Human life is precious and there is no retake. Once it has gone, it has gone forever and brings utmost pain and suffering for those who are left behind. When

subject available on: -http://judis.nic.in/supremecourt/list_new2_Pdf.asp?FileName=44707, (visited on May 11, 2017).

22 *Liquor ban impact estimated at Rs. 65,000 crores in revenue foregone by states, hospitality industries'* Ratna Bhushan etc., *The Economic Times*, available at <http://economictimes.indiatimes.com/news/industry/cons-products/liquor/liquor-ban-impact-estimated-at-rs-65k-crore-in-revenue-foregone-by-states-hospitality-industry/articleshow/57980528.cms>, (visited on May 11, 2017).

23 *The State of Tamil Nadu Rep. By Sec. v. K. Balu.* available at http://judis.nic.in/supremecourt/list_new2_Pdf.asp?FileName=44707, (visited on May 11, 2017).

it goes it creates vacuum, not only in the family of the departed soul, but also in the society. It does not only affect departed soul's economy, but also affects the social capital and economy of the nation. It is a settled law that death is unnatural and right to live with dignity until the natural span of one's life is guaranteed by Article 21 of the Constitution of India. Since right to life does not include right to die, hence it must also exclude right to be killed negligently. The judgment of the apex court is one of the best judgments pronounced in recent times and would go a long way in saving lakhs of lives from accidental deaths on highways. However, the researcher feels and recommends that keeping in mind the eating habits and culture of our foreign guests (which has been adopted by many of us), some exception may be created for three/five star hotels, also because they are out of reach of poor truck drivers. In the end I wish to endorse Hon'ble Dr. Justice D.Y. Chandrachud, who held that: - "*The Constitution preserves and protects the right to life as an over-arching constitutional value. The preservation of public health and of public safety is an instrument of enhancing the right to life as a constitutionally protected value. Where a balance has to be drawn between protection of public health and safety and the need to protect road users from the menace of drunken driving (on the one hand) and the trade in liquor (on the other hand) the interests of the latter must be subordinate to the former.*"²⁴

24 *Ibid.*

THE CHANCELLOR, MASTERS AND SCHOLARS OF THE UNIVERSITY OF OXFORD v. RAMESHWARI PHOTOCOPY SERVICES

Ragini P. Khubalkar*

ABSTRACT

Intellectual Property Rights have the origin in the man's intellect. The rights over intellectual property means the right over the ideas which are expressed or which are converted into objects. One characteristic shared by all types of IPR is that they are essentially negative: these are rights to stop others doing certain things, in other words, to stop pirates, counterfeiters, imitators and even in some cases third parties who have independently reached the same ideas, from exploiting them without the license of the right-owner. Intellectual Property is a genus and the various forms of it are Patent, Trade Mark, Trade Designs, and Copyright etc. When any person without a license from the owner of the Copyright or the Registrar of Copyrights or in contravention of the conditions of a license does anything which violates the exclusive rights of the copyright owner, it constitutes an infringement of the Copyright. In University of Delhi case, the Delhi High Court has dealt with an interesting conflict between protection of the right and infringement of the rights of copyright holder, during the process of photocopying of some part of the books, at the authorised photocopying centre of the University. The Court has pertinently held that private rights will have to yield to larger social goals while interpreting the concept of 'fair use'. The author has endeavoured to analyse this path-breaking case which has carved out new IP Jurisprudence.

Keywords: *Copyright infringement; fair use; Photocopy; Right to Access.*

Introduction and Background

In the wake of growing awareness amongst the copyright holders with respect to protection of their rights and the issues about the various acts of infringement of copyright by novel modes, arose an interesting issue as to whether the act of photocopying from different books, will amount to infringement of copyright. Prima facie, this is without the consent of the copyright owner and the act of photocopying violates his copyright and therefore it amounts to infringement¹. However, the act of photocopying for its use as 'material for study' can fall in the

* Assistant Professor of Law, Maharashtra National Law University, Nagpur, e-mail: raginikhubalkar@gmail.com.

1 Section 51 of the Copyright Act 1957 defines infringement of the Copyright in general terms which is applicable to all works protected under the Act.

purview of exceptions, thereby giving a premium for photocopying. This interesting issue was very well considered by the Delhi High Court in the matter against University of Delhi and Rameshwari Photocopy services.

In an appeal from the decision of Single Bench of the Delhi High Court,² a Division Bench of the Delhi High Court comprising Hon'ble Pradeep Nandrajog and Yogesh Khanna J.J. on 9th December, 2016, rendered an important decision and upheld the argument that the act of photocopying from different books by University of Delhi will not amount to infringement of copyright. It further held that, making copies of the course pack through photocopying services will come under the exceptions provided under Section 51(1) (a) (i) of the Copyright Act, 1957 and restored the trial on factual aspects. The controversy raised in the matter is interesting in view of the niceties touched by the court, while deciding the case. This article seeks to summarise the key points of the case and the rationale of the court for its judgment.

The factual matrix needs to be understood in brief. The Chancellor, Masters and Scholars of the University of Oxford, was the original plaintiff in this particular case along with leading publishers such as Oxford University Press (OUP) and Cambridge University Press (CUP) and their offices situated in India. Rameshwari Photocopying Services was the original defendant. University of Delhi was arrayed as a second defendant/respondent and other bodies of students and academicians *viz.*, ASEAK and an association called SPEAK (Society for the Promotion of Educational Access and Knowledge) intervened.

Rameshwari Photocopying Services, is a small photocopy shop having a license within the premises of University of Delhi. It so happened that the professors imparting education in the University of Delhi authorised the preparation of course packs and Rameshwari Photocopying Services was entrusted the work of photocopying the pages from the books published by the plaintiffs and after binding the same, to supply them to the students charging 50 paise per page.

The plaintiffs/appellants case was that the inclusion of specific pages of its publication in the course pack by the University of Delhi and making photocopies of it by the Rameshwari Photocopy Services (respondent no.1) amounted to institutional sanction for infringement of copyright in those books. Further the contention of the plaintiffs was that section 52(1) (i) was not applicable since reproduction by Rameshwari photocopy Services with the assistance of Delhi School of Economics could not be classified as 'reproduction by a teacher' or a pupil in the course of instructions. While raising several aspects the plaintiffs also relied upon certain provisions of the Berne Convention.³ While the defendant/respondents pleaded that the preparation of course packs by it amounted to 'fair

2 The Single Judge of the Delhi High Court, Justice Rajiv Sahai Endlaw, dismissed the suit of the applicant/plaintiff on September 16, 2016 and held that photocopying by the Delhi University in the form of course pack do not violate copyright of the owner of the work. (CS(OS) 2439/2012, I.As. No. 14632/2012).

3 Article 9(1) specifically provides 'Reproduction'. It means 'copying' and this basic right of the author was first introduced into the convention in the Stockholm Act of 1967, before that time it had been assumed that authors enjoyed the reproduction right regarding unauthorized printing or multiplication of copies from each day. At the Stockholm Revision Conference, it was considered that reproduction right should be specifically guaranteed and Article 10 of the Berne Convention.

use' within the meaning of sections 52(1) (a) and (h) of the Copyright Act 1957. The University of Delhi pleaded that section 52(1) (i) of the Copyright Act 1957, permits students and educational institutions to copy portions from any work for research and educational purpose.

After the decision of the original suit, the matter was carried before the Division Bench, which has analysed the intricate issues, while interpreting the terms in the exceptions clause and laid down the law which is very significant in view of the rampant acts of photocopying. The learned single judge elaborately considered various issues and various provisions.

The suit was contested by both the parties extensively. The court held in favour of the plaintiff, clarifying that there is no infringement in case of providing study material in the form of course pack, to the students⁴. Against this judgement of the Single Bench, an appeal came to be filed before the Division Bench of Delhi High Court.

In appeal before the Division Bench, the Delhi High court has further considered the intricate issues and discussed the law in detail. On the point of granting injunction, the court refused to give injunction to photocopying for the course pack, but has remanded the case for conducting the trial on specific issues of fact which could be decided on the basis of expert evidence which could come on record. The judgment is very significant and landmark, for a student of IPR since it deals with the aspect of overriding wider public interest over the individual right of copyright holder.

The main legal issue which arose for consideration before the Division Bench of Delhi High Court was about interpretation of Section 52(1)(i) of the Copyright Act in relation to infringement of copyright by a 'teacher or a pupil in the course of instruction in Section 52(1)(a)(i)'. The sub issue was what is the phrase 'by a teacher or pupil in the course of' construction in Section 52(1)(i). While arguing the case, in support of their submissions, a number of foreign judgements were cited by the learned counsels of both the parties.

For proper understanding of the controversy, a bare look at the provision of Section 52 is necessary. Section 52 (1)(a),(h) and (i) of the Copyright Act, read as under⁵:-

Section 52 Certain acts not to be Infringement of Copyright-(1) The following acts shall not constitute an infringement of copyright, namely:

(a) a fair dealing with any work, not being a computer programme, for the purposes of-

- (i) private use, including research;
- (ii) criticism or review, whether of that work or of any other work;
- (iii) the reporting of current affairs, including the reporting of a lecture delivered in public.

(b) the publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions, and so described in

4 The Single Judge of the Delhi High Court, Justice Rajiv Sahai Endlaw, dismissed the suit of the applicant/plaintiff on 16th September, 2016 and held that photocopying by the Delhi University in the form of course pack do not violate copyright of the owner of the work. (CS(OS) 2439/2012, I.As. No. 14632/2012).

5 Wadehra B.L, LAW RELATING TO INTELLECTUAL PROPERTY, 5th ed. 2011.

the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for the use of educational institutions, in which copyright subsists:

Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.

Explanation.- In the case of a work of joint authorship, references in this clause to passages from works shall include references to passages from works by any one or more of the authors of those passages or by any one or more of those authors in collaboration with any other person;

(j) the reproduction of any work-

(i) by a teacher or a pupil in the course of instruction; or

(ii) as part of the questions to be answered in an examination; or

(iii) in answers, to such questions;

A bare reading of these provisions show that an attempt is made to maintain a balance between the rights of the creator's with that of the user's rights to access the work. The intention of the legislature can be gathered from the list of exceptions provided under Section 52 of the Act, which again shows that a proper balance is sought to be maintained in the copyright system.⁶

The learned Single Bench of Delhi High Court has opined that the clause (h) would be applicable where there is publication of a collection comprising mostly non copyrightable materials. The learned Single Bench has highlighted the difference between 'reproduction' and 'publication' and has held that the concept of publication would be the preparation and issuing of material for public sale and would exclude use by students for teaching purpose. The word 'reproduction' which finds a purpose in clause (i) has been given its ordinary meaning by the learned single Judge (though not expressly so stated in the judgment).

During the course of arguments, the appellant pointed out the historical origin of the copyright law and the reasons for extending protection to copyrighted work for the limited time. It was contended that the institute of copyright stands on the boundary between the private and the public. They contended that copyright is associated with our sense of privacy and our conviction, at least in theory, that it is essential to limit the power of the state. The counsels for appellants also referred to the definitions provided under Section 14 of the Copyright Act, 1957⁷ and highlighted the word 'substantial' and argued that the legislative intent was exclusivity in the exploitation of copyright even with respect to a substantial part thereof in the copyright holder. It is further pleaded by the counsel that the right to reproduce the work in any form was exclusively that of the author and the right conferred by Section 52 are the privileges and therefore while exercising those privileges with respect to work of another, the interest of the copyright owner has to be always considered.

6 'Delhi University Photocopy Shop Judgment: A Landmark in The Access to Knowledge Movement in India.' by Dr. Arul Sacaria, available at: <http://www.livelaw.in/delhi-university-photocopy-shop-judgement-landmark-access-knowledge-movement-india/>, (visited on January 5, 2017).

7 As per Section 14 of the Copyright Act 1957, copyright would mean the exclusive right to do or authorise the doing of the acts enumerated in various clauses of Section 14 in respect of the work or any substantial part thereof.

Another submission of the appellant's counsel was on the subject matter of the work and the activities to be covered by different clauses of Section 52 of the copyright Act. On the basis of the activities the counsel further analysed about the limitation in the use of copyrighted material while performing the activity that some works are expressly or implied limited by considering the public policy. It is argued by them that 'fair dealing' expressed in clause (a) and clause (h) was the manifestation of fair use. The contention of the appellant was that a direct connection between the teacher and pupil had to exist in the course of instruction, to avoid infringement. Whereas the Division Bench of the High Court has held that in 'publication' to be interpreted by common sense i.e. the targeted audience has to be kept in mind while deciding whether publication of a work takes place or not.

While countering the argument of the appellant, the counsels for the respondents submitted that the course pack is prepared by the University of Delhi as per the syllabus of that University and would make no sense to an outsider and would appear to be irrelevant for a third person. It is for limited use of the students attending the particular subject lecture for a discussion in the course of instructions as reference material. It was further argued that the literacy level is very low and purchasing power is also weak in our country, that even compulsory licensing had failed to achieve the desired object of dissemination of knowledge. The respondent's counsel argued for liberal interpretation of the clause (i).

The Division Bench of the Delhi High Court, after hearing both the sides discussed about the importance of education and promotion of equitable access to knowledge. It is observed that the purpose of use would determine whether it is fair use and in the context of teaching and use of copyrighted material, the fairness in the use can be determined on the touchstone of extent justified for purpose of education. The court opined that the teaching is a process of imparting of instructions or knowledge and education is the process involving communication between students and teachers and not limited by classroom teaching. Thus, the court rejected the argument of the appellant that the four factors on which fair use is determined in abroad would guide fair use of copyrighted material during course of instruction and also rejected the adverse impact argument raised by the appellant on the market of the copyrighted work due to course pack photocopying as the students are not considered as future potential buyers, to buy thirty or forty reference books.

The word 'reproduction', the phrase 'by a teacher or a pupil' and 'in the course of instruction' were the most debated terms in the course of argument. While dealing with the word 'reproduction', court opined that making more than one copies of the original, i.e., photocopying contemplated by the statute. The court gave wide interpretation to the term 'course' and held that it means the entire process of education as in a semester or the entire programme of education as in a semester. It is held that the Section 52(1)(i) states that the reproduction of a work by a 'teacher/ pupil in the course of instruction' would not constitute infringement. The question before the court was whether the interpretation of this section was restricted to an individual teacher and an individual pupil or whether it would extend to an institution and its students. The Court unequivocally held that it cannot be so restricted especially when considering the societal realities.

Education in India has for long been institutionalized and therefore, the law cannot and should not be interpreted in such a fashion that it does not reflect the realities of our education system. The second main contention was with respect to the interpretation of the term ‘course of instruction’. The plaintiffs contended that this term must be limited to lectures and tutorials, where the teacher is directly interacting with the pupils and in doing so, is using the copyrighted work. The Court did not accept this contention and held that the legislature specifically chose to use the word instruction rather than lecture, and therefore, the interpretation of the term ‘instruction’ cannot be limited to that of lecture.

The court also considered at length the foreign judgement of the New Zealand court,⁸ but at the end it expresses its inapplicability to India due to amendment in provisions of the Copyright Act of New Zealand.

The court held that the law in India would not warrant an approach to answer the question by looking at whether the inclusion of the copyrighted work in the course pack has become a textbook, but by considering whether the inclusion of the copyrighted work in the course pack justified by the purpose of the course pack i.e. for instructional use by the teacher to the class. While considering this delicate aspect it is held that this would require an analysis of the course pack with reference to the objectives of the course, the content and the list of suggested readings given by the teacher to the students, which would require expert evidence. The court has laid down the law, as regards the major controversy, however, remanded the case for trial on the limited issues as specified in the judgment.

The Division Bench of Delhi High Court corrected the decision given by the Single Bench about the issue of ‘publication’ and held that it need not be for the benefit of or available to or meant for reading by all the members of the community. It is further held that a publication would have the element of profit, which would be missing in the case of reproduction of work by a teacher to be used in the course of instruction while imparting education to the pupil. The Court further held that the argument concerning use of agency as irrelevant. It also rightly rejected the argument that the University of Delhi or Rameshwari photocopying services was making any profit out of photocopying.

The remand of the case to the learned Single Bench of Delhi High Court, was an interesting turn, since it paved the way for reopening of the entire controversy with a desire that each of the relevant issue will be reconsidered from all possible angles. The case assumed a lot of significance amongst the IP law experts and the final outcome was anxiously awaited. However, unexpectedly, after the reopening of the case before the Single Bench, instead of contesting the matter on merits, the plaintiffs have abruptly withdrawn the civil suit, thereby leaving the controversy undecided.⁹ Further, all the International publisher in their joint public statement said, “We support and seek to enable equitable access to knowledge for student and we understand and endorse the important role that

8 (1991) 2 NZLR 574 Longman Group Ltd. High Court of New Zealand.

9 On March 9, 2017 the Petitioners Oxford University Press, Cambridge University Press, and Taylor and Francis had withdrawn their copyright suit against Delhi University and Rameshwari Photocopy Centre. (Read more at: <http://www.livelaw.in/sc-moved-du-photocopy-case-judgment/> (visited on May 3, 2016).

course packs play in the education of students...” It shows that the exception provided under the Indian Copyright Act, of fair use, is accepted to all and widened its horizon. The plaintiffs having the dominus, had chosen to withdraw the suit. One more development needs attention, the Indian Reprographic Rights Organisation (IRRO) has filed a Special Leave Petition before the Supreme Court challenging the judgment passed by the Division Bench of the Delhi High Court on December 9, 2016. However, in view of the withdrawal of the suit, the Supreme Court refused to admit this Appeal. The controversy was not decided on merits by the Supreme Court. Nonetheless, the issues raised in the University of Delhi case and the arguments advanced have already charged the IP law experts, to critically analyse every possible angle. Since the factual scenario under which the litigation was started is not uncommon in India, the issues involved do not lose its significance.

Evaluation

This decision in University of Delhi case (as popularly known) as rendered by the Division Bench, is a landmark decision since it takes in to consideration the controversy which is associated with routine activities in the universities in India. The preparation of course packs by photocopying the textbooks, for the purpose of consolidating the material is not uncommon, in most of the universities. Although the rights of copyright holder needs protection, but when confronted with the issue of use of the material for studies, a wider interpretation of the provisions was definitely warranted.

Despite the subsequent withdrawal of the suit the interesting issues touching various aspects of IP law, are already decided and the law is laid down. The University of Delhi case has brought into limelight the controversy about possible infringement of copyright. The case assumes significance in view of the discussion of the court on the finer aspects of IP law. Such kind of overhauling of the intricate issues of the IP law is always desirable in order to get the legal position clarified. The issue is most likely to crop up in similar situations of photocopying in the University of Delhi or elsewhere. The issues raised in University of Delhi case and the observations of the court in the University of Delhi case have now opened a new spectrum for IP law students.

This decision will prove to be one of the biggest landmarks in IP jurisprudence the world over. Significantly, it spells out that private rights will have to yield to larger social goals which have to be interpreted widely. Much like the Supreme Court decision in the Novartis case, this decision too makes it amply clear that while India will be guided by foreign precedents, it will carve out its own IP jurisprudence and interpret the law in a way that suits its own societal requirements.

FORM –IV
Statement Ownership and other particulars about the
CONTEMPORARY LAW REVIEW

Place of Publication : Nagpur

Periodicity of Publication : Bi-Annually

Printer's Name : Maharashtra National Law University
Nagpur-440001, Maharashtra.

Nationality : Indian

Address : Maharashtra National Law University, Nagpur,
Judicial Officers' Training Institute (JOTI),
Civil Lines, C.P. Club Road
Nagpur-440001, Maharashtra.

Publisher's Name : Dr. Naval Kishor Manohar Sakarkar
Registrar,
Maharashtra National Law University,
Nagpur, Maharashtra.

Editor's Name : Prof. (Dr.) Naresh Kumar Vats,

Nationality : Indian

Address : Maharashtra National Law University, Nagpur,
Judicial Officers' Training Institute (JOTI),
Civil Lines, C.P. Club Road
Nagpur-440001, Maharashtra.

Owner's Name : Maharashtra National Law University, Nagpur

I, Dr. Naval Kishor Manohar Sakarkar hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
Dr. Naval Kishor Manohar Sakarkar
Registrar



NATIONAL LAW UNIVERSITY
NAGPUR

www.nlunagpur.ac.in