

MNLU, Nagpur Contemporary Law Review



Justice A.K. Sikri - *Judiciary's Relevance in a Democracy and the Role of Law Schools in Shaping it*

Justice Ruma Pal - *Freedom of Religion Under the Constitution*

G.S. Bajpai and Garima Pal - *Exigency for Law on Hate Crime Against Racial Minorities: A Comparative Study with Special Reference to North-East People in India*

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Rishabh Shukla - *Breastfeeding in Public: A Policy Review*

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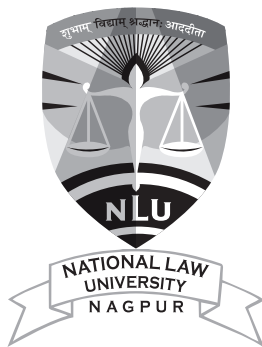
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Table of Contents

Message from the Patron		xi
Editorial		xiii
Judiciary's Relevance in a Democracy and the Role of Law Schools in Shaping it	<i>Justice A.K. Sikri</i>	255
Freedom of Religion Under the Constitution	<i>Justice Ruma Pal</i>	271
Exigency for Law on Hate Crime Against Racial Minorities: A Comparative Study with Special Reference to North-East People in India	<i>G.S. Bajpai and Garima Pal</i>	283
Regulation of Anti-Competitive Behaviour by Sports Organisations: A Critical Analysis of India and EU	<i>Reuben Philip Abraham</i>	293
Viability of Market Mechanisms in Transboundary River Allocations: A Look at the Colorado River	<i>Mrinalini Shinde</i>	307
Passive Euthanasia: An Analysis of Supreme Court Judgments	<i>Vidhi Singh</i>	319
Making of a Model Procedure of Institutional Arbitration for Domestic Commercial Disputes in India	<i>Aaliyah Siddiqui</i>	339
An Entwinement of Sustainable Development and International Trade: Analysis through the Lens of Paris Climate Convention	<i>Kaustub Neil Singh Bhati and Prankul Boobana</i>	353
Regulating Real Estate Sector in India: A Paradigm Shift from Builder's Dominance to Buyer Centric	<i>Sumit Bamhore</i>	361
Liability of Intermediaries in India	<i>Pallavi Khanna</i>	371
Persons with Disabilities and Inclusive Education in India: A Critical Analysis (with Special Reference to Hearing Impairment)	<i>Avanika Gupta</i>	383
Issues and Challenges Relating to Girl-Child: International Deliberations and Discourse	<i>Nitu Kumari</i>	397
Fair Dealing in the Information Age: Passé or Impasse	<i>Divita Pagey</i>	413
Breastfeeding in Public: A Policy Review	<i>Rishabh Shukla</i>	427

Message from the Patron

It is with great pleasure that I introduce to you the latest edition of 'Contemporary Law Review', the interdisciplinary journal of Maharashtra National Law University (MNLU), Nagpur. As the socio-economic landscape of the world rapidly evolves, so must our mindset. Law can no longer be viewed or analysed in a vacuum. Innumerable disciplines, be they sociology, anthropology, political science, psychology, environmental science, or international relations etc., have both shaped, and been shaped by, the law of the land and of the world. As Earth becomes increasingly globalised and our lives, increasingly intertwined, there is a need, more than ever before, to analyse the impact of law on society and mould it to better serve humankind. This is impossible to achieve without dispelling ignorance, which can only be done by filling gaps in knowledge through an extensive study of both law and its allied disciplines. With this in mind, we encouraged academia, scholars and professionals from various fields to contribute to our journal, with the aim that it will serve as a shining beacon to those seeking holistic insight, so that they may forge new paths to justice.

Some view law as a tool to regulate the deviant mind and to protect the oppressed; I believe it is also a powerful means to self-actualisation, not just of the human mind but of society as a whole. MNLU, Nagpur was established with this goal in mind. Through various conferences, seminars and memorandums of understanding, the University has strived to tread the road not taken. It intends to stand out from the crop of premier institutions in the country by building precisely the kind of environment that will ensure its students can go forth into the world and transform it with their wisdom and ingenuity. As part of our everlasting commitment to academic excellence, we have focussed on publishing research papers and articles that delve into the issues most predominantly affecting society. We also have the honour to publish articles on subjects hitherto unknown. The concepts of rule of law, justice and rights are thrown into turmoil as society pushes the boundaries of the known and rushes into areas previously unimagined. Law must therefore be the fulcrum on which the familiar and the unfamiliar are delicately balanced and we have recognised and highlighted this particular facet of law in the journal. Regardless of whether a study delves into the known or unknown, we have ensured to cast the spotlight on only the study which has made original contributions to research. For anyone

can parrot facts, but few can truly understand them and their implications. In the famous words of Arthur Schopenhauer, research does not mean “to see what nobody has yet seen, but rather to think concerning that which everybody sees, what nobody has yet thought”.

The journal aims to provide a platform where curious minds may dwell, bloom in the warm glow of intellectual debates, philosophical propositions and pragmatic solutions. I hope those who reach this journal find it an enriching experience and a source of lively discussions regardless of whether they are research scholars, law students, academicians, professionals, or the average layperson.


(Vijender Kumar)

Editorial

Though in its nascent stage, Contemporary Law Review, has taken tremendous leaps forward in interdisciplinary legal research. This is due, in great part, to the laudable contributions of stalwart academicians, scholars and professionals. With each new issue, the journal has pushed past boundaries and ventured into new expanses of research and knowledge, resting on the shoulders of experts in the field of law and its allied disciplines. The latest issue continues this journey with the blessings of our Patron-in-Chief, Hon'ble Shri Justice S.A. Bobde, Judge, Supreme Court and Chancellor, MNLU, Nagpur and Patron, Prof. (Dr.) Vijender Kumar, Vice-Chancellor, MNLU, Nagpur. The Editorial Board has been honoured to work under the guidance of these luminaries.

The latest issue of the Journal focuses on topics generally ignored or simply unknown. The past few years have witnessed an upsurge in the enactment, amendment and judicial interpretations of laws and policies aimed to better serve the 21st century world. It is these novel and exciting frontiers that the articles in this issue have explored. The Journal has been enriched by the insight into law that has been provided graciously by two distinguished judges, Hon'ble Shri Justice A.K. Sikri, Judge, Supreme Court and Hon'ble Mrs Justice Ruma Pal, Judge (retd.), Supreme Court and is honoured to include their lectures on modern issues.

Justice A.K. Sikri, in his article titled "*Judiciary's Relevance in a Democracy and the Role of Law Schools in Shaping it*", discusses the potential of law students to bring about impressive change in the Indian democratic setup. He emphasises the role of law schools in helping groom these future flagbearers. He does so in a unique manner, beginning with the three important roles of a judge. He then proceeds to the lawyer's contribution to the judicial process. Finally, he moves to the integral role of law schools in shaping a lawyer who will assist the judiciary to uphold the highest values of democracy and the Constitution.

Justice Ruma Pal, in "*Freedom of Religion under the Constitution*", elaborates upon the oft-misinterpreted and misunderstood right to freedom of religion in India in the context of the recent *Sabarimala* judgment. Tracing the history of its interpretation and delineation by the Apex Court, she moves on to discuss the multitudinous aspects of religion, both the belief and the action. She employs the Constitution as a *grundnorm* during her analysis of the court's verdict, and Justice Indu Malhotra's dissent, in the case.

Prof. (Dr.) G.S. Bajpai has written an eye-opening article "*Exigency for Law on Hate Crime against Racial Minorities with Special Reference to North-East People in India*". In highlighting the plight of the North-East people, he

draws a comparison with the mistreatment of racial minorities in the US and UK. Unlike these countries, however, India does not have a law in place to deal with such crimes. While acknowledging few actions taken by the government, he stresses on the need for doing more to protect the racial minorities and presents numerous solutions to the problem.

Mr. Reuben Philip Abraham, in his article titled “*Regulation of Anti-Competitive Behaviour by Sports Organisations: A Critical Analysis of India and EU*”, unveils the darker side of Sports Organisations and their tendency to misuse their regulatory, financial and organisational powers, which results in abuse of dominance. Given their monopoly in the market and almost total control over the players, they require various changes to their structure and policy. The author makes several such suggestions to achieve these changes.

Ms. Mrinalini Shinde, in her article titled “*Viability of Market Mechanisms in Transboundary River Allocations: A Look at the Colorado River*”, discusses the potential of monetising the environment and water resources. Her article serves as an enlightening case study of the Colorado River, where the US and Mexico have put in place various market mechanisms to regulate and manage transboundary waters. She discusses in-depth the benefits and flaws of these market mechanisms, critiquing them through the lens of both economic and legal literature. She concludes her paper with suggestions for possible reformations to these market mechanisms in order to better protect the rights of the marginalised users as well as the vitality of the riverine ecosystems while safeguarding inter-state interests and ensuring their cooperation.

Ms. Vidhi Singh, in “*Passive Euthanasia: An Analysis of Supreme Court Judgments*”, tackles the thorny issue of passive euthanasia. By exploring the interplay between passive euthanasia on the one hand, and history, theology, economics and sociocultural beliefs on the other, she paints a nuanced and empathetic picture of people in need of passive euthanasia. She discusses the Indian position on the subject by tracing the history of judicial decisions, especially with regard to the right to dignity and human life as enshrined in the Constitution. Following a thorough and vigorous analysis, she makes a strong case for legalising passive euthanasia in the country.

Ms. Aaliyah Siddiqui, in her article on “*Making of a Model Procedure of Institutional Arbitration for Domestic Commercial Disputes in India*”, stresses upon the need to bolster the current arbitration regime in the country. In assessing the sluggish progress of India on creating a conducive environment for arbitration, she acknowledges that concerted efforts will be required from every organ of the government and inspiration will have to be sought from both the UNCITRAL Model Rules and the best practices of other countries round the globe. Using these, she creates a pragmatic model

procedure for India to adopt in order to strengthen the arbitration laws in the country.

Mr. Kaustub Neil Singh Bhati and Mr Prankul Boobana have co-authored an article on “*An Entwinement of Sustainable Development and International Trade: Analysis through the Lens of the Paris Agreement*”. They bring to the fore the burning issue of climate change and the final bastion of humanity against its ravages, the Paris Agreement. Acknowledging the demerits and lacunae in the Agreement, they proceed to discuss how current international trade law is interlinked with environmental law, sometimes impeding and sometimes boosting each other. They explore the entwinement of international trade as well as environmental protection *vis-à-vis* combating climate change through the lens of the Paris Agreement.

Mr. Sumit Bahmore, in his article titled “*Regulating Real Estate Sector in India: A Paradigm Shift from Builder’s Dominance to Buyer Centric*”, details the rise of builders’ dominance in the real estate sector and its subsequent downfall with the enactment of the Real Estate (Regulation and Development) Act 2016. He highlights the key provisions of the Act in terms of the obligations of builders, promoters and developers, the rights of buyers, and the speedy dispute redressal mechanism, all through the eyes of the buyer, once beleaguered but now empowered.

Ms Pallavi Khanna in “*Liability of Intermediaries in India*” focuses on a pressing issue in the age of the internet. Acknowledging the need to regulate online content, she warns against over-regulation leading to self-censorship and a possibility of state surveillance of individuals. She explores questions of the nature, role and liability of intermediaries, specifically with regard to third party data or the data available on their networks. She points out the glaring downsides to placing a disproportionate liability on intermediaries and suggests possible suggestions and improvements to improve the IT regime.

Ms Avani Gupta, in “*Persons with Disabilities and Inclusive Education in India: A Critical Analysis (With Special Reference to Hearing Impairment)*”, emphasises the role of education in the development of a human being and attainment of his or her potential, especially in case of a disabled person. She lauds the increased efforts to provide inclusive education to the disabled and its positive implications on their human rights, also pointing out glaring flaws in the system. Using persons with hearing impairment and their unique educational needs as an example, she proceeds to create a model that will provide the most suitable system of education, based on active decision making and the bridging of gaps between the abled and the disabled.

Ms Nitu Kumari, in “*Issues and Challenges Relating to Girl-Child: International Deliberations and Discourse*”, presents a litany of woes that

befall a girl child, a victim of intersectionality being both a child and a girl. Bringing to light the lack of specific treaties and international bodies meant specifically to protect and empower the girl child, she analyses the action of the international community. After investigating the international standards and guidelines formulated by different states and organisations and as a result of international deliberations, she provides further remarks on the strengthening of the redressal and rehabilitation mechanisms under international law.

Ms Divita Pagey, in her article titled “*Fair Dealing in the Information Age: Passé or Impasse?*” analyses the traditional notions of copyright and its exception, fair dealing, in light of the postmodern era. She discusses the copyright regime under Indian and international law and discusses the need to adapt in accordance with the information age. By highlighting the inadequacies and ascertaining whether the present rules on fair dealing need modification or simply stricter implementation, she utilises her nuanced understanding of the subject to make suggestions for the improvement of the copyright regime.

Mr Rishabh Shukla, in his trailblazing article on, “*Breastfeeding in Public: A Policy Review*” brings to attention the plight of the modern mother and her baby with regard to providing the child with adequate nourishment through breast feeding even in public areas. He evaluates the policies and schemes of India that currently serve to promote breastfeeding. This empirical research demonstrates the reasons that prevent women from breastfeeding in public and produces solutions to implement policies that will help these women and their children with immediate effect.

(Editorial Committee)

JUDICIARY'S RELEVANCE IN A DEMOCRACY AND THE ROLE OF LAW SCHOOLS IN SHAPING IT*

Justice A.K. Sikri*

If I say today that I am honoured to speak at a lecture in memory of Late Shri G.L. Sanghi, I would be stating the obvious. Few people with their work inspire lecture series in their memory, but this is testament to the footprint that Mr Sanghi left both as a lawyer, with his hard work, sincerity, sound knowledge of law and legal acumen, and as a fine human being.

Before advertng to the topic of the lecture, I would like to pay my tribute to Mr. Sanghi, son of the Soil and there is a reason for that. What I am going to say about him has a direct connect with the subject on which I am going to speak today.

Son of Shri V.K. Sanghi, a leading advocate of Nagpur, Mr. G.L. Sanghi also followed his illustrative father by pursuing law as his profession after obtaining his degree from Nagpur University. He started his career under the tutelage of Mr. A.S. Bobde (father of Justice Sharad Bobde) who saw a spark in him and persuaded him to shift to the Supreme Court. He came to Delhi in the year 1965 as a young lawyer and made his presence felt in the legal circle very soon not only because of his hard work and legal acumen but also due to his sincerity of purpose and ethical disposition. Senior lawyers started associating this smart young lawyer in important cases knowing fully well that there was a spark in him and his assistance on the nuances of the cases would be very valuable, as he was the person who could think out of the box. Recognising his all-round merit, Full Court of the Supreme Court designated him as the senior advocate within ten years of his practice in the Supreme Court, which is a rare honour. It was a remarkable achievement as getting 'silk' from the Supreme Court is itself difficult. Receiving this honour at a young age was an icing on the cake.

During his career as a lawyer, he appeared in thousands of cases in the Supreme Court as well in other courts. There are more than 700 cases decided by the Supreme Court and reported in the Supreme Court Cases (SCC) wherein he had appeared – a glorious record indeed. But the real glory is not merely appearance in the Court. Mr. Sanghi has been instrumental in contributing to the growth of law and constitutional jurisprudence because of his valuable assistance to the Court in many landmark cases which have shaped the legal system of this country by laying down fundamental principles of the rule of law, liberal democracy and constitutionalism. Be it *Kesavananda Bharati v. State of Kerala*¹ case (locus classicus), *Shamsher Singh v. State of Punjab*² case in which the powers of the Governor were defined by the Court, *D.S. Nakara v.*

* Second G.L. Sanghi Memorial Lecture delivered by Hon'ble Shri Justice A.K. Sikri organised by Maharashtra National Law University, Nagpur held on September 1, 2018.

♣ Judge, Supreme Court of India.

1 (1973) 4 SCC 225: AIR 1973 SC 1461.

2 (1974) 2 SCC 831: 1974 AIR 2192: SCR (1)814.

*Union of India*³ case which not only held that the grant of pension is a matter of right, but also eliminated discrimination which was practiced by creating two classes thereby entitling government employees to the revision in the pension from time to time; and *Waman Rao v. Union of India*⁴ case where the constitutional validity of first amendment and fourth amendment was upheld holding that these amendments do not damage any of the basic features of the Constitution. He also argued *Sri Jayendra Saraswati Swamigal (II) v. State of Tamil Nadu*⁵ i.e., *Sankararaman* case, *State of Gujrat v. Moti Kureshi Kassab Jamat*⁶ i.e., *Cow Slaughter* case, *In Re Noise Pollution*⁷ case (where freedom from noise pollution is treated as fundamental right), *Balco Employees Union (Regd.) v. Union of India*⁸ case (dealing with challenge to the disinvestment policy of the Government), *Steel Authority of India Limited v. National Union Water Front Workers*⁹ case (where the Constitution Bench dealt with the question of abolition of contract labour) among others.

In nutshell, it can be safely said that he was preferred choice of briefing advocates as well as litigants as everyone was eager to engage him as a senior advocate. Most of the cases which related to the service conditions of judges in the lower judiciary were argued by him. His greatness lies in the fact that to these judges coming from the subordinate courts, Mr. Sanghi rendered his services *pro bono* without even charging any fee. So much so, Mr. Sanghi would spend the money from his pocket towards expenses in those cases.

He would thoroughly prepare all his cases which he was to argue. His argumentative skills were of par excellence. He even exhibited unrelenting persuasive skills in the Court. He argued all types of cases exhibiting his expertise in various branches of law, which is again a rarity. The success which he achieved never bloated his ego. He always remained a warm person who would interact with senior lawyers as well as junior most lawyers with humility. I never saw any arrogance in him at any point of time.

Instead, he could maintain cool in every situation and would always be smiling. Above all, he was a good neighbour, a great husband and father, a true friend and even an excellent host. As a junior lawyer, I had engaged him in few cases and whenever I went to brief him, along with discussions on the case, we would be stuffed with delicacies. In the year 1994, I was the Vice-President of Delhi High Court Bar Association. A lady lawyer had come from Lahore and at the request of Lahore High Court Bar Association, we had extended courtesies to her to see that she has a comfortable stay. In India, she knew only Mr. Sanghi. She expressed her desire to see him, as she had met him earlier in some Law Asia Conference. When I called Mr. Sanghi, not only did he remember that

3 (1983) 1 SCC 305; 1983 AIR 130; 1983 SCR (2)165.

4 (1980) 3 SCC 587; 1981 (2) SCR 1; AIR 1981 SC 271.

5 (2005) 8 SCC 771; AIR 2005 SC 716.

6 (2005) 8 SC 534; AIR 2006 (SC) 2012; 2005(8) Scale 661.

7 (2005) 5 SCC 733; AIR 2005 SC 316; 2005 (4) JCR 4 SC.

8 (2002) 2 SCC 333; AIR 2002 SC 350; 2002 (1) JCR 339(SC); (2002)1CompLJ 205(SC).

9 (2001) 7 SCC 1; 2001 LLR 961.

advocate, but welcomed her wholeheartedly and utmost warmth at his residence, with a fabulous feast for all of us.

Mr. Sanghi was a voracious reader, who was always on a learning spree. It was his conviction that a lawyer (or for that matter a Judge) remains student for life. In spite of the fact that he was so busy in profession, he could take out time for extra-curricular activities. He became President of Law Asia Office, President of Bar Association of India, President of the Indian Association of Lawyers (Delhi Chapter), Vice-President of Art Care Foundation of India Office, President of United Lawyers Association. He was also President of an organisation (an NGO called SEARCH) which holds talks at regular intervals on spirituality and art. Another rare achievement was that he could maintain work- life balance which is not easy for a busy lawyer or a Judge. I feel proud in the fact that his illustrious son Justice Vipin Sanghi has not only imbibed good qualities of his father, he is also carrying his mission forward. SEARCH is still functional and vibrant because of him. It goes to the credit of Justice Sanghi that in the memory of his father, this initiative of memorial lecture series has been taken.

Few minutes ago, I had remarked that I wanted to pay tribute to Justice Sanghi with a specific purpose in mind. What I have told you about him is very relevant for today's topic. In fact, I was inspired from the life of Mr. Sanghi which gave me the idea to choose this topic.

Introduction

Sir Edward Coke, an English Judge of the 16th Century, said, addressing the lawyers of England, "there is no jewel in the world comparable to learning; no learning so excellent both for prince and subject as knowledge of laws..." Indeed, it is so. Law encompasses every individual from birth to death. It is so closely associated with life that lawless life is not merely undesirable but practically unthinkable. We don't even realise it, but every instant, everything we do has a law governing it. Law is the basis of an organised society and it seeks to regulate life. The problems of life as, it is common knowledge, are infinite and varying. Law does not and cannot remain static, while life by its very nature is dynamic. As the wheels of time roll by, experiences multiply justifying and quite often demanding new laws and regulations. The life of law is therefore ever-changing and endless.

Legal reforms generally go hand in hand with social reforms. One of the permanent problems of a State is to constantly adjust its laws to the changing conditions and needs of society. Law schools cannot afford to keep indifferent to, much less ignore, the developments and changes in the domain of law. As long as efforts are afoot to adapt the legal system to the changing social pattern in a country, it is not only desirable but necessary to have periodical assessment of the methods and content of legal education with a view to effecting improvements therein. Changes consonant with public opinion are easily possible and take place more frequently in a democratic society than in any

other type of society. Institutions, whether political legal or social, have much in common in democracies. They have similar tasks to face and problems to solve.

It was Mr. Justice Holmes, who had said “the business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner, and to make great lawyers.”

Today I am not only going to talk about the change agents of tomorrow viz. the students. I am concentrating on the role which law schools are expected to play in grooming them. There is one thing that neither a judge nor a lawyer can escape and that is going to law school/university. That is the common ground. It is this place that gives you a taste of the profession, an insight into what the practice of law demands, a trailer to the movie of the legal profession. With this first interaction with law, it is safe to say, it moulds the student into the lawyers and/or the judges, that they are going to be. I am going to trace this backwards- I am going to begin by first talking about the Role that a lawyer plays, the Role of a Judge. Then, I shall describe as to how the lawyers, who are inseparable part of the judicial system, enable the judges to achieve their role. Thereafter, I shall speak about the place (viz. the Law Schools) where, before they are even a judge or a lawyer, they are students. Their roles as a judge or the lawyer in a constitutional democracy, their duties and the values are instilled when they are students. No doubt, this learning does not end in the Law Schools, it is only the beginning of a life dedicated to learning. But this beginning is of vital importance and foundation is laid here.

Role of Judge

If we put in simplistic terms, the function of a lawyer is to argue a case before a court and the duty of a judge is to decide the disputes coming before her. While deciding these cases, the judge is supposed to decide correctly by arriving at a ‘just’ decision. To put it otherwise, the function of a judge is to do justice that is why courts are called ‘temple of justice’.

Justinian in his introduction to the INSTITUTES proclaimed these as precepts of law: to live honestly, to injure no one, and to give every man his due. These precepts still provide the rules of conduct for the majority of the civilised world.

However, the aforesaid simplistic description of the function of a judge and a lawyer would not suffice. While administering justice, the judges are upholding the rule of law as well as the Constitution. In this sense, the judicial system or the legal system is performing a much larger role for the betterment of the society. For any civil society governed by the Rule of Law, effective judicial system is a necessary concomitant. The Rule of Law reflects man’s sense of order and justice. There can be no government without order; there can be no order without law; and there can be no administration of law without judges and lawyers.

While there are many theories and opinions often diverse regarding the role of a judge, there is one common thread which is undeniable, viz. there is some

minimum threshold that a judge is expected to meet, in her responsibility towards a constitutional democracy. This emanates from the Constitution, the fundamental ethos of a democracy and extends beyond mere dispute resolution. On that parameter, Aahron Barak in his book “The Judge in a Democracy” stated two basic roles which judges are supposed to perform in a democracy and these are:

- (i) to uphold the Constitution and the rule of law; and
- (ii) to bridge the gap between the law and the society.

I shall add a third role which has emerged in a liberalised world, called Globalisation. It is:

- (iii) to connect the law with economics in her decision making process and be a person who contributes to the economic progress of the nation.

In the first role, the judge ensures that constitutional democracy prevails and the society is governed by the Rule of Law which commands: *However high you may be, the law is higher than you*. In the second role, she ensures that the society keeps pace with changing social norms thereby achieving social justice. Third role is to advance economic justice and be a part of economic progress of the nation.

First Role

Let me elaborate on the first role, namely, upholding the Constitution and the law in a democracy. I emphasise here that we are talking of democracy in a constitutional set up, i.e. as provided under the scheme of our Constitution. In this sense, a constitutional democracy is not merely a formal democracy which is a government of majority rule (of, by and for the people), but a substantive one. Let me explain here the basic feature of this constitutional democracy. It enshrines values such as the Rule of law, separation of powers, the independence of judiciary, human rights, political, social and economic justice, dignity, equality, peace and security. *Justice Aharon Barak* calls these values ‘*the inner morality of a democracy*’, ones which make a democracy a substantive democracy.

The American jurist, *Ronald Dworkin*, in his book *A Bill of Rights for Britain*, had described a true democracy as:

Not just a statistical democracy, in which anything a majority or plurality wants is legitimate for that reason, but communal democracy ... where everyone must be allowed to participate in politics as an equal ... political decisions must treat everyone with equal concern and respect. Each individual must be guaranteed fundamental civil and political rights which no combination of other citizens can take away, no matter how numerous they are or how much they despise his/her race or morals or way of life.

The values of a constitutional democracy are protected by the Constitution, a formal document which enjoys a normative supremacy over the general law of

the land by defining the roles and powers of the State and limiting their interference with individual rights. In this sense, judiciary is the guardian of fundamental rights of the citizens. It grants ascendancy to the substantive values of the democracy over its formal rules and acts as a counter-balance to majoritarianism.

Rule of law is the basic feature of our Constitution and judges are its guardian. The Indian judiciary was the common law guardian armed with power of judicial review to make it function according to constitutional ethos, morality and values to ensure constitutional fraternity. The Fundamental Rights Chapter empowered it to 'enforce' equality and reasonableness as spelt out in it. The Directive Principles Chapter informed it about the reasonable Indian society as a fundamental principle of India's governance, of which the judiciary constituted a critical part.

No doubt, the principle of separation of powers is a backbone of the constitutional system. It ensures that the power is not concentrated in the hands of any one government branch and that they operate independently. The three branches of the government, namely, Legislature, Executive and the Judiciary, play an equally important role in the governance of the country and there are checks and balances as well. At the same time, insofar as the Judiciary is concerned, not only its independence is ensured (which again is treated as inalienable basic feature of the Constitution), it is also given power of judicial review. This power extends to administrative/ executive as well as legislative function.

Thus, first role is that of protecting the very Constitution under which a judge has been appointed. In the process:

- To ensure that democratic principles are followed by the Government in power (all basic features of the Constitution remain intact).
- There is a good governance (example of the 2G spectrum and Coal Scam Cases).
- Fundamental Rights of the people are protected (which means right to equality, freedoms and right to life and liberty etc. is ensured).
- Rights of marginalised section of society and their dignity as well are translated into reality (socio-economic justice).
- Centre-State relationship.

Second Role

In order to describe the second role, it is necessary to first understand the relationship between the law and the society. The law sets down the legal norms and thereby controls and governs the behaviour of the society. At the same time, there are certain ethical and moral norms which the society lays down for itself from time to time. Without delving into the discussion insofar as connect between the law and morality is concerned, suffice is to say that in many areas there is an overlap between the law and the morality. Many laws are influenced

by moral and ethical values, thereby converting those moral norms into legal norms and, in the process, providing consequences for violating these norms. In this context, there has always been a debate as to whether societal norms influence the law making or it is the law, prescription thereof, which leads to change in the behavioural norms in the society.

In a modern and democratic society, the objective of the rule of law should not be simply to maintain peace in a frozen or paralyzed state. Rather, the rule of law should have the dynamism of life itself, and it should adapt itself to the constant process of transformation, which characterizes all living organisms. Law is a fact of transformation and growth of human society, and it is the Judiciary that ensures that this process takes place in an orderly, non-violent, and peaceful fashion, while at the same time contributing towards greater justice.

The attempts of the courts to bridge the gap between provisions of existing law and the requirements of justice, is the occasion for the development of new dimensions of justice by way of evolving juristic principles within the framework of law for doing complete justice according to the current needs of the society. It is the quest for justice in the process of administration of justice which occasions the evaluation of the "New Dimensions of Justice", the phrase used by J.S. Verma, former CJI. The new dimension is actually not really a new dimension. It only seeks first to bridge the gaps in existing laws, and then it fulfils the needs of the society by evolving juristic principles within the framework of law and with the objective of doing complete justice.

Social changes sometimes lead to a situation in which a statute passed in the context of a certain reality which was constitutionally valid at the time of its enactment, becomes unconstitutional in light of a new social reality. At such juncture the court should do everything it can to give the old statute a new meaning, in order to preserve its constitutionality.

While bridging the gap between law and society, a judge must take into account a complex array of considerations. Three such considerations are: (1) the coherence of the system in which she operates, (2) the powers and limitations of the institution of the judiciary, as defined within that system, and (3) the way in which her role is perceived.

Within aforesaid considerations, such cases may fall into three categories:

- (a) Where there is a clear recognition of a right in law and societal norm also accepts that right. But in reality, that particular class is deprived of its right. The court in that case, enforces the right and bridges the gap.

(Examples: Child Labour, Bonded Labour Placement agencies/Trafficking).

- (b) Where the society recognises or accepts a particular right and there exists a legal norm as well. By giving appropriate interpretation or by broadening the scope of such norm by interpretative process, the gap is bridged and objective realised. (Social Context Adjudication)- Examples:

- Termination of pregnancy of a raped girl - Sec. 125 Cr.P.C.
 - Providing maintenance to a destitute wife by interpreting the term 'wife' broadly.
 - Child Marriage / Sex with minor wife.
 - Expanding disability rights on the touchstone of human dignity (*Jeeja Ghosh v. Union of India*¹⁰ case).
 - Rights of SC/ST/OBC (*Indira Sawhney v. Union of India*¹¹ case).
- (c) Where the Court creates law in enforcing rights and bridges the gap -
- Sexual harassment at workplace (*Visakha v. State of Rajasthan*¹² case).
 - Recognised Transgenders as third gender (*National Legal Services Authority v. Union of India*¹³ case).
 - Recognising passive euthanasia and Living Will (*Aruna Ramachandra Shanbaug v. Union of India*¹⁴ and *Common Cause (A Regd. Society) v. Union of India*¹⁵ cases).

But then there is one controversial category- Where society's opinion may be sharply divided: These have dimensions of morality as well. For example:

- Triple talaq;
- Beef eating; and
- Euthanasia.

Pending Cases:

- LGBT (Sec. 377);
- Sabrimala (Entry of women into that temple); and
- Decriminalisation of Bigamy.

These are known as "Hard Cases". The function of the judge is to find the solution by applying constitutional norms.

Third Role

The first two roles described above are within the framework of the Constitution, having national perspective in mind. Today, we are living in the era of globalisation where economic boundaries are getting blurred. No doubt, the countries still have their separate entities with their respective geographical

10 (2016) 7 SCC 761.

11 AIR 1993 SC 477; (1992) Supp 3 SCC 217; 1992 Supp 2 SCR 454.

12 (1997) 6 SCC 241; AIR 1997 SC 3011; (1997) 3 LRC 361.

13 (2014) 5 SCC 438; AIR 2014 SC 1863.

14 (2011) 4 SCC 454; AIR 2011 SC 1290.

15 (2018) 5 SCC 1.

boundaries. Insofar as economic activity is concerned, it has trans-border ramifications and the world is becoming one economic village.

One consequence thereof is free flow of capital and human resources. Another fall out is that it is leading to convergence of laws. Not only is there universalisation of human rights, there is a convergence of many commercial laws and uniformity in this behalf is achieved by most of the countries.

This has changed the legal environment as well. With FDIs, collaborations, multinationals- new vistas of legal practice are opening up. Economic developments are giving rise to new IP issues, complexity in international arbitration matters, and also trans-border insolvency issues. In the globalised world of today and tomorrow, the lawyer and law professionals are to be well versed in the transnational- based science civilization where a lawyer has to do global lawyering.

Simultaneously, message has to be sent to the world at large that Indian judicial system is robust, fair and transparent, it does not brook delays. When we talk of ease of doing business, the efficacy of legal system becomes an important aspect in that direction. Therefore, it becomes the bounden duty and function of a Judge to deliver speedy justice. One of the major problems is mounting arrears and long delays in dispensation of justice. Thrust should be on Alternative Dispute Resolution, Legal Aid and Legal Awareness. All this will help in image building of legal profession.

Again, while dealing with the matters that have bearing on the economy of the country, the judge is supposed to keep in mind the economic impact of his/her decisions. Interface between law and economics is much more relevant in today's time when the country has ushered into the era of economic liberalisation, which is also termed as "globalisation" of economy. India is on the road of economic growth. It has been a developing economy for number of decades and all efforts are made, at all levels, to ensure that it becomes a fully developed economy. Various measures are taken in this behalf by the policy-makers. The judicial wing, while undertaking the task of performing its judicial function, is also required to perform its role in this direction. It calls for an economic analysis of law approach, most commonly referred to as "Law and Economics". In fact, in certain branches of law there is a direct impact of Economics and economic considerations which play a predominant role, even recognized as legal principles. Monopoly laws (popularly known as "Antitrust Laws" in USA) have been transformed by economics. The issues arising in competition law (which has replaced monopoly laws) are decided primarily on economic analysis of various provisions of the Competition Commission Act. Similar approach is to be necessarily adopted while interpreting bankruptcy laws or even matters relating to corporate finance, etc. The impress of economics is strong while examining various facets of the issues arising under the aforesaid laws. In fact, economic evidence plays a big role while deciding environmental issues. There is a growing role of economics in contract, labour, tax, corporate and other laws. Judges are increasingly receptive to economic arguments while deciding these issues. In such an environment it becomes the

bounden duty of the judge to have the economic analysis and economic impact of its decisions.

Role of Lawyers

You will think that I am only mentioning the role which a judge is supposed to discharge in a constitutional democracy. What about lawyers? However, if you noticed, I have already emphasised that in order that judiciary achieved its goals, contribution of lawyers becomes imperative, as there can be no administration of law without lawyers.

The legal profession at the highest level develops absorptive and analytic capacities of the human mind and offers great intellectual stimulus. It is no small service to be called upon to defend life, liberty and the other fundamental rights. But a rare degree of equipment is needed to discharge such duties properly. A lawyer with a well-furnished mind alone can be truly a counsellor at law; he alone can, not merely look up precedents, but guide his client along with the path of wisdom, even of generousities which may appear irrelevancies to be preoccupied client. In the hands of such a lawyer, the law represents the application of reason to noble and purposeful ends.

In performing his task, an advocate is expected to act without fear or favour and to conduct herself with dignity and decorum showing due respect and courtesy to the court. His main concern is to present to the court all that can be properly said on behalf of his client's case and in so doing he is not to cater to the opinions and prejudices of the litigant. The better the case is argued on each side the more likely the judge will reach a correct conclusion. That is why it is said that a strong bar makes a strong bench. It is, therefore, by contributing an essential aid to the process of the administration of justice that the advocate discharges a public duty of the highest utility.

M.C. Desai, former Chief Justice of Allahabad High Court has observed in one of his writings:

I always have a great respect for the lawyer's profession because there is no profession higher than that of law. It is one of Ruskin's five great intellectual professions relating to daily necessities of life. A Judge and a lawyer both participate in the administration of justice. A Judge administers the law and the lawyer guides him in doing it. They are both set on a common purpose and the administration of justice is their joint responsibility, that is why cooperation between them is essential for the achievement of the common purpose. Without a strong and independent Bar, it is not easy for the Court to receive the guidance which is essential in the administration of justice. A fear of the Bar is the most efficient check upon the arbitrary power which necessarily must be vested in the Judge.

Lawyers are essential to the dynamic capacity of a legal system and the rule of law because they are the carriers of "legal human capital"- the raw material

on which a legal system draws in the process of interpreting, implementing, and adapting legality to local and changing conditions.

To become a lawyer is to be more than being available as a “hired gun” or a “legal mechanic”. To be sure, one of our great tasks is to be effective advocates. An independent judiciary alone is not enough; it must be supported by a strong, independent, courageous and competent bar. This is an imperative for a free people.

Lawyers must be more than skilled legal technicians. But in a larger sense, they must be legal architects, engineers, builders, and from time to time, inventors as well. They have served, and must continue to see their role, as problem-solvers, harmonizers, and peacemakers, the healers-not the promoters-of conflict. In the beginning, I narrated the fine qualities which Mr. G.L. Sanghi possessed and that made him an outstanding lawyer. I hope you are now realising the relevance thereof. Lawyers need to imbibe those attributes. Lawyers must reconcile and stabilize, for a democracy often functions best by compromise. It bears repeating that they must see themselves more clearly in the function of healers rather than as promoters of litigation. Our profession carries public and ethical burdens with its privileges. Daniel Webster spoke of justice as “the greatest interest of man on earth.” And rightfully so, as a profession with a monopoly over the performance of certain services, we have special obligations to the consumers of justice to be energetic and imaginative in producing the best quality of justice at the lowest possible costs for those who use it, and with a minimum of delay.

How does this bear on the role of lawyers in a constitutional democracy? Lawyers are not unique in most respects relating to the preservation of democracy. They do, however, have a monopoly on assuring that citizens can take advantage of the rule of law, are specially trained to comprehend the importance of the rule of law, and are granted special privileges (i.e., the economically valuable license to practice) that may encompass some expectation that they will function as advocates of the rule of law. If lawyers do not protect individuals’ access to a properly functioning legal system, no one will.

At this juncture, let me advert to the state of affairs in this country, particularly in the field of law and order.

We live in a world where there is abject poverty; social injustice and deprivation; a world of declining public and private morality- every morning we wake up to read ghastly stories of crime against women, of lynching by mobs, of vandalism, of intolerance, of vigilantism, *et al.* We read about a world that is rocked by violence and terror; a world of pollution and environmental degradation; a world that lacks good governance, where common man is not able to get his legitimate rights and access to justice.

This scenario poses a great challenge for each of us. It brings to the fore relevance of all three roles I described above. Therefore, I exhort all of you youngsters, who are going to enter new phase in your life that too connected

with law and legal system, to prepare yourself to meet this challenge with appropriate learning in the law school itself.

Role of Law Schools

In the beginning of my lecture, I quoted Mr. Justice Holmes who remarked that the function of a law school is not merely to teach law or to make lawyers. Rather it is to teach law in the grand manner and to make great lawyers. Having regard to the aforesaid description of role of judges and lawyers, one cannot simply ignore the one place that shapes these future canons of justice. The one place I mentioned earlier, where the future lawyers and judges are simply students- students with a thirst to make a difference, with a desire to be positive change agents, entering the place with one can say an almost tabula rasa (blank slate) for the law schools to fill it up with legal principles, theories, the importance of the rule of law and ethics.

What is dominant or deficient in law schools both reflects and stimulates what is dominant or deficient in the legal profession, and vice versa. Simply put, what we fail to instil in our law students, we find lacking in our lawyers or even judges. The problems in the legal profession and the law schools are dynamically related to each other. For example, the “business” character of most law practices short-changes the poor and other under-represented interests. The excessively theoretical approach to legal education leads to the value-neutral technique of private dispute resolution over public interest advancement. The consequences of the dynamic relationship between law schools and legal profession are that changes in both areas influence each other. The relationship of the law school to the legal community is both direct and indirect. It is direct in the sense that law students and their teachers become participants in the community; it is indirect in the sense that legal education may influence what lawyers do.

There is one more foundational matter that must be examined: the functions of law, the roles of lawyers and judges, and the objectives of legal education. If we are able to come to some basic agreement about those matters, we should be able to agree about the social and educational obligations of law school. The functions of law include the institutionalization of social norms and the implementation of social policy.

It is through the law school professor that theories about legal education become practice and that implementation starts to “spin the tumblers” of a student’s mind, to borrow a phrase from Professor Kingsfield. The task of professing law incorporates two distinct functions. One is the academic function, the job of criticizing, expounding, and reforming law. The other is the training of young lawyers, which includes teaching legal doctrine and skills training.

Nani Palkiwala says that real education performs two major functions: it enlightens the understanding, and it enriches the character. The two marks of a truly educated person whose understanding has been enlightened is the capacity to think clearly and intellectual curiosity. If you have imbibed the ability to

think clearly, you will adopt an attitude of reserve towards ideologies that are popular and be critical of the nostrums that are fashionable, and this way you will be able to find the truth. Intellectual curiosity would enable you to continue and intensify the process of learning and shall keep you a student for life.

Keeping in view all the aforesaid parameters, according to me, role of the law schools in shaping future lawyers and judges is not limited to teaching the traditional law subjects only. Law schools have to keep in mind following responsibilities as well:

- (i) Instil moral sense and importance of ethics in legal profession. For this purpose, there should be some discourse of professional responsibility in legal studies. Law schools can play an important role by becoming immensely powerful force in defining, structuring and internalising professional norms, values and studies. It is the task of law schools to ensure that their sensitivity to ethical problems as well as their idealism doesn't decline as it is the one thing which we should be charged with above all others, the inculcation of a sense of discipline and morality into the practice of the law. Law schools can not necessarily make up for the shortcomings in an individual's previous ethical training, nor do I argue that law schools should or could do so much that no further exposure to ethical issues is necessary. But I do submit that a very large responsibility rests with the law schools to teach real life problems in real life terms. The law school is uniquely situated to shape and form the habits of students during the period in which their professional ideals and standards of ethics, decorum and conduct are being formed. At this stage, law students are more malleable and receptive than they will be after years of professional observation of bad habits of legal thinking, legal application, or dubious ethics.
- (ii) There should be legal aid clinics in law schools so that training is given to the budding lawyers and judges in legal aid work. They need sensitisation at this stage itself about the importance of legal aid and how it can benefit the society and would achieve the constitutional vision of access to justice to the deserving persons. Students should be associated with the legal aid work by connecting legal aid clinics with the District or State Legal Services Authorities.
- (iii) Teachers are supposed to inculcate hope in the students that when they become lawyers, they would be able to stand up for the weaker section whenever and wherever they see injustice is done to a person and whose rights are violated. Values of justice, equality, liberty, freedom and human dignity instilled in them passions to fight against injustice, wherever they see it. This way they will be helping in maintaining the faith of general public in the justice system of this country. So, just imagine the kind of impact that you are going to create on these students. Use your knowledge and your heart to teach them to stand up for those who can't stand. Speak for those who can't speak. Be a

beacon of light for those whose lives have become dark. Be an ambassador for the kind of world they want to live in.

- (iv) There should be training on mediation at the school level itself. This form of Alternate Dispute Resolution is the best form of attaining justice in many circumstances. At the same time, it reduces the burden of the court as well. Benefits of mediation and the nuances of the mediation are to be taught to them at law school level.
- (v) The teaching methodology needs to be revamped. It cannot be a 'rote' system. I have already stated what Nani Palkiwala says about real education and truly educated person. He stressed upon enlightening the understanding which means capacity to think clearly and intellectual curiosity. This becomes very relevant insofar as legal education is concerned. Law schools are supposed to inculcate these qualities in a student.
- (vi) Further, the globalisation scenario which I have indicated above, necessitates introduction of courses like: (1) Comparative Law; (2) International Criminal Law; (3) International and Comparative Copyright; (4) International and Comparative Antitrust; (5) Law of the European Union; (6) National Security Law; (7) International and National Issues; and (8) Worker Rights in the Global Economy. These courses would provide a foundation for knowledge of multiple international legal traditions, while an additional set of courses to be designed, so as to examine the ways in which legal issues may be resolved between parties from countries with dissimilar legal systems. Such course consists of: (1) International Conflict of Laws; (2) Judicial Assistance in Transnational Litigation; (3) State Responsibility for the Protection of Foreign Investment; and (4) International Litigation and Arbitration. Various methodologies of teaching and learning process such as co-operative teaching, case studies, lecture demonstration, group discussions and self-conducted research should be practiced and based upon output requirement of skills and knowledge.
- (vii) There should be research wings in the law schools which should create and disseminate world class research. Projects on certain social issues should be taken up and students should be encouraged to do empirical and doctrinaire research on such projects. This effort should be supplemented with law reviews/law journals publishing the outcome of research, on regular basis. This kind of research and scholarship in law schools would lead to creation of knowledge and that should become the fundamental objective of higher education.

In summation, I say that legal education plays an important role in grooming future lawyers and judges who act as social engineers and work towards the construction of national building. Therefore, law schools have to keep focus on this objective of legal education and train their students accordingly.

Concluding Remarks - No Termination Date for Continuing Education

There is no termination date for continuing education. To resort to the old cliché: Education is a journey, not a destination. Very clearly, in the case of the legal profession, it should continue to the grave or at least to that illusory date of retirement which some regard as a delightful dream and others as a dreadful nightmare. There are three somewhat different forms of education for which opportunities should be offered.

The first is training for greater competence in practice. This is the orthodox variety with which all of us are familiar and which is appropriately but undignifiedly referred to as how-to-do-it, bread and-butter or grass-roots education.

The second is instruction to qualify for professional responsibilities both in practice and beyond. These include much more than what is prescribed by the rules of conduct laid down in the Canons of Ethics. In a very general way, these responsibilities have to do with the improvement of the law or the administration of justice. The appropriate form of systematic education for this differs little from the traditional training and instruction except that it must have greater breadth and depth and must look towards the stimulation of activity outside of and beyond practice.

The third form has been called education for public responsibility. This involves a further step beyond education for competence and professional responsibility and is designed to qualify for public service not frequently undertaken by lawyers or included within their commonly accepted professional responsibilities. This public service is frequently full-time and almost always so intensive as to require a greater reduction of activity in practice than does the performance of the more usual professional responsibilities.

You all must have heard about the great painter and sculptor *Michelangelo*. He has several masterpieces to his credit. On the top of his list is his work *David*, which is an eighteen-foot-tall statue sculpted in marble in Florence, Italy. The story goes that this mammoth eighteen-foot block of marble had been lying around for several years. Some great artists, including *Leonardo da Vinci*, were invited to create something from the slab of marble. They all looked at it and dismissed it as flawed and worthless. It is *Michelangelo* who accepted to work on that *flawed and worthless* piece of marble and went on to create a magnificent work of art. While he was working on *David*, a little boy asked him as to why he was hitting that rock of marble so hard. He replied - '*Young man, there is an angel inside that rock. I am just setting him free.*'

The message of this story to the teachers of this law university sitting here is that there is a genius inside each of these students. There is a winner inside waiting to be unleashed. None of them is flawed and none of them is worthless. In most cases, we are just waiting for the right sculptor to come along, chisel away at the rock and set the winner inside all of them free. Who is the right sculptor in their case? It is you teachers! I hope it is you teachers who will unleash angels in all these noble souls, who are your students.

At the end, I will abandon philosophy and quote from the poet, Laurence Hope: “Men should be judged not by the colour of their skin, the Gods they worship or the vintage that they drink, not by the way they love or fight or sin, but by the quality of thought they think.”

And to this, I will add - this is where the law schools step in for it is their responsibility in ensuring this quality of thought.

Jai Hind!

FREEDOM OF RELIGION UNDER THE CONSTITUTION*

*Justice Ruma Pal**

The Constitution, particularly the Part on Fundamental Rights has become a part of everyday conversation in some form or the other whether consciously or not at every level of society across the country. The topic for today's talk suggested itself to me after religion was pushed to the forefront politically, socially and legally. Although there is so much discussion and violent demonstrations on issues of religion, rarely do we find an understanding or even knowledge of this fundamental right to freedom of religion as contained in Article 25(1) of the Constitution. It is a wonderful coincidence that Justice Daud, in whose memory it is my honour and privilege to speak today, was himself deeply concerned about the conflict between religious communities.

Article 25(1) says that “[s]ubject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.” In other words, each person in this country, whether citizen or not, has the fundamental right to conscience, and to profess, practice and propagate his/her religion provided it is not contrary to public order, morality, health or the fundamental rights of others.

In my opinion ‘Conscience’ is what we call ‘*vivek*’ in this country. It is translatable as belief in a truth which may be theistic or non-theistic. Although ‘religion’ has not been defined in the Constitution, the Courts have broadly defined it as the relationship between the individual and the Divine.¹ Therefore, religion is that aspect of conscience which is theistic. My interpretation of Article 25(1) which I hope to justify in the course of this talk is that the regulatory phrase in the Article beginning with the words ‘subject to’ refers only to the profession, practice and propagation of religion and not to freedom of conscience or belief itself where the freedom is absolute.

I start with an analysis of the title that I have chosen- ‘Freedom of Religion under the Constitution’. The word ‘under’ can mean ‘below’- a concept which is somewhat oppressive, regulatory and despotic. In this sense the phrase ‘under the Constitution’ would mean a single order. But the Constitution itself provides for rights and freedoms of individuals. This individuality which each of us enjoys necessarily includes a plurality of thought, opinions, values and beliefs including a right to one's own religious belief.

* Second S.M. Daud Memorial Lecture delivered by Hon'ble Smt. Justice Ruma Pal organised by Maharashtra National Law University, Nagpur held on January 12, 2019.

♣ Former Judge, Supreme Court of India.

1 See generally on this subject as per Dipak Misra, C.J. in: *Indian Young Lawyers Association v. The State of Kerala*, W.P. (Civil) No. 373 of 2006, pp. 1-5.

The importance that the framers placed on this right is evident from the fact that as originally framed, out of 19 substantive articles of the Constitution dealing with fundamental rights (Articles 14-32), as many as 5 were devoted solely to matters in connection with religion (Articles 25 to 30). With the knowledge that beliefs are part of the human identity and can be deeply divisive,² India adopted secularism as its implicit Constitutional goal³ - a goal that was made explicit by a Constitutional amendment in 1977.⁴

The word 'Secular' can be broadly defined in two ways.⁵ First, 'Secular' can signify 'worldly' as distinguished from spiritual. I understand the word 'worldly' to mean relating to the perceptible universe - material things which we can perceive with our senses as well as relationships between persons whether politically, economically or socially. 'Spiritual' means relating to the spirit, which is to say beyond the senses relating to the relationship between a person and the Divine. The word 'Secular' in the second sense means "of no particular religious affiliation".⁶ Secularism has been incorporated expressly in both senses in the Constitution. India is secular in the first sense, in that its Constitutional provisions do not seek to regulate matters which are in the realm of the spiritual or in a person's belief in the Divine and give each individual a fundamental right to freedom of religion (Article 25(1)). "Religion and secularism operate at different planes. Religion is a matter of personal belief and mode of worship and prayer, personal to the individual while secularism operates, as stated earlier, on the temporal aspect of the State activity in dealing with the people professing different religious faiths."⁷ What the Constitution seeks to regulate into a democratic order are worldly matters *viz.*, the relationships between individuals, between individuals and society whether at the social, economic, financial, political levels and with the relationship between the State and individuals and their secular activities even if they pertain to religion.

Secularism is therefore distinct from spiritualism, just as the physical is separate from the metaphysical. The two should not and cannot be mixed constitutionally because it results in disorder - a kind of social indigestion which can not only destroy us as a country but our very selves.⁸ Just as the State

2 The National Integration Council's Report, 2007 has listed about a hundred communal clashes since 1947 and till 2007 there were at least 29 Commissions of Enquiry in respect of these incidents. "*Report of Working Group of National Integration Council to Study Reports of the Commissions of Inquiry on Communal Riots. 2007*".

3 Vide Articles 27 and 28(1) of the Constitution of India.

4 The Constitution (Forty-second) Amendment Act, 1976.

5 Bryan A. Garner et al. (eds.), BLACK'S LAW DICTIONARY, 10th ed. 2014, p. 1558.

6 *Ibid.*

7 Per Ramaswamy J., *S.R. Bommai v. Union of India* (1994) 3 SCC 1, p. 167: AIR 1994 SC 1918: [1994] 2 SCR 644.

8 Section 125(3) of the Representation of Peoples Act, 1951 (corrupt practices).

cannot interfere with the freedom of religion, religion cannot impinge on the secular rights of citizens or the power of the State to regulate socio-economic relations.⁹ “If religion is allowed to overplay, social disunity is bound to erupt leading to national disintegration.”¹⁰

India is secular in the second sense in that there is no official religion.¹¹ India is not a theocratic State. It is not affiliated to any particular religion. Admixture of politics of the system of social power and religion is a particularly lethal combination and forbidden by law. Its dangers have been repeatedly pointed out by the Supreme Court.¹² That is why secularism is mentioned in the Preamble itself as one of the qualities on the basis of which the concept of this country has been built and is recognised as part of the basic structure of this country.¹³

Secularism in the second sense of ‘no particular religious affiliation’ is unique to this country. In other democratic countries such as the United States, secularism envisages the erection of ‘a wall of separation between Church and State’.¹⁴ The Indian Constitution on the other hand envisages the involvement of the State in matters associated with religion and religious institutions negatively and positively. Negatively, because Article 15(1) prohibits the State from discriminating against any citizen on the grounds only of religion, race, caste, sex, place of birth. An example of positive involvement is Article 28(2) which contemplates the State itself managing educational institutions in which religious instructions are to be imparted.¹⁵ I do not want to digress on these Articles¹⁶ because today I intend to speak only about India’s Constitutional goal as a secular country in the first sense, that is as keeping outside its purview matters which are purely spiritual.

To keep outside its purview means non-interference which in turn implies complete freedom from constitutional regulation. That freedom is not only of the individual but also of groups or communities sharing the same belief. When individuals’ beliefs coincide either by reason of birth, conviction or persuasion, they form religious communities which are bound together because of the commonality of their beliefs and the rights available to individuals are enjoyed

9 *A.S. Narayana Deekshitulu v. State of A.P.* (1996) 9 SCC 548, p. 588: AIR 1997 SC 3702: [1997] Supp 1 SCR 328.

10 *Supra* n. 7, p. 207.

11 *See* Preamble to the Constitution of India.

12 *Ramesh Yeshwant Prabhuo (Dr.) v. Prabhakar Kashinath Kunte*, (1996) 1 SCC 130, p. 147: AIR 1996 SC 1113.

13 *Supra* n.7, p. 298.

14 *Per* Jefferson, *Reynolds v. United States* [1878] 98 US 145, p.164.

15 But only to a limited extent in linguistic and religious minority educational institutions (vide Article 30 of the Constitution of India).

16 The three other Articles relating to religious matters which are excluded by me for today’s purposes are Articles 27, 28, 29 and 30.

by the group as well. As is well known India being a land of many religions i.e., Hindu, Sikhs, Jain, Buddhist, Christian, Muslim and Parsi, their sects and sub-sects all form the nation¹⁷ and, as said by the Supreme Court, “In our country ... the Constitution guarantees to all individuals freedom of religious faith, thought, belief and expression...where no particular religion is accorded a superior status and none subjected to hostile discrimination...”¹⁸ The Articles of the Constitution which make this clear are Articles 25(1) and 26.

As I have said at the outset, the Constitution itself speaks of freedom of conscience, indicating that one's belief need not necessarily be theistic. My belief that there is no god is as equally protected as the belief that there is a God.¹⁹ Religion in this sense of belief is included in the word ‘conscience’. For today's talk, I will limit the word ‘conscience’ to belief or religious thought and opinion and will use the word ‘religion’ to cover both.

Four aspects of the freedom of religion have been specifically referred to in Article 25(1). The first aspect is metaphysical, namely, the belief or thought itself- which for some is an entirely mental process and for others a supra-mental or intuitive experience.²⁰ The second aspect is profession or manifestation of that belief such as wearing particular dress, *Vibhuti* markings etc. The third aspect is practice of the belief or acts flowing from or towards or supporting belief such as rituals relating to worship like *Aarti*, etc. The fourth and final aspect is propagation, dissemination or spreading of the belief to others. Before I deal with each of these aspects separately, one further concept needs to be analysed and defined and that is the concept of ‘freedom’.

When one talks of ‘freedom’, it means freedom from interference by others. Freedom may be absolute or may be conditional. Freedom in an organised society cannot, by definition, be absolute. Restrictions on freedom by law must necessarily relate to the temporal world. Thought or belief itself, which is entirely personal in the sense of subjective- mentally or spiritually, cannot be the subject matter of external regulation. Freedom of belief from laws is therefore absolute. This absolute protection from State interference was necessary to be expressly articulated in the Constitution as ‘conscience’ given the historical background of persons being persecuted or even killed for their belief by those in power.

17 Ruma Pal, “*Religion and Personal Law in Secular India*”, G.J. Larson (ed.), RELIGIOUS MINORITIES AND THE LAW, 1st ed. 2001.

18 *Dharma Rama Bhagare v. State of Maharashtra*, (1973) 1 SCC 537 p.543: AIR 1973 SC 476: 1973 CrLJ 680.

19 *Commr. Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* 1954 SCR 1005: AIR 1954 SC 282.

20 *Durgah Committee v. Syed Hussain Ali* (1962) 1 SCR 383: “According to Soofies a clear distinction has to be drawn between the real and the apparent, and they believed that the ultimate reality could be grasped only intuitively (Ma’arifat or gnosis).”

Laws can only regulate external behaviour. Therefore, the profession, practice and propagation of religion which are all external expressions of belief, have been made subject to Constitutional regulation because they may involve or impact others. While this distinction between the absolute protection afforded to the individual's subjective belief and the regulated protection afforded to its profession, practice and propagation must be kept distinct, nevertheless because it is sometimes difficult to separate the distilled belief from its profession and practice, this absolute Constitutional protection has been extended through a process of interpretation by the Courts to such profession or practice of a person's religion as is integral or essential to the belief to which an individual subscribes.²¹

At this stage, it is appropriate to clear the ground regarding a common confusion relating to religion and personal laws. The distinction between the spiritual or the belief on the one hand, and the worldly or secular on the other, explains why we treat freedom of religion and personal laws separately and differently. Till the advent of the British, every aspect of one's life at every level of one's existence was covered by texts which are considered sacred by the different faiths. As a result, there were several different codes of conduct operating simultaneously in India till the late 19th Century not only for the different religious communities but for sects and sub-sects within the communities. The British sought to organize social conduct first by delinking rules of ethical conduct relating to families, i.e., marriage, divorce, adoption and inheritance now known compendiously as personal laws, from rules relating generally to society at large i.e., trade and crime.²² Thus, the Transfer of Property Act was enacted in 1882, the Indian Contract Act in 1872, the Indian Penal Code in 1860 and the Code of Criminal Procedure in 1898 respectively. Personal laws were left to be governed by the religious texts although the activities covered by those laws are not religious in the sense that they do not impact one's belief or relationship with the Divine (the spiritual) but concern the temporal world and one's relationship with other humans (the secular). In time, the prescription of objective criteria by laws was thought necessary by the British to bring about uniformity of acceptable social conduct even as far as personal laws were concerned. They moved from community to community collating and codifying personal laws. Uniformity was first brought about among the Christian community as far as marriage²³ and divorce²⁴ were

21 *Commr. of Police v. Acharya Jagadishananda Avadhuta* (2004) 12 SCC 770: "Essential part of a religion means the core beliefs upon which a religion is founded."

22 Regulation of 1772 introduced by Warren Hastings; "In all suits regarding marriage, caste, and other religious usages the law of the Koran with respect to the Mohammedans and the Shaster with respect to the Gentoos shall be adhered to." THE GOVERNMENT OF INDIA, BEING A DIGEST OF THE STATUTE LAW RELATING THERETO, 1st ed.1907, p. 325.

23 The Christian Marriage Act 1872.

concerned in the late 19th Century. Then came the Parsi Marriage and Divorce Act in 1936. A law relating to divorce by Muslim women was enacted in 1939.²⁵ After Independence and post the Constitution, between 1955 and 1956, Acts covering all aspects of Hindu personal laws were passed by the Indian Parliament.²⁶ Whether ultimately there will be uniformity in personal laws governing all religious communities in terms of Article 44,²⁷ is still being debated, but perhaps our country is not yet (at least politically) ready to accept it.²⁸ But it is necessary to emphasize that personal laws despite the sacredness of the texts on which they may be based are secular and are distinct from religion the freedom of which is guaranteed by the Constitution. As the Supreme Court has said: “it is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution.”²⁹ Public opinion regarding the laws relating to religion unfortunately rests to a large extent on an ignorance of this distinction. I now return to the second aspect of the Freedom of Religion *viz.*, profession.

As I have indicated earlier, the profession of religion is an outward manifestation of a belief. An example of such profession is the wearing of *Kirpans* by Sikhs which is expressly referred to in Article 25(1). Other instances may be the wearing of a particular dress (like the ‘*Hijab*’) or outward markings (like the ‘*Tilaka*’ on the forehead of many Hindus). All forms of profession do not necessarily form part of the core of a religion and a particular form of profession may be integral to one religion and not to another. For example the growing of beards and long hair is an essential part of the Sikh faith.³⁰ But as far as other religions are concerned, the growing of beards is optional and therefore not essential or integral to the religion. Many Hindu ascetics and Muslims also grow beards as an outward profession of their religion, but such profession is not essential to either belief. When Mohammed Zubair, a Muslim,

24 The Indian Divorce Act 1869.

25 The Dissolution of Muslim Marriages Act 1939.

26 The Hindu Succession Act 1955, the Hindu Marriage Act 1955, The Hindu Minority and Guardianship Act 1956 and the Hindu Adoptions and Maintenance Act 1956. The Parliament and the State Legislatures have been expressly empowered by the Constitution to enact laws on marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition [and] all matters in respect of which parties in judicial proceedings were immediately before the commencement of [the] Constitution subject to their personal law. [Constitution: Article 246: Schedule 7: Concurrent Powers of Parliament and State: List III: Entry 5]. As opposed to these intra-personal relationships it is noteworthy that there is nothing in the Constitution which empowers the passing of laws in respect of the beliefs *simpliciter*.

27 Article 44 of the Constitution of India reads as: “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”

28 *Pannalal Bansilal Pitti v. State of AP* (1996) 2 SCC 498: AIR 1996 SC 1023.

29 *John Vallamattom v. Union of India* (2003) 6 SCC 611, p. 627: AIR 2003 SC 2902.

30 Sarup Singh Alag, *HAIR POWER*, 15th rev. ed. 2005, p. 206.

was enrolled as an Airman in the Indian Air Force he was asked to shave his beard while in service in keeping with a particular Regulation of the Indian Air Force.³¹ The Regulation only made an exception “where the religion professed by him prohibits the cutting of hair or shaving facial hair”. Zubair’s challenge to the Regulation as violating his right under Article 25(1) was negated by the Supreme Court saying that his religion did not prohibit the shaving of beards and that therefore the regulation was permissible to maintain uniformity, cohesiveness and discipline in the armed forces.³²

The third aspect of religion is the practice of it. Practice- as the word implies- means acts done or activities pursuant to a religious belief. This is an area where the maximum confusion about religious rights exists. Activities in connection with religion are wide ranging. Like the profession of religion, those activities which are so closely linked with the belief that they are considered essential or integral to the belief are protected from interference by law. But as said by the Supreme Court “the protection must be confined to such religious practices as are an essential and an integral part of it and no other.”³³ Most judicial decisions on the topic of Article 25 had to resolve the question as to which activity is essential to a religious belief and which is not.

To sum up my views expressed till now: There are two different levels of religious freedom - first, there is the core belief, profession and practices essential or integral to that belief where the freedom is absolute. Second, are the profession, practice and propagation of religious beliefs not essential to that belief which may be subject to constitutional norms and regulation by the state. Two questions follow. How does one determine which practice is essential to the belief? What are the regulations to which non-essential religious practices may be subject?

To differentiate between practices which are afforded protection from State Regulation by the Constitution and those which are not, the Supreme Court lucidly stated: “Essential practice means those practices that are fundamental to follow a religious belief... Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part.”³⁴ Recently, Gogoi, J., as his Lordship said that to pick out those religious practices for Constitutional protection, Courts must identify “essential religious

31 Regulation 425 (b) of the Armed Force Regulations 1964.

32 *Mohammed Zubair Corporal v. Union of India* (2017) 2 SCC 115: AIR 2017 SC 107.

33 *Supra* n. 20.

34 *Supra* n. 21, p.783.

beliefs and practices, sans which the religion itself does not survive.”³⁵ The courts have had, so to speak, to separate the wheat from the chaff. Thus they have held that “rituals, observances, ceremonies and modes of worship are regarded as integral parts of religion”³⁶ but the “administration of a religious institution or endowment ... being a secular activity ... is not an essential part of religion”.³⁷ If it is not an essential part of religion but nevertheless a religious practice it is still protected constitutionally just not absolutely.

Even in respect of inessential religious practices, regulatory laws can be passed only for four objectives- health, public order, morality and the fundamental rights of others. Also non-essential religious practices may be subject to regulation only by laws under the Constitution and not by any other so called ‘laws’. Therefore, a ‘*fatwa*’ is only an ‘opinion’. “It is not a decree, nor binding on the Court or the State or the individual”.³⁸ Examples of inessential religious practices which have been regulated on the ground of health are the bursting of fire-crackers during Diwali³⁹ and the use of amplifiers for recitation of prayers.⁴⁰ The performance of the ‘*Tandava*’ dance in procession by *Ananda Margis* was found by the Supreme Court to be inessential to the belief and subject to regulation on account of public order.⁴¹ Regulation on the ground of morality has also taken place although morality is a nebulous term. The regulation of practices such as ‘*suttee*’⁴² and ‘*devadasis*’ have been held by the Supreme Court⁴³ to fall within such laws. In 2017, it was said by the Supreme Court that “the practices of ‘*sati*’, ‘*devadasi*’ and ‘polygamy’ were abhorrent and could well be described as sinful.”⁴⁴

The Rajasthan High Court has held that the practice of ‘*santhara*’ or the Jain method of fasting to death to be an inessential part of the Jain religion and therefore could be prohibited by law.⁴⁵ However, the Supreme Court has stayed the High Court Order and the matter is pending final decision; when hopefully the court will finally lay down the criteria for determination of the essentiality of a religious practice.

35 *Adi Saiva Sivachariyargal Nala Sangam v. State of Tamil Nadu* (2016) 2 SCC 725, p. 734.

36 *Supra* n. 19.

37 *Supra* n. 28, p. 513.

38 *Viswa Lochan Madan v. Union of India* (2014) 7 SCC 707, p. 715: AIR 2014 SC 2957.

39 *In re, Noise Pollution* (2005) 5 SCC 733.

40 *Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Association*, (2000) 7 SCC 282: AIR 2000 SC 2773: 2000(6) SCALE 163.

41 *Supra* n. 21, p. 783.

42 On December 4, 1829, Lord Bentinck issued Regulation XVII declaring *Sati* to be illegal; the Commission of Sati (Prevention) Act 1987.

43 See e.g., The Madras Devadasis (Prevention of Dedication) Act 1947.

44 *Shayara Bano v. Union of India* (2017) 9 SCC 1, p. 239.

45 *Nikhil Solni v. Union of India* 2015 CrLJ 4951.

While inessential religious practices may be subject to the fundamental rights of others,⁴⁶ the fundamental rights of others cannot prevail over one's fundamental right to one's beliefs and essential practices. Thus, the fundamental right to freedom of expression under Article 19(1)(a) cannot be exercised to maliciously criticise or interfere in the faith of others. On this basis in 1995 the Supreme Court upheld the forfeiture of a novel entitled '*Dharmakaarana*' under Section 95 of the Code of Criminal Procedure.⁴⁷ In the same way the fundamental right under Article 19(1)(g) to carry on trade as a butcher can be denied during the period of Jain religious festival.⁴⁸

Before leaving the topic of essential and inessential religious practices, in my opinion the difficulty for courts in India is compounded by reason of the complexity of the nature of Hinduism itself. "Hinduism, as a religion, incorporates all forms of belief without mandating the selection or elimination of any one single belief. It is a religion that has no single founder, no single scripture and no single set of teachings";⁴⁹ where the Bhagavad Gita quotes Sri Krishna as saying to Arjuna: "Howsoever I may be conceived, I will appear in accordance with such conception."⁵⁰ With Hindus forming almost 80% of a population of over 1.2 billion, the possibilities of conceptualising God in manifold forms are endless. God has been conceptualised as without form (*nirakara*) and without qualities (*nirguna*), with form (*sakara*) and with qualities (*saguna*), as a creator, as a destroyer, as a preserver, lover, friend, child, mother, father, as embodying different qualities such as wisdom, good fortune and so on. In Bengal alone, it is said that there are 33 crore forms of God.

In this context, consider the recent decision of the Supreme Court in *Indian Young Lawyers Association v. The State of Kerala*⁵¹ or the Sabarimala case. The belief of some Hindus is that God has manifested Himself in the form of a *Naisthik Brahmachari* or eternal celibate in Sabarimala. From ancient times the practice of celibacy as a means to control one's sensual attraction is common to practising ascetics in many religions. Ruined monasteries in Nalanda and convents in Europe bear witness to this. Celibacy is a spiritual path which many Hindus practice individually in solitude or in a religious order or community, where the way is considered as sacred as the goal itself. That is the belief. One may not subscribe to it but one must understand it. As in monasteries elsewhere, in the temple at Sabarimala women of a particular age are barred from entering because God, as the believers have it, is practising celibacy there. Why women

46 *Shastri Yagnapurushdasji v. Muldas Bhundardas Vaishya* (1966) 3 SCR 242.

47 *Baragur Ramachandrapa v. State of Karnataka* (2007) 5 SCC 11.

48 *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat* (2008) 5 SCC 33, p. 49.

49 *Supra* n. 35, p. 734.

50 Chapter 4 Verse 11, Bhagavad Gita.

51 *Supra* n. 1.

of a particular age? Because little girls and older women are perceived as not sexually attractive and it is believed do not pose a distraction to the practice of celibacy by the deity. The State of Kerala, where Sabarimala is situated, enacted a law⁵² protecting this practice. The challenge to the constitutionality of the law had been rejected by the Kerala High Court as far back as in 1993.⁵³ The issue was raised again almost 25 years later before the Supreme Court by way of a Public Interest Litigation. The matter was heard by a bench of five judges, four of whom⁵⁴ were of the view that the practice of debarring women between 10-50 years was inessential to the belief and consequently the law was unconstitutional as it offended the fundamental right to equality of those women who fell within the debarred age group. One judge, Malhotra, J., dissented. She held that the practice was essential to the perception of a practising celibate deity and therefore could not be denied the absolute protection of Article 25. Other grounds were also discussed and differently resolved by the judges but I have chosen to exclude them for my present purpose. The crucial point of difference between the two views appears to hinge on the word 'essential' or 'integral' because all five agreed on the nature of the belief. As I have said earlier in connection with the Santhara decision all the tests to determine essentiality are yet to be authoritatively and clearly spelt out by the Supreme Court. Will these tests of essentiality be applied cumulatively or singularly? In my opinion, the one test which cannot logically be questioned is the one which has been beautifully expressed in the '*tandava*' decision⁵⁵ and reiterated recently⁵⁶ is "whether the nature of the religion (or belief itself) will be changed without that part or practice." Would the belief of God as a practising celibate be affected by the entry of young women in His presence? In my opinion, it would, whether such celibacy is practised in a monastery by humans or by a manifestation of God in a temple. As the old proverb goes, if you sit under a palm tree and drink milk, people will believe you are drinking toddy! And it is this perception which is the substratum of belief which is absolutely protected from being subjected to the impact of other constitutional rights including equality amongst women. The view perhaps needs further discussion but for the time being I repeat the distinction in freedoms between the spiritual on the one hand and the temporal and social on the other. Moving on to the fourth and final aspect of the religious freedom of the individual and that is the right to propagate one's belief.

52 Rule 3(b) of the Kerala Hindu Place of Public Worship (Authorisation of Entry) Rules 1965.

53 *S. Mahendan v. The Secretary, Travancore Devaswom Board, Thiruvananthapuram* AIR 1993 Ker 42.

54 Dipak Misra, C.J., A.M. Khanwilkar, R.F. Nariman, Dr. D.Y. Chandrachud, JJ.

55 Per Rajendra Babu, J., *supra* n. 21.

56 *Supra* n. 33, p. 755.

As I have said earlier, propagation means to spread and in the context of religion the right can be best described as the right to preach, whether orally or visually. The inclusion of this aspect of religion as a fundamental right was opposed by many during the Constituent Assembly Debates.⁵⁷ Mr. Tajmal Hussain said “if you start propagating religion in this country, you will become a nuisance to others.” Mr. Loknath Misra said “If people should propagate their religion, let them do so. Only I crave, let not the Constitution put it as a fundamental right and encourage it.” Supporting its inclusion, Pandit Lakshmi Kanta Moitra said: “If we are to restore our sense of values which we have held dear, it is of the utmost importance that we should be able to propagate what we honestly feel and believe in. Propagation does not necessarily mean seeking converts by force of arms, by the sword or coercion.” As it transpired, the propagation of religion was retained as a part of the fundamental right to freedom of religion under Article 25(1), where “subject to the restrictions which this Article imposes, every person has a fundamental right not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others.”⁵⁸ “It is the propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery, or in a temple or parlour meeting.”⁵⁹

In 1977, the Supreme Court has also held that propagation must be limited to the mere transmission or spread of the tenets of a particular religion but excludes actual conversion because “that would impinge on the ‘freedom of conscience’ guaranteed to all citizens of the country alike.”⁶⁰ In my opinion, this judgment is too restrictive of the right. ‘Propagation’ has been defined in the New Shorter Oxford Dictionary as cause to grow in numbers or amount. A belief is usually propagated to increase the number of subscribers to the belief. Numbers can be increased by persuasion at an emotional, mental or intellectual level otherwise the right to a large extent becomes meaningless. However, I agree that in increasing the number of believers, temporal methods like force or inducement to some bodily benefit such as money or food cannot be allowed. Just as others cannot use temporal methods to alter my belief, I cannot also alter my belief for temporal gains. As Saghir Ahmed, J., put it: “Religion is a belief which binds the spiritual nature of man to a supernatural being ... if the person feigns to have adopted another religion just for some worldly gain or benefit, it should be religious bigotry.”⁶¹

57 The Constituent Assembly Debates held on December 3rd and 6th, 1948.

58 *Ratilal Panachand Gandhi v. State of Bombay* 1954 SCR 1055: AIR 1954 SC 388.

59 Per M.K. Mukherjee, J., *supra* n. 21.

60 *Rev. Stanislaus v. State of M.P.* (1977) 1 SCC 677 p. 682.

61 *Lily Thomas v. Union of India* (2006) 6 SCC 224, 245.

Time constraints prevent me from further elaboration of the highly abstruse and contentious subject of religious freedom. However, I believe and would like to conclude by quoting Swami Vivekananda: “The basis of all systems, social or political, rests upon the goodness of men. No nation is greater or good because Parliament enacts this or that, but because its men are great and good ... Religion goes to the root of the matter. If it is right, all is right ... One must admit that law, government, politics are phases not final in any way. There is a goal beyond them where law is not needed...”⁶²

Thank you.

62 Swami Vivekananda, THE COMPLETE WORKS, Vol. I, 11th ed., pp. 192-193 as quoted by Ramaswamy, J., in *A.S. Narayana Deekshitulu v. State of AP* (1996) 9 SCC 548, p.571.

EXIGENCY FOR LAW ON HATE CRIME AGAINST RACIAL MINORITIES: A COMPARATIVE STUDY WITH SPECIAL REFERENCE TO NORTH-EAST PEOPLE IN INDIA

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Abstract

The concept of hate crimes is not simply a crime in which the offender hates the victim. In fact, for any act to be classified as hate crime it is also motivated by the bias a person would have against any affiliation like race or caste or religion. This paper aims to analyse the status of North-East people in India; assess the legislative provisions of UK and US with India regarding racial hate crime; suggest key changes that India needs to adopt for safeguarding the rights of racial minorities of North-East people. After analysing the objectives, the researcher deduced that we are in need of an effective monitoring, regulating and statutory bodies in order to deal with the current situation of hate crime incidents in India. Our legislative bodies can borrow the best practices from UK and US legislations for formulating safeguards against hate crime instances towards North-East people of India.

Keywords: Hate Crime, Racial Minority, Discrimination, Bias Motive.

Introduction

Hate violence has a long history which has increased in the recent past. It is difficult to define the concept of 'Hate Crime' yet few theorists have shared their thoughts. According to Finn and McNeil, Hate crime is defined as "words or actions designed to intimidate an individual because of his or her race, religion, national origin or sexual preference."¹ Hate crime is one where a criminal act is committed with a bias motive. Such crime is based on a very complex phenomenon with a special ingredient of hate or bias towards what another person represents in the society. Hate crime is not universally same in every society but fundamentally similar around the world. The 'bias' or 'hate' factor is important to distinguish it from other crimes. On this basis, hate crime is defined universally. The nature of hate crimes, their victims and perpetrators vary according to the history, persisting social and geographical conditions. This hate or bias can be the result of a person's race, religion, caste, language, ethnicity, nationality, disability, gender or sexual orientation, or a similar common factor.

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1 P.F. McNeil, THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIMES: AN EXPLORATORY REVIEW, 1st ed. 1987.

Hate crime is unique in the sense that, if compared to other criminal activities towards a person, the perpetrator targets a person or group of persons or property of a person or a group of persons which shares a particular characteristic. The feeling of vulnerability that the victims of such crime face is far worse than victims of other crimes. The victims feel intimidated or threatened, because it is an attack on such a characteristic of the victim which he/she cannot change. These victims are attacked on the factor of what they represent in a society or on their group identity which is permanently embedded in their life. This makes the victim as well as the entire group vulnerable, since the very objective of these crimes is to frighten the entire community.

Accurately measuring the number of hate crimes is extremely difficult, though few bodies have tried to capture the statistics on hate crimes. As per the FBI Statistics, in the Year-2016, 6,063 hate crime incidents were reported involving 7,509 victims in United States. Out of these, 58.9% of victims were targeted because of the offenders' race/ethnicity/ancestry bias.² Similarly, in UK, police recorded crime, Home Office published statistics for the year 2016-17 where out of the total 80,393 hate crime incidents 62,685 were racially motivated.³ As per the Five-Year Report (2011-2015) of All India Christian Council-Centre for North-East Relations (AICC-CNER), Bangalore reported highest at 62% of racial attacks, followed by Delhi (37%) and other states with 1%. Out of these crimes, 54% happened against North-East communities in Delhi and NCR, and 42% occurred in Bangalore, while a mere 4% were reported in other cities like Mumbai, Hyderabad, Pune and West Bengal.⁴

Victims of hate crimes face a lot of difficulty because the crime is committed due to the differences existing in the cultures which can be easily identified on the basis of body structure, facial features, skin colour, religious beliefs, race, food habits etc. Enforcement agencies, police persons and other public servants who owe a duty to prevent and control such crime, fail to identify and recognise incidents of racial violence due to lack of adequate training. Further, natural reluctance by the victims of hate crime to report any such incidents to law enforcement agencies exacerbates the prevailing hate crimes. These acts of racial violence reflect a racial prejudice or interpersonal hostility that is based on the stereotype that different cultures do not require equal or special treatments, or they can be held responsible for any alleged

2 U.S. Department of Justice, "Hate Crime Statistics" FBI: Uniform Crime Reporting, 2016 <https://ucr.fbi.gov/hate-crime/2016>, (visited on November 28, 2018).

3 A. O'Neill, "Hate Crime, England and Wales, 2016/17", UK: POLICE RECORDED CRIME, HOME OFFICE, 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652136/hate-crime-1617-hosb1717.pdf, (visited on November 28, 2018).

4 A.C. Relations, FIVE YEARS REPORT- THE CHALLENGES FACED BY NORTH EAST COMMUNITIES IN METRO CITIES. INDIA: AICC, 2011-2015.

social problem(s). Racial minorities are perceived with certain prejudices. These stereotypes are generally race based and act as a trigger point for violence.

Now the question arises, what exactly is race? Is there some governing body who decides which person fits in the racial, ethnic, cultural landscape of India? Many a times, these fundamental questions are left unanswered. On the other hand, there is unwritten social consensus regarding the co-relationship between race and identity of person in India. As per the traditional definition of race, "it is a biological trait, susceptible of classification into four types, known to have no significant relation to culture."⁵

The racism theory conveys that people of one race are considered superior to another. It often results in conflict and hostility among the races. The races thought of as inferior are subject to discrimination, persecution and in some cases even genocide. Racism asserts that human beings are divided into races which are distinguished by their physical characteristics, cultural patterns and their modes of behaviour. Racial discrimination is deeply rooted in Indian history. However, racial discrimination against people with certain racial-cultural affinities (primarily Mongoloid and Blacks) is quite unknown. Unfortunately, the public and government agencies deny such social practices. Few brazen incidents of extreme violence have brought the issue about racism in forefront in India.

Arguments against attack on North-East people have immensely sought the media attention. The SMS disdain battle against North-East people and attack on lookalike females from Singapore, shows the racial discrimination in our country. Assault on two men from Nagaland by a gathering of more than 15 individuals in Gurgaon is an instance of revolting, criminal intimidation and endeavour to murder. No arrest happened in this incident. In Bangalore, Michael Lamjathang Haokip was assaulted due to his physical appearance and language. Even before Nido's death, a 19 years old boy Loitam Richard from Manipur was found dead in his hostel room in Bangalore. The local police authorities first stated that it was death under mysterious circumstance and proceeded the matter in accordance with Section 174 of the Code of Criminal Procedure. Thereafter, hostel supervisor filed a fresh complaint against two other persons, who allegedly had beaten up Richard in the previous night. Consequently, police registered the case of 'Murder' under Section 302 of the Indian Penal Code.⁶ All these cases question the efficacy of Indian Criminal Justice System and put forth the need of an anti-racism law to prevent racial

5 T.L. Angel, "A People Distinct from Others: Race and Identity in Federal Indian Law and the Hispanic Classifications in OMB Directive No. 15", *TEXAS TECH LAW REVIEW*, Vol. 26 No. 4 1995, pp. 1219-1274.

6 Indrajit Hazra, "Racism, Our Dirty Secret", *TIMES OF INDIA*, February 10, 2010, <http://timesofindia.indiatimes.com>, (visited on November 30, 2018).

discrimination and violence. The pertinent questions regarding people of North-East are as: Should North-East Indians be handled in a different manner? Is there no violation of their fundamental rights? Are they not deprived of the constitutional guarantees (i.e., social justice, equality, dignity, fraternity, unity and integrity)? Why is there discrimination on the basis of race?

Henceforth, the study highlights the status of North-East people, the efficacy of the existing laws in India with comparative study of UK, US and suggestions towards prevention and control of hate crimes in India.

Theoretical Framework

The study of race and race-relations as imperative social issue can be traced back to the early 20th Century in United States. Scholars in the United States define racism through two legal theories *viz.*, the Intent Theory talks about the acts done with intent to damage the disadvantaged people due to their race; the second theory, the Disparate Impact Theory says that the practices or institutions cause racism which systematically results in disadvantaging a subordinate racial group relative to a dominant one.⁷

As per the Natural Law theory's perspective, a law should provide justice and if it does not serve its purpose, then it is to be considered 'not a law at all'. Law that is good is moral and any moral law is good. But today, the defenders of Natural Law argue that slavery, racism, or gender inequalities on the basis of natural law are wrong in their interpretation. Defence of such nature would claim that issues like these are wrongly based on natural equality among the races and genders.⁸

Status of North-East People

North-East region of India comprises of eight states *viz.*, Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim and Tripura.

There was a time when the North-East population came under the category of Mongoloid race. But now, the very idea of race is based on biological factors, although it has no standing in the scientific field, since there is more diversity of gene types within single race. Though the concept of race might not be accepted as a scientific category, it does not stop people from making distinctions on the basis of skin colour/ physical appearance/ stereotypical phenotypes.

7 C. Duncan, DANIEL HINDES, April 17, 2005, <https://danielhinds.com/blog/2005/04/17/defining-racism>, (visited on July 31, 2018).

8 A.F. Barbara Mackinnon, ETHICS- THEORY AND CONTEMPORARY ISSUES, 1st ed. 2014.

Arunachalis, Assamese, Garos, Khasis, Manipuris, Mizos, Nagas and Tripuris may indeed have some phenotypical similarities related to genetics.

Race, if considered to be a social category is the product of practices. There are numerous visual regimes of labelling and people encountering those labels from their childhood may internalise features associated with those labels and learn to adapt to the socially formulated racial order. Troubled North-East people's image is increasingly mediated with visual regime formulated by films, television, magazine, newspapers etc. A large number of people come to metro cities for studies or work. Unfortunately, many of them share their experiences of being labelled as 'Chinky', 'Firangi', 'Nepali' 'Chapta' (flat nosed), 'Momo'.

Many North-East people, especially females are working in restaurants, spa, salon and superstores in metro cities. They are considerably suitable for these jobs due to their looks, attentive behaviour and proficiency in English language. Their contribution in development of the main stream of society can't be ignored. Contrarily, some conservative and prejudiced minds opined that the North-East people are spoiling Indian traditional culture by imbibing westernisation in their life style i.e., dressing style and food habits etc. The rented accommodations in metro cities are also up scaled for them, as their monetary affordability is judged on their wearing and fooding style, or there may be some other factors which change the mind of [we] the people [of India] while making commercial, social or other form of transactions with our own brother(s) or sister(s) coming from North-East region. This raises a question that why are we still stuck upon racial discrimination? Racially marked niches the market or in settlement patterns enforce a lot of danger with reference to racial discrimination. The fractured relation of North-East region with the mainland can be described as cultural, economic, psychological and emotional gap. Thus, it carries the danger of this fault line leading to racial discrimination.

The North-East people are much closer to their culture and ethnicity compared to the rest of India. Due to their Mongolian race they are labelled as Chinese. Not only this, despite India's diverse culture most of the traditional dresses in the other parts of India are 'Salwar-kameez' or 'Saree' but only in the North-Eastern states the attire is completely different. There is also huge linguistic diversity between these states and the rest of the nation.

The researchers had come across a blog that contained a question stating, How many Indians view people from North-East as a part of Indian fraternity? Shockingly! a lot of opinions pointed out that North-East people shouldn't be considered as Indians and no one is to be blamed for treating the North-East people differently. Some who had friend from North-East were of the opinion that "the North-East India is vastly underrepresented in political dialogue and culture. Even South and North Indians have their own prejudices and

differences so it is no surprise that people who look considerably different than the stereotypical Indian are not accepted in the mainstream culture.”⁹

Hate Crime Laws in India, UK and US: A Comparative Analysis

This fact cannot be denied that in every country the criminal acts are committed in furtherance of the bias motive and the penal laws keep the provision for prevention and control thereof. Many provisions under the criminal statutes can be identified for deliberations which provide punishment for the commission of such offences. However, no direct provision exists in the statute that recognize the ingredient of hate or bias motive. Provisions which deal with crimes against body or property are objective in nature, whereas, hate crimes require the subjective element for punishment, in order to attain rightful justice in such cases. Codifying these violent manifestations of prejudices restores faith of the affected person or community on the criminal justice system.

The debates and deliberations that pave the way for the enactment of law to deal with the cases of hate crime, spreads awareness and increase response of the public towards it. The criminal justice system and agencies cannot effectively deal with such cases due to inadequate legal framework, mechanism and training towards the prevention and control of hate crimes. Enactment and implementation of hate crime laws will promote further discussions, scrutiny and training of agencies would definitely contribute towards the capacity building; to bridge the gap between the police and public relations in the society; and sensitize the people towards the nature of crime committed on the basis of a person's affiliation or his/her group identity.

Hate crime in India, UK and US are similar in the sense that in all three nations, hate crime exists and has been a menace from a very long time. The only differentiating point is the progress that UK and US have started clutching the problem of hate crimes in their society. India, UK and US were among the 48 members who voted in favour of the United Nations Declaration of Human Rights, which was adopted on December 10, 1948. The first line of the UDHR preamble indicates recognition of inherent dignity and of the equal inalienable rights of all members of the human family. To this effect and in order to ensure freedom, justice, equality and peace, both UK and the US enacted hate crimes laws. Unfortunately, India has not been very keen on enacting a law to that effect.

9 M. Khadka, “How do Indians view people from the Northeast part of India? How are these opinions different from how other Indians are viewed?”, QUORA, March 19, 2018, <https://www.quora.com/How-do-Indians-view-people-from-the-Northeast-part-of-India>, (visited on July 30, 2018).

The US struggle for equality to all people irrespective of their race, started from the emancipation of African American population of the US. In 1954, the case of *Brown v. Board of Education of Topeka*¹⁰ was a turning point in the history of race relations when the Supreme Court of America abolished segregation of education over race. Thereby, declaring it to be violative of the 14th Amendment, which gives equal protection of laws to all citizens. It was in 1968 that the first law on hate crimes was passed by the congress under the presidency of President Lyndon Johnson, which made it a crime to use or threaten to use force to wilfully interfere with any person because of race, colour, religion, sex, or national origin, to which familial status was added later in 1988.¹¹ Then, in 1993 the case of *Wisconsin v. Mitchell*¹² the Supreme Court found that penalty-enhancement for hate crimes did not violate free speech rights since it does not punish an individual for exercising freedom of speech and expression, rather allows the court to consider motive in a criminal conduct.

Again, in 1993 in case of *In Re Joshua H.*¹³ the court said that prosecution does not have to show that the perpetrator had knowledge of the particular provisions of state or federal laws to which he was depriving the victim. Only proof of a specific intent to deprive an individual of a right is required. That it is sufficient if the right is clearly defined that the defendant intended to invade the interest protected by constitutional or statutory authority. In 1996, congress passed the Church Arson Prevention Act. Under the said act, a person was held liable if he/she defaces, damages or destroys religious property or interfered with the religious practices, because of race, colour or ethnicity of a person.¹⁴ In 2009, President Obama signed the enactment of Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act. This expanded the federal definition of hate crimes, enhanced the legal tools available to the prosecutors, removed the earlier existing jurisdictional obstacle to prosecution and added new federal protections based on gender, sexual orientation, gender identity and disability.¹⁵ So, according to 18 U.S.C. § 245, § 247 and § 249, hate crime included wilfully injures, intimidates, interferes or destroying religious property, or disrupting religious practices, or causes bodily injury, because of actual or perceived race, colour, religion, national origin, gender, sexual orientation, gender identity, or disability is said to be criminally liable for committing the offence of hate crime.

10 347 U.S. 483 (1954).

11 "Hate Crime Laws" THE UNITED STATES DEPARTMENT OF JUSTICE, July 28, 2017, <https://www.justice.gov/crt/hate-crime-laws> (visited on July 31, 2018).

12 508 U.S. 476 (1993).

13 13 Cal. App. 4th (Cal.Ct. App. 1993).

14 *Supra* n. 11.

15 *Supra* n.11.

The UK has similarly progressive development of the laws on hate crime. Protection against hate crime is given under the Crime Disorder Act 1998 under Sections 28-32 and Section 145 of the Criminal Justice Act 2003. These provisions include racial and religion related aggravated offences, where race, religion, colour, nationality (including citizenship), ethnicity, national origins and religious belief are included as an element in crime. The Crime Disorder Act criminalizes such act and the Criminal Justice Act is the punishment enhancer in offences where bias motive or hate is involved. Section 146 of the Criminal Justice Act also includes sexual orientation, transgender identity and disability, in effect of which the Law Commission Report 2014 has also recommended widening of the definition of hate crime under the Crime Disorder Act to include sexual orientation, transgender identity and disability. Apart from these initiatives, Sections 18-23 of the Public Order Act 1986, hate speeches on the ground of race, religion and sexual orientation are criminalized. There is also another provision under Section 3 of the Football (Offences) Act 1991 which proscribes indecent and racist chanting during the football game. The Crown Prosecution Service (CPS) has issued various guidelines to - support hate crime victims and witnesses; the police for operational part; and the prosecution for preparation of the cases of hate crimes.

The Ministry of Justice has also issued a Code of Practice for Victims of Hate Crime. UK development of hate crime laws are enacted in such a way which focuses both on curbing the hate crime offences and to strengthen the relations of the public with the police. The CPS has widened the scope of justice to hate crime victims by defining hate crime in the sense of what the victims, third party, or the police perceive hate crime. The guidelines also state that the hate crimes is not only physical assault but also includes offensive language i.e., verbal abuse, name calling and even posting online content.

India has been indifferent towards the problem of hate crimes. There are hate crimes incidents widely rampant without adequate relief. There is no protection for hate crime victims to seek justice in Indian criminal justice system. Although the Constitution of India ensures equality among citizens under Article 14 and Article 15 provides safeguards against discrimination on the basis of religion, race, caste, sex or place of birth, or any of them. But such constitutional guarantee is beyond the approach of the people living in North-East region. The problem with hate crime against North-Eastern people is that public does not even know the humiliation and struggle they face, especially in metropolitan cities.

Now in the era of information technology and media, the cases of Hate crimes against religion, caste, creed or race cannot be concealed. It attracts the attention of entire world if any such crime happens anywhere in the country. However, the north-eastern people who migrate from their state of origin to

metropolitan cities suffer racial slurs; frequent name-calling, verbal and physical abuse, as well as sexual attack on dignity and body, which hardly catches the requisite preventive and remedial responses on the part of the State. Majority people coming from this region are generally falls into the Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989, but the problem is that there is no express provision for prohibiting abuse of these people on account of being from North-East India. The Act also faces several criticisms due to lack of provisions to provide justice to these people. Nevertheless, there is the problem of punishing the hate motive or bias motive which leads to the hate crime against the north-east Indian population in our country, which seems impossible under the existing legal regime. As a result of the increasing racial hate crime among other types of hate crime, an 11-member Bezbaruah Committee submitted its report in 2014 which supported tackling such acts in the society by suggesting functional and normative guidelines to that effect. This was a welcoming initiative for protection of North-East Indians against hate crimes but there was no further debate or deliberations on the same.

Conclusion

Incidents of discrimination against North-East people cannot be ignored. As a sensitive human being we do realise that it is easy to sit in ivory tower and advance idealistic propositions; it is quite difficult to consider practical ways to undertake them. Any comprehensive effort to fight hate crimes will clearly be a massive task requiring creative planning, cooperation and coordination among people, groups, State and non-state agencies. No matter how good the programs and initiatives are, we cannot completely eliminate hate crimes or prejudice easily. However, the significant attempts to reduce hate crimes should be made.

AICC-CNER had introduced a separate helpline for north-east people in the year 2014. However, seeing the statistics it is evident that the helpline is not effective and known to people. Initiative has to be taken to sensitize people about this helpline. Suggestion regarding appointment of North-East people as operator in helpline services, so that they can sensibly deal with the grievances of North-East people who are approaching the helpline. This will also afford employment opportunities for them. Availability and accuracy of data on hate crimes is very limited to the government. It will be more fruitful if the government bodies involve academic and research institutions engaged in imparting education and research on social issues.

Capacity building of police personnel especially in the lower grade level who must be able to interact and sensibly deal with the victims of such crimes. Designing of an operational guide for police, as well as formulating guidelines for handling of victims and witnesses of hate crime, investigation process and in prosecution of cases, the reference of which can be taken from UK laws on Hate crimes. Training of police officials, especially the constables, in order to ensure

sensitive treatment towards the victims of hate crimes is essential. By establishing NGOs with adequate support specifically working towards rehabilitating and restoring victims of hate crime can be a parallel support to the State in curbing such crime.

Idea for insertion of provisions for protection against hate crime in Indian Penal Code can be conceived where the bias or hate motive can be considered to enhance quantum of punishment. Further, there is a need to formulate a legal/statutory definition of 'hate crime' keeping in view the prevailing social conditions and within the Constitutional limits.

Establishment of Centre for North-East people is required in every district; student committees and bodies in every university and college, which will consist of social workers, psychologists and legal personnel to protect the interest of people of North-East and save them against all forms of victimization. Further, sensitization of the community and fostering relationship between law enforcement agencies and community groups is an inevitable process to establish public peace, tranquillity and fraternity for making North-East people to restore their faith in law and justice. This will enable them to confidently report such crimes. Educating people, especially children from the very early age, about the concept of 'Hate Crime' can be an effective tool towards prevention and control of crime. Refurbish the school curriculum in a way that would make the children aware of the social issues around them.

This article thus is a small attempt to put forward the race based plight of North-East people.

REGULATION OF ANTI-COMPETITIVE BEHAVIOUR BY SPORTS ORGANISATIONS: A CRITICAL ANALYSIS OF INDIA AND EU

Reuben Philip Abraham*

Abstract

The sport authorities or organizations possess immense powers to regulate sports including players and competitions. Million dollar disputes arise when players go outside the domain of respective sport authority, to play for other sport leagues or clubs. In such situations, the sports authorities usually obstruct them by abusing their regulatory, financial and organizational powers. Such situations occur in parts of Europe and also many times in India. The BCCI and other sporting organizations have been fighting legal battles against allegations of abuse of dominant position in various aspects, which have been critically analysed in this paper. This paper intends to discuss possible solutions to prevent the misuse and abuse through changes in structure and policy of such sports organizations. This paper specifically contains a comparative analysis of reported cases of abuse of dominant position which occur in India and European Union.

Key Words: Sports Organization, Abuse of Dominance, Denial of Market Access, Proportionality Rule, Rule of Reason.

Introduction

Sports authorities and organizations are the most illustrious of entities in India. The sole organizations of the respective sport have a huge amount of power vested in them, both regulatory and economic. They play a major role in the success of that particular sport in the country, from selecting the players playing for the nation, to organize tournaments for the furtherance of the sport. Million dollar disputes arise when the players of a particular sport go outside the jurisdiction of the main sport authority to play for other sport leagues or club matches. In such situations, the sports authorities go far to stop the players from indulging in other leagues and restrict or sanction those players and practically deny market access to other organizers. The role of the authority as a regulator and custodian of the game often overlaps with that of its economic gains, whereby unfair competition is caused, giving rise to a situation of monopoly and dictatorship.

Competition authorities all over the world are looking for solutions to deal with such anti-competitive behaviour of sports organizations. In India, the first major incident occurred with BCCI, before the wake of IPL. The news caught public attention when the newly born Indian Cricket League (ICL) was stopped

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after two years of its inception. It was all over the news as to how BCCI did not support such an initiative and pushed them out of the market using all the monopoly powers they had. BCCI abused its dominant position being the regulator and administrator of sports arena. It was alleged that soon after ICL was pushed out of market, they introduced IPL which became a huge success. Another such incidence occurred with Hockey India; they restricted players from participating in a new initiative with the intention of pushing them out of the market. Both these cases came under the scanner of the Competition Commission of India and it highlighted the dominance of these sporting organizations and misuse of powers to put entry barriers making them anti-competitive.

Such monopoly and misuse of power cannot be easily diminished, although preventive measures can be taken so that they do not abuse the same. Such problems are prevalent all over the globe, with the acknowledgment of such particular situation arising in cases relating to sport. Such cases need to be dealt in a specific way to keep balance between the interests of the sport and competition law. The commercial and regulatory powers of the sporting organizations usually do not comply with the competition law, which needs to be addressed and resolved amicably. The study intends to critically analyse the case of BCCI along with the Hockey India Judgment, in the light of alleged abuse of dominance by the sporting authorities. Further, the study also deals with a comparative analysis of constitution, power, functions and prevailing practices in other countries in above context. In the last segment, the researcher puts forward different possible solutions to untangle the rope.

Analysis of Indian Cases

*S.S. Barmi v. BCCI*¹ was the most celebrated case wherein the Competition Commission of India punished the BCCI for its wrongful acts. Alas! it was short lived, as later in appeal, the COMPAT overruled the decision on procedural irregularities and issued it back to CCI for fresh disposal, which will be analysed in the later part of the study. The informant in the above case was a cricket fan who put up allegations against the actions of BCCI which are:

- Irregularities in the grant of franchise rights for team ownership;
- Irregularities in the grant of media rights for coverage of the league; and
- Irregularities in the award of sponsorship rights and other local contracts related to organization of IPL.²

1 Case no. 61/2010 of CCI, http://www.cci.gov.in/sites/default/files/612010_0.pdf, (visited on April 23, 2017).

2 *Ibid.*, p. 3.

These issues are clearly demarcated as to whether BCCI has a dominant position in the relevant market as determined? And if so, whether BCCI has abusively used its dominant position in the relevant market in contravention of the provisions of Section 4 of the Act or not?

In the issue of dominant position, BCCI acknowledged the fact that it is a monopoly in the sporting industry, but related to the whole structure of sports and how ICC has framed only one representative body per region for the regulation of sport, which was also held by DG. After holding the relevant market to be 'Organisation of private professional leagues/events in India', the commission took into understanding the pyramid structure of the sport and thereby the monopoly of such sports organizations is a natural outcome. Thus, owing to regulatory role, monopoly status, control over infrastructure, control over players, ability to control entry of other leagues, historical evidences, BCCI is concluded to be in a dominant position in the market for organizing private professional league cricket events in India.

We know that having dominance in a market is not an issue but the main question is whether BCCI has abused this dominant position or not. The commission clearly analysed the problem and opined that there is an overlapping of roles by BCCI which is causing concerns for fair competition. Therefore, the acts of BCCI need to be scrutinised.

The last issue regarding determination of abuse of dominant position, the commission acknowledged that with a phenomenal increase in commercial dimensions of the sport, there is a great incentive for Sports Federations to use their regulatory powers for protecting their own commercial interests. The situation where the regulator is also the economic beneficiary, leading to role overlap is definitely a competition concern. In *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*³ Grand Chamber of the European Court of Justice expressed their concern on regulatory powers being a potential source for abuse of dominance.⁴

In this issue, abusive use of dominance, the commission took up the situation which happened between BCCI and organisers of ICL. Indian Cricket League or ICL was the first private professional league, but it became defunct after two years due to many reasons, out of which the attitude and strict opposition showed by BCCI was one of the main reasons. On the other hand, BCCI in its submissions attributed ICL failure to factors i.e., lack of transparency for award of media rights, low television viewership, failure to attract crowds, underinvestment, and lack of fan appeal.

3 ECLI:EU:C:2008:376.

4 *Supra* n. 1, p. 34.

Now to frame the issue of abuse of dominance, one of the concrete ground that CCI got against BCCI was clause 9.1(c) (i) of the IPL Media Rights, which reads, “BCCI represents and warrants that it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league.”

This agreement as noted earlier has been entered between BCCI and MSM for a period of 10 years. Thus, BCCI has clearly bound itself not to organize, sanction, recognize any other private professional domestic league/event which could compete with IPL. Clause 9.1(c) (i) clearly and unambiguously amounts to a practice through a contractually binding agreement resulting in denial of market access to any potential competitor, and is decidedly a violation of Section 4(2)(c) of the Act.⁵ Analysis of Clause 32 of ICC Rules reveals the intent of the international regulator to place ICC at the top of pyramid. But ICC does not seem much interested in preserving the specificities of sport, rather assuring revenue for Cricket Sports Federations under the guise of pyramid structure, such an intent is shown in the explanation of this provision. The conduct of BCCI in incorporating the clause 9.1(c)(i) in its agreement conclusively indicates that BCCI has also used its regulatory power in the process of arriving at a commercial agreement and thereby violating Section 4(2)(c) of the Act.

The case in India is very much revolutionary for the reasons that it was the first time the BCCI was slammed down by an adjudging body. The case against the BCCI for anti-competitive activities was apparently very strong on merits. Firstly, the exclusionary practice on part of the BCCI attracts liability under the provisions of the Competition Act, 2002. As per Section 4(2)(c) of the Act if any enterprise “indulges in practice or practices resulting in denial of market access in any manner”, then it shall be liable for abuse of dominant position. Thus, such practice of banning players from domestic tournaments on account of joining the rival leagues may prove expensive for the BCCI, which may face a challenge on grounds of abuse of dominant position. In addition, denial of stadium applying the essential facilities doctrine, they should be held liable under the same provision. The essential facilities doctrine as developed in *Hetch v. Pro Football Inc.*⁶ refers a situation where a dominant firm owns or controls a facility that is indispensable to its competitors and refuses to grant access to that facility. It imposes liability when one firm, which controls an essential facility denies a second firm reasonable access to a product or service, that the second firm must obtain in order to compete with the first.

Regarding the broadcasting issue, giving exclusive agreements in itself is not wrong, but for a long period of time is restricting competition and leading to

⁵ *Supra* n. 1, p. 37.

⁶ 1978, 436 US 956.

market foreclosure. In one case (*KNVB/Sport 7*), the EC held that though exclusivity per se is not anticompetitive, grant of exclusive broadcast rights for eight years by the Danish Football Association was anti-competitive.⁷

Majorly, the case totally falls against BCCI when they exclusively agreed to push out competitors as per clause 9.1(c)(i) of the IPL Media Rights and also clause 8.2 of IPL Contract between IPL and a Player, which restricts the player from participating in another competing league.

The very nature of BCCI in this case, where it abused its role of being a regulator and organizer can be explicitly seen and hence it has been rightly held by the Commission that they have violated the provisions of the Competition Act.

The Second Order on 29.11.2017, the present order came after the COMPAT, vide its order dated 23rd February, 2015, setting aside the Commission's order dated 8th February, 2013 on the ground of violation of principles of natural justice and remitted the matter to the Commission for fresh disposal.

In the present case, DG found the relevant market to be '*organization of professional domestic cricket leagues/events in India*'. The supplementary investigation concluded that BCCI is in dominant position in the relevant market considering the market share, size, resources, etc. The BCCI again contended that it does not come under the purview of an 'enterprise'. One of the main contentions of the BCCI that was different from last time was with regard to relevant market, where they stated that, IPL and other forms of cricket need to be considered equal to other entertainment programmes and thereby it should be wider relevant market. DG had delineated market to be separate for IPL and such formats to be different from other formats of cricket also, stating that cricket is unique in itself from other entertainment programmes and is not substitutable based on ratings etc.

The DG concluded that the impugned clause in the IPL media rights agreement and also Rule 28(b) and (d) are abusive and in contravention of section 4 of the Competition Act 2002. BCCI contended that this IPL media rights agreement clause was to protect sports commercial partners as mandated by ICC Rules, Clause 32.3 and stated that it is the standard practice in sports to investment industry. They also took the defence of the pyramidal structure of sports to state that such mandating of permission from BCCI is all for the interests of sport.

7 <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=FC738390B5848DB9F398F8CC5EA8E24F?doi=10.1.1.608.7564&rep=rep1&type=pdf>, (visited on November 23, 2018).

With respect to the issue of determination of relevant market, the Commission observed that the DG rightly held the relevant market to be narrow. The Commission noted that every sport has some unique characteristics which leads to its fan following and hence held that a cricket match is not substitutable with any other programme nor any other forms of TV entertainment, and also went forward to note that the private professional league such as IPL in itself is a different market from other forms of cricket. BCCI clearly failed in establishing that a sport like cricket is substitutable with other forms of entertainment.

With respect to the issue of abuse of dominance, the Commission clearly noted that the impugned clause in the IPL Media Rights Agreement is in consonance with Rule 28(b) and (d) of the BCCI Rules and Regulations and they are in contravention of Section 4(2)(c) of the Competition Act 2002.

More importantly, the Commission noted that BCCI failed to produce any evidence or establish anything as to how these restrictive conditions are in furtherance of interest of the sport in general. One really important observation by the Commission was on the acknowledgement that sporting rules usually have restrictive environment due to the pyramid structure of the sporting organizations and stated that the BCCI made nothing but vague assertions as to the same. The Commission finally held that the impugned clause in the IPL Media rights Agreement and clause 28(b) of the BCCI Rules and Regulations create an insurmountable entry barrier in the relevant market for the organization of domestic professional cricket leagues.

The case of *Dhanraj Pillay v. Hockey India*⁸ was centred on the events leading to the organization of World Series Hockey League (“WSH”) by Indian Hockey Federation (“IHF”) in collaboration with Nimbus Sport. The case pertains to the alleged imposition of restrictive conditions by Hockey India (“HI”) on players for participation in un-sanctioned prospective private professional leagues resulting in undue restrictions on mobility of players and on prospective private professional leagues leading to denial of entry to competing leagues. The case is very similar to the BCCI case in the aspect that, in the category of Hockey, the first private professional league was started by IHF called WSH, and then later the authorized organization of hockey which is HI, went on to push them out of the market so as to monopolize and make profits for themselves.

The issues considered for determination included whether there has been any abuse of dominance by HI/FIH and any contravention of Section 3 of the Act?

8 Case No. 73 of 2011 of CCI: 2013 Comp LR 543 (CCI).

Here the issues are very generally drafted which pertain to denial of market access to rivals and abusing its dominance under Section 4 and also Code of Conduct (“CoC”) agreement which is alleged to be anti-competitive on the basis of having exclusive supply agreement and restrictive conditions.

According to the informants, the CoC agreement which is entered into between HI and the players is a vertical agreement and is in the nature of an exclusive supply agreement, as it exclusively ties down the player to HI and restricts their options to participate in other tournaments and also cause appreciable adverse effect on competition in India, creating barriers to new entrants.⁹

The DG held WSH to be a domestic event which was approved by one of the national associations for hockey in India, the IHF, and observed that the action of HI and the FIH to introduce rules relating to sanctioned and unsanctioned events and also to prevent the national hockey players to play WSH is anti-competitive and in violation of the provisions of the Act. It was clearly seen that their actions were clearly biased against WSH to push them out of the market.

According to DG, the act of the OP for restricting the players to play hockey in unsanctioned events organized by the recognized sport association (IHF) and not issuing ‘No Objection Certificate’ (NOC) as well as not including their name in the 48 probables for the camp held at Bangalore for preparation and selection of Indian team, which went to London to play 4 nation test match is in contravention of Sections 4(2)(a)(i) and 4(2)(c) of the Competition Act.¹⁰

A very interesting and important point held by the DG that as there is a lack of commercial relationship between HI and players which nullifies the application of Section 3(4) of the Act. Hence, the allegation of contravention of this provision with regard to the Agreement does not exist.

From the side of HI, they put forward the arguments with regard to ‘specificities of sport’ and also the pyramidal structure whereby leading to such situation. Also, various EC cases were cited i.e., *Walrave and Koch*¹¹; *Deliege v. Ligue Francophone De Judo Et Disciplines Associees Asbl And Others*¹²; *David Meca Medina and Igor Majcen v. Commission of the European Communities*¹³ which have considered that competition laws should not stop sports Federations issuing regulations required for proper organization and

9 *Ibid*, p. 8.

10 *Ibid*, p. 19.

11 C-36/74 [1974] ECR 1405.

12 C-191/97 [2000] ECR 2549.

13 C-519/04 [2006] ECR 6991.

conduct of the sport, so long as the restrictive side effects of those regulations are inherent in and proportionate to the achievement of that objective.¹⁴

HI submitted that framing them for abuse of dominance based on their monopoly is unfair with regard to being a sanctioning authority, as that is part of their legitimate role. They also submitted various threats that such unsanctioned events pose to the general sport which conflicts with the sporting calendar and when any problem arises, they cannot interfere to make it right, and it is more about money which will undermine the sport.

One of the major points brought up here is that WSH and Nimbus never came forward to ask for sanction in the first place, which is a pretty downside for the other party because only after that abuse can be determined. Also, with regard to restricting players, HI stated that they never withheld or threatened or took action against any player, as those players had all freedom to participate and also only those players who participated in the national camp were allowed to play for national as it usually happens and that is why many players were not selected.

The Commission examined a number of articles/papers on the aspect of significance of the pyramid structure for successful development of the sport, such as White Paper on Sport issued by EC and international jurisprudence.¹⁵ The Commission has rightly commented that, a new dimension of this pyramid is coming out as now huge revenue is also involved, whereby this pyramid can be used to conduct abusing activities which may fall within the ambit of anti-competitiveness.

In this case, the Commission analysed the specificities of sport so as to accept that this is a special case and thereby a special method is required to judge anti-competitiveness in this arena. The landmark case of *Meca-Medina and Majcen v. Commission*¹⁶ judgment by ECJ relied upon where the *inherence proportionality principle* was propounded. The Commission held that the *inherence-proportionality test* which is currently considered as the appropriate approach to address the competition issues in sports sector, provides that, if the alleged restrictive conditions are inherent to the objectives of the sports federation and the effect of restrictive condition on economic competition among stakeholders or on free movement of players is proportionate to legitimate sporting interest perused, the same may not be viewed as anti-competitive.

In the instant case, there are two issues at broader level, the first relates to alleged practices of FIH/HI to foreclose the market for rival leagues by bringing

14 *Supra* n. 8, p. 24.

15 *Supra* n. 8, p. 36.

16 C-519/04 [2006] ECR 6991.

in regulations related to sanctioned and unsanctioned events; the second relates to restrictive conditions imposed by HI on players through the CoC agreement. Just like the BCCI case, the commission rightly held that the relevant market is that of “organization of private professional hockey leagues in India.”

On the issue of restrictions, the point about sanctioned and unsanctioned events was brought into light and the importance of that regulation was talked about, whereby the integrity of the sport is kept alive. One of the major points that was held against the IHF was that they never went to HI for sanctioning the event and the argument put forward by HI was that they never meant to foreclose any market, but only that any other private party needs to get a sanction from HI, which IHF did not get.

Again in the matter with regard to CoC agreement, even though HI and FIH brought out these regulations, they never took any action against any player who played in the WSH and never barred from playing any player who took the contract before adopting this regulation. The allegation that they did not choose any player who played in WSH from the national team was brought down by the fact that such players are only chosen, if they attend the national camp where these players who did not play WSH and thereby cannot be selected.

On the legality of the agreement, even though on the face of it, this agreement looks like it is anti-competitive, the Commission went deep into to check the details. Such an agreement is pretty much required for every sport where no blanket restriction is put, but clauses like that of requirement of NOC for participating in other clubs and sanctioning of events are all part of the regulatory functions of an organization and all are meant for the upholding the dignity of the sport.

The dissenting judgement by Mr. R. Prasad is baseless without affording the logical justifications for opposing majority’s views. He is even contradicting himself when he says that there is nothing wrong with the sanctioned and unsanctioned events, but later supports to amend these regulations. His order is completely extreme and does not take into considering the dignity of sport.

This case is clearly different from the BCCI case, in the sense that no real harm has been caused, or is going to be caused, even though everything looks anti-competitive on the face of it. The Commission has taken a very delicate stance so to acquit HI and FIH of all charges. The authorities here have not in fact done any harm unlike the BCCI where the harm done was evident. From the CoC agreement to the regulations brought about, they had tread the legal path where sanctioned and unsanctioned events are accepted as worldwide concepts and all they put forward was a stringent rule, never intending to restrict any authority or competition.

Scenario of Sports Organizations Globally

The above two are prominent Indian cases which are related to competition and sports. In both these cases, we can see that the core issue as to the facts is very much similar where there is one national sports organization which has both regulatory and organizational functions that overlap on certain occasions, whereby such huge power and dominance in market might be misused to cause abuse.

This scenario is not just limited to India but is prevalent worldwide. Firstly, we can safely conclude that this is one of the side effects of the pyramidal structure followed in sports organisations. Even though pyramidal structure is an accepted structure with benefits for the sports integrity, with the new dimension of economic revenue available in sport, such monopoly which exists is often misused to push out any sort of rivals and foreclose market. Hence in such situations, the two functions of the regulation and organization might overlap and cause adverse effects.

The *White Paper on Sport* by EC in 2007 openly stated this problem for the first time.¹⁷ The specificity of sport is another major argument to give a different method of dealing with such cases that arise as a sporting exception to the general idea of competition law. Hence such a special treatment for sport is given both in EU and US.

In EU the practice is such that if certain decisions were purely of sporting nature and non-economic nature then the competition law would not attract.¹⁸ Later on, in *Meca-Medina and Majcen v. Commission*¹⁹ the ECJ modified its earlier judgment and stated that the sport authorities cannot get complete exception but a sporting rule will not violate competition law if it is related to the objectives of the rule, inherent to the pursuit of those objectives, and proportional to the aim it seeks to accomplish.²⁰

In U.S., one of the landmark cases is *American Needle v. Nat'l Football League*.²¹ After this judgment, it appears to be settled that the NFL, NHL, and NBA's decisions and agreements (excluding those pertaining to broadcasting rights and collective bargaining) are subject to the Rule of Reason. The Rule of Reason is an alternative to declaring that a particular action is anti-competitive on its face. US law applies the Rule of Reason in sports cases because of a

17 Commission of the European Communities, WHITE PAPER ON SPORT, 2007.

18 *Supra* n. 11.

19 *Supra* n. 16.

20 Leah Farzin, "On the Antitrust Exemption for Professional Sports in the United States and Europe", JEFFREY S. MOORAD SPORTS LAW JOURNAL, Vol. 22 No. 1, 2015 p.75.

21 560 U.S. (2010)183, pp. 187-188.

general recognition that without horizontal agreements between clubs, no club could produce its product.²²

In *MOTOE Case*²³ EU clearly talked about sport organizations donning two hats of regulator and also market competitor so as to end up pushing out competitors and engaging in anti-competitive practices. The court held that it is impossible for them to do both, and a fair amount of checks and balances is required. Relying on the rule in *Meca-Medina case*, the court held MOTOE liable for violation of law. The European Commission in Federation *Internationale de l'Automobile (FIA)*²⁴ observed that FIA was the regulator for motor racing the world over and was also engaged in commercial promotion activities of motor racing. The Commission held that FIA had used its regulatory powers to force a competing series out of the market. In this particular case, the European Commission ordered a complete separation of commercial and regulatory functions in relation to the FIA Formula One World Championship and FIA World Rally Championship.

In *Minnesota Made Hockey, Inc. v. Minnesota Hockey, Inc.*²⁵ case, it was with regard to restricting players which the court clearly held to be anti-competitive. Another case of Australian Competition and Consumer Commission (ACCC) is the case of *Ice hockey*²⁶. In this case, Ice Hockey Australia had held that it had the power to suspend or expel any member of the IHA who had or was going to participate in any non-sanctioned Australian or international hockey game or league. The ACCC found these provisions to be in breach of competition laws for imposing a barrier to the establishment of rival hockey leagues, reducing their competitive ability and reducing overall consumer choice. While coming to this conclusion, ACCC was of the view that not only competition was effected but it also effected the ability of the rival leagues to attract new players. It also restricted the ability of players and officials to switch between sanctioned and non-sanctioned competitions. Another Australian case is of *News Ltd. v. Australian Rugby Football League Ltd.*²⁷ where exclusionary contract so as to foreclose market and push out competitors was held to be in violation of competition law.

In the perspective of sanctioned and unsanctioned events, in the case of *Greig v. Insole*²⁸ the English High Court held that the game should be properly

22 Shlomi Feiner, "Regulation of Playing Equipment by Sports Associations: The Antitrust Implications", UNIVERSITY OF MIAMI BUSINESS LAW REVIEW, Vol. 10 No. 3, 2014 p. 585.

23 *Supra* n. 3.

24 European Commission Press Release, "Commission Opens Formal Proceedings into Formula One and Other International Motor Racing Series", IP/99/434 Brussels, June 30, 1999.

25 761 F. 2nd 848 (D. Minn. 2011).

26 C-2009/1391.

27 (1996) ATRP 41-466.

28 [1978] 1 WLR 302 (Ch D 1977).

organised and administered. The High Court approved the prospective disqualification of the cricket players, who would thereafter contract to play with World Series Cricket or other unapproved private promoters. In the case of Asian Tower, *Pilkadaris v. Asian Tour*²⁹ where also the issue of unsanctioned tournaments came up. In this case some golfers had played in an unsanctioned tournament for which the Golfers' Association fined them \$5000 before they were allowed to play in a sanctioned event. The players challenged issue in the Singapore High Court but the Singapore High Court confirmed the fines levied on the golfers.

Hence, in all these cases, the sports organisations all over the world have locked their horns with Competition Commissions as to such arbitrary behaviour of creating a huge entry barrier for organizing other leagues or events of the respective sport. The problem this paper wanted to address is the same as to how such conflict of organizational and administrative powers of the sporting organisations violate competition laws.

Conclusion

In this last segment, I would like to draw out all possibilities of such an anti-competitive situation which arise or persist in sports organizations and try to give out possible solutions in a way which is best to sort out this anti-competitiveness and also make proper logic and fairness. After analysis of the above mentioned cases shows how the problem arises when the regulatory power of the sports organisations are used unfairly to drive out other competitors and use it for their own economic benefit.

Denial of Market Access to Other Players

Firstly, attacking the big fish, action has to be taken to make sure that the powers of BCCI/HI don't overlap or even if they overlap they don't use it to drive out other competitors and abuse their dominance in the market. One argument could be to strip BCCI/HI of the economic function and just concentrate mainly on the organizational function. During the time of the emergence of private professional league, one fair option that could have been exercised by BCCI/HI having the regulatory role was to put out a fair tender process and whereby giving every competitor an equal chance to put forth their bid to organize a league in India. Even though BCCI/HI cannot stop the start of a new league but as BCCI/HI controls the players, the stadiums and many more. Conducting a league without the approval of BCCI/HI is impossible. Hence, under the regulation of BCCI/HI a private player conducting one league in India, considering the sporting calendar etc, could have been a fair option.

29 [2010] SGHC 294.

Monopoly of BCCI to Conduct Leagues/Events

BCCI/HI has pushed out its competition and thereby monopolized the market to gain full economic value out of it as seen earlier in the paper. Thinking from another extreme, we can argue that as BCCI/HI is the custodian of that sport in India, only BCCI/HI should be allowed to organize any sort of league or monopolize that sport in any form. Thereby both the roles become one, where it is only BCCI/HI who has the sole authority to do anything about organizing and monetizing that sport in India. The integrity of the sport is kept intact and so is anti-competitiveness kept outside. This argument is pretty much the indirectly practiced form throughout the world, where all the private professional leagues of respective countries are held by the sporting boards of those countries.

Balance of National Interests vis-à-vis Freedom of Choice for the Players

From the perspective of the individual players, it is very sad to restrict their playing options as BCCI/HI do not allow them to participate in any other tournaments inside or outside India. Freedom of choice to select which tournament to play should be given, but the duty of the player to play for the nation should be given the utmost importance, and the proportionality principle can be applied here. Hence, a situation where a player is restricted with the sole excuse that the national duty will get affected and that needs to be given priority, should be allowed but nothing else. Otherwise, a player who is not always eligible for national duty, should be given enough freedom to participate in other tournaments, as at the end of the day he/she is an entertainer and a player and it will mostly benefit him and the audience only.

Assuming, tomorrow a new league comes up in the side of IPL, BCCI can be allowed to take actions in proportion to maintaining the integrity of the sport, but otherwise, restriction of players who don't have national duty or where the sporting calendar is free during that time, and not permitting stadium which are anyway not required at those moments etc., should not happen, whereby, the entertainment for the public and more opportunity for upcoming talent should be the motto. Or else, as suggested in second point, such a competing league itself should never arise, where only BCCI's league happens and they regulate and organize anything and everything under the sun with regard to the sport of cricket in India.

Controlling Powers and Duties to the BCCI

From the perspective of a more rigid law to avoid all this confusion and govern and regulate such sporting bodies who dons two hats and misuses it, we can look up to the CCI to come with a specific set of regulations, so as to properly draw the line of role and functions of these sports organisations. Such a regulation can be very helpful for the future. Moreover, it has been already

established that even though ‘sports organisations’ do not come under the purview of ‘state’ under Article 12 but it is amenable to writ jurisdiction due to the fact that it carries about important public function.³⁰ The Supreme Court through *Lodha reforms* has understood how much BCCI is going off the line in its freedom, therefore it needs to have a quantum of checks and balances on it. Although BCCI is a private organization, but the fact that it can be held to be a national sports federation, the Ministry of Youth affairs and sports should have a reasonable amount of check on BCCI so as to curtail the huge amount of power given to it.

Proportionality Rule to Balance Interests between Sport and Competition Law

For the present situation, with the pyramid structure, specificity and integrity of sport in mind, the proportionality rule is one of the best methods so as to tackle sports-competition cases, but with a hope that in future clear cut role of sports organizations will be given so that they cannot cut across any line. The law authorities around the world need to understand the importance of the pyramidal structure in sport and the specificity in sport so as to balance the same interests with those of competition law.

As already seen in the second order of the Commission in the *Barmi case*, they clearly acknowledged the interests of the sport and applied the proportionality rule to see whether the restrictive conditions are indeed violating any competition law. This is indeed revolutionary in India and thereby the courts and the Commission need to apply more of the proportionality rule to determine the violation of competition law principles of Abuse of Dominance in sports organization cases. This is a world-wide problem with regard to sports organizations, and the application of competition law becomes very tough. It is high time to take a call and take an extreme step rather than linger in between.

³⁰ *Geeta Rani v. Ministry of Youth Affairs & Sports*, CIC/MOYAS/A/2018/123236; *Ajay Jadeja v. Union of India*, 95 (2002) Delhi Law Times 14.

VIABILITY OF MARKET MECHANISMS IN TRANSBOUNDARY RIVER ALLOCATIONS: A LOOK AT THE COLORADO RIVER

Mrinalini Shinde*

Abstract

Market mechanisms are often cited as being efficient methods to regulate and manage transboundary rivers. The Colorado, which flows between the United States and Mexico, is an illustration of said market mechanisms. This article explores the different market mechanisms such as water banks and public allocation, which can be employed in transboundary river management and discusses the benefits and flaws of these mechanisms with respect to the Colorado River basin. The paper also examines how NAFTA can be adapted to impose liability in cases of illegal water use between the two countries. Using extant economic and legal literature, the paper seeks to explore the potential ways in which market mechanisms can be adapted, if at all, to protect the rights of marginalized users and the vitality of the riverine ecosystem in the Colorado, with the aim that this could have positive implications for the governance of other transboundary rivers.

Keywords: Colorado River, Environmental Externality, Market Mechanisms, Allocations, River, Water Rights, Water Markets, Water Banks.

Introduction

The Colorado River is a unique example of transboundary river law in practice as it involves water sharing and liability disputes on an international level between the United States and Mexico, and on an intra-national level between the seven sovereign states within the Colorado River basin in the United States. There has been a history of statutory and litigation responses to the disputes regarding water allocation and liability between the United States and Mexico. However, this article seeks to focus on the viability of market mechanisms and economic instruments with respect to resolving water sharing disputes. Market mechanisms have not been a popular method of water allocation with respect to the Colorado. Market mechanisms have faced political resistance, especially from the Upper Basin of the river owing to the public's reluctance to give up future water rights by agreeing to current transfers.¹

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1 Jerd Smith, MANAGING THE COLORADO RIVER IN THE 21ST CENTURY: SHARED RISKS AND COLLABORATIVE SOLUTIONS, Vol. 12, 2016, <https://www.cobank.com/Knowledge-Exchange/~media/Files/Searchable%20PDF%20Files/Knowledge%20Exchange/2016/Colorado%20River%20Report%20%20Mar%202016.pdf>, (visited on May 6, 2018).

There is a common conception that market mechanisms can self-regulate by adjusting themselves according to supply and demand for the resources, and are therefore an efficient means of valuing and regulating disputed commodities or scarce resources like water. On the other hand, there is sufficient research advocating against the widespread use of market mechanisms for water allocation and pollution. They are seen as being ineffective as a conservation strategy in the long run, attracting criticism of the commodification of a common good for private consumption.²

Since running water in a river is a finite good and the supply is largely constant, any market intervention would have to work by adjusting the demand and price of the good. Water is difficult to market owing to the expense and difficulty in creating and maintaining the resource management infrastructure required to successfully transfer it in the open water market. As technology advances, management becomes increasingly expensive, making it difficult to price water effectively.³ Instead, efficient water pricing is offered as a more practical alternative to the authorisation of large scale water transfers from one region to another.⁴

An important question that must be answered before establishing water markets is whether pricing water on an open market would be justified considering that lower value uses of the water such as agriculture would be replaced by higher value uses,⁵ thereby endangering the livelihood of farmers, and subsequently lowering food supply.⁶ Moreover, market mechanisms do not treat water as a resource, but convert the right to use that water into property which can then be traded, altering the application of property rights in this regard.⁷ This article will discuss mechanisms i.e., the water trading market to assess their efficiency in allocating water between nations, and the potential for market solutions to impose international liability. This case study is of significant interest also from an Indian perspective, given the inter-state transboundary river disputes which have gained prominence as a crucial political question.

2 Jesse Reiblich and Christine A. Klein, “*Climate Change and Water Transfers*”, PEPPERDINE LAW REVIEW, Vol. 41, 2014, pp. 439-442.

3 See Carol M. Rose, “*Rethinking Environmental Controls: Management Strategies for Common Resources*”, DUKE LAW JOURNAL, Vol. 1, 1991, pp. 1-3.

4 See Peter H. Gleick, “*The Effects of Future Climatic Changes on International Water Resources: The Colorado River, the United States, and Mexico*”, POLICY SCIENCES, Vol. 21, 1988, pp. 23, 35-36.

5 See R. Quentin Grafton et al., “*Global Insights into Water Resources, Climate Change and Governance*”, NATURE, Vol. 3, 2013, p. 320.

6 See Michael Levy, WATER CONSERVATION OPPORTUNITIES AND CHALLENGES IN THE COLORADO BASIN, 2014, pp. 1-6, https://watershed.ucdavis.edu/education/classes/files/content/page/18%20Levy_water%20conservation%20opportunities%20%26%20challenges%20in%20Colorado%20Basin.pdf, (visited on March 6, 2018).

7 David Getches, “*Water Wrongs: Why Can't We Get it Right the First Time?*” ENVIRONMENTAL LAW, Vol. 34, 2004, p. 1.

Types of Market Mechanisms

Justice Hobbs provides a concise description of four conditions in which market transfers over public resources are possessed by private entities: the presence of an exclusive physical resource; the cost of transfer being relatively low compared to the resource value; absence of network externalities preventing transfer; and clear definition of what is permitted and prohibited under the transfer. Hobbs explains how water transfers are becoming a response by cities in need of additional water supply, due to high environmental permit requirements and local resistance towards diversion of surface water.⁸ Market mechanisms are used across the world in different river basins as a possible solution to disputes over river water allocation; whether it is by direct trading, transfers or auctions. This article specifically explores the following market mechanisms at work in the Colorado River basin.

Marginal Cost Pricing

Marginal cost pricing is the method by which the price of water is determined by the marginal price of supplying it. Although its proponents cite its economic efficiency as it avoids under-pricing and prevents overuse, it has been criticised for not being feasible because determining the marginal price is difficult as it requires volumetric monitoring of total flow and the failure of the strategy to address equity.⁹

Public Allocation

Public allocation is a system wherein the government allocates water throughout the economy using permits or water pricing schemes; this system is popular owing to the fact that it is more feasible for the state to manage water resources in terms of infrastructure required and works on the belief that water is a public good.¹⁰

Water Markets

In the water market, water entitlements can be allocated through direct trade or auctions for previously unallocated water at the local and regional market either between individual users or between states.¹¹ Limited supply of water requires reallocation of the same sources to different users and different purposes, so that water can flow between sectors depending on the developmental focus of planning authorities; this is usually obtained through cap and trade methods, which create tradable water entitlements, for long term

8 Gregory J. Hobbs Jr., “Colorado Water Law: An Historical Overview”, UNIVERSITY OF DENVER LAW REVIEW, Vol. 1, 1997, p. 1.

9 Diane Arjoon, “Water and Benefit Sharing in Transboundary River Basins”, Unpublished PhD Thesis, Université Laval, 2016, p. 11, http://www.ihqeds.ulaval.ca/fileadmin/fichiers/fichiersIHQEDS/Publications/CahiersInstitutEDS/EDS_PAPER_LATEX_TILMANT_FIN_AL_.pdf, (visited on May 6, 2018).

10 *Ibid.*

11 Robert Speed et al., *Basin Water Allocation Planning. Principles, Procedures and Approaches for Basin Allocation Planning*, 2013, p. 89, <http://unesdoc.unesco.org/images/0022/002208/220875e.pdf>, (visited on May 6, 2018).

or short-term use.¹² However, this system can only work in near-perfect water management scenarios which are unaffected by environmental and political externalities. The benefits of this system are theoretically higher economic returns on water, and incentivisation of efficient consumption.¹³ State regulatory authorities can control the number of allocations within sectors and repurchase extra allotments from voluntary sellers.¹⁴ As mentioned earlier, for this system to be efficient or effective, it requires a high degree of precision by authorities in terms of defining the rights and rules for trade in water, and will also require an advanced degree of monitoring and evaluation within the water management infrastructure.¹⁵ Moreover, an efficient water market requires investments in sophisticated conveyance systems.¹⁶ According to Hennessy, a shortcoming of the water market is its susceptibility to “third party effects”, i.e., people with water rights willing to market them but are hindered by the prospect of having to bear the transfer costs themselves; which decreases the economic efficiency of the transfer.¹⁷

While water markets exist within countries to address domestic water needs, we must explore their potential at an international level. There is little optimism about “securing tradable water rights across international boundaries” due to the lack of cooperation and mechanisms to enforce respective storage capacity between nations.¹⁸ The cooperation between nations also depends on the type of water dispute. For instance, Janmaat and Ruijs illustrate how, in the case of the Rhine and Colorado rivers which have a primary problem with respect to the quality of water, there is a scenario created incentivising cooperation for mutual interest between riparian states, while in the Nile or Ganges, a dispute relating to quantity of water does not encourage cooperation and can involve political negotiations or military intervention.¹⁹

Water Banks

A water bank is an institution wherein water marketing can occur; it does not have to be a physical bank, but can be created through legal instruments. Water banking involves the conservation of water by users in one part of the river in a stream system, and which can be “physically and legally transferred” between buyers and sellers of this right without interference with third party water rights.²⁰ This system also requires the creation of reservoirs where water

12 *Ibid.*

13 *Ibid.*

14 *Ibid.* p. 90.

15 *Ibid.* p. 74.

16 *Supra* n. 9, p. 12.

17 Megan Hennessy, “Colorado River Water Rights: Property Rights in Transition”, THE UNIVERSITY OF CHICAGO LAW REVIEW, Vol. 71, 2004, pp. 1677-1678.

18 Johannus Janmaat and Arjan Ruijs, “Sharing the Load? Floods, Droughts, and Managing International Rivers”, ENVIRONMENT AND DEVELOPMENT ECONOMICS, Vol. 12, 2007, pp. 573-589.

19 Hans Petter Wollebaek Tøset et al., “Shared Rivers and Interstate Conflict”, POLITICAL GEOGRAPHY, Vol. 19 No. 8, 2000, p. 977.

20 *Supra* n. 1.

can be stored in the interim period between transfers.²¹ The Colorado River stream system allows for water banking, with a five per cent tax in the Lower Basin; and this system, in keeping with basic free market model, would transfer water from lower value to higher value uses, calling the issue of equity into question.²² The state of California and the Bureau of Reclamation created the California Water Bank between 1986 and 1991 during a period of severe drought, for transfers valid for a year, which resulted in the trade of around 800,000 acre-feet of water.²³

Water Exchanges

Bjornlund describes two kinds of water exchanges which could work within the water market, namely “sealed bid double-auction” and the “bulletin board approach”.²⁴ In the sealed bid double-auction, both buyers and sellers submit sealed bids to purchase or sell water volumes, and the exchange operator who is the auctioneer, collects the total volumes to be bought and sold, and then determines the price, allowing the largest volume of water to be sold and so forth, at one clearing price.²⁵ The bulletin board approach, on the other hand, requires willing buyers and sellers to display their offers on a public board; trades can be made by matching offers, but the amount of water traded depends on the potential for matching both price and volume of water.²⁶ Such a market has existed in the Northern Colorado Water Conservancy District (NCWCD) since the 1950s.²⁷ It includes the Colorado-Big Thompson Project, transferring water from the western slope of the Rocky Mountains to the eastern slope, and is distributed by the NCWCD depending on shares of users in the NCWCD; shares which can be traded in the open market and are traded by the bulletin board method.²⁸

User-Based Allocation

User-based water allocation is when communities collectively manage their water use for individual or collective use such as community wells and irrigation systems managed by farmers. This sort of system is deeply entrenched in established rights to water use within the property law regime. While this system has a high potential for equitable use, it requires transparency within its structure.²⁹

21 *Ibid.*

22 Erin C. Betley, “*How the West was Watered: A Case Study of the Colorado River*”, 5 LESSONS IN CONSERVATION, Vol. 5, 2015, pp. 62, 76.

23 Charles W. Howe, “*Protecting Public Values in a Water Market Setting: Improving Water Markets to Increase Economic Efficiency and Equity*”, UNIVERSITY OF DENVER WATER LAW REVIEW, Vol. 3, 2000, pp. 357-359.

24 Henning Bjornlund, “*Efficient Water Market Mechanisms to Cope with Water Scarcity*”, INTERNATIONAL JOURNAL OF WATER RESOURCES DEVELOPMENT, Vol. 19, 2003 pp. 553, 557.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 *Supra* n. 23.

29 *Supra* n. 9, p. 12.

Environmental Flows

Traditional water allocation systems have usually considered in-stream water flow as being a wasted resource, without accounting for the need for in-stream water flow to maintain ecological needs and ecosystem services. However, there exists a strong case to be made in favour of including environmental flow of water within market mechanisms to safeguard ecosystems while allocating water.³⁰ Katz stresses that there is an increasing emphasis on securing adequate water flow for the ecosystem because of “a growing understanding of the importance of water flow as a “master variable” in determining aquatic ecosystem functioning.”³¹ He cites Swiss law which mandates minimum water flows, South African law which prioritises ecological and human needs over the water flow before other uses³² and international law: “the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses”, which includes environmental conservation as a factor to be taken into account while allocating transboundary water under Article 6.³³ Katz attributes this increasing importance of environmental flows in allocation to the increase in public awareness regarding economic benefits derived from ecosystem services for which adequate water flows are essential. He explains that there are primarily three economic models used in isolation or simultaneously to allocate water:³⁴

- ‘Environmental Externality Model’, in which water is allocated to all sectors except environment, and markets do not include “environmental values in their objective function.” This is traditionally the most commonly used model, and has contributed to the degradation of marketed waterbodies.³⁵
- ‘Minimum Flow Allocations Model’, in which utility is maximised for non-environmental sectors but there is a restriction on total flow for environmental purposes; however, they only satisfy a minimum legal flow value, rather than the most efficient flow required to maximise ecosystem services.³⁶
- ‘Competitive Market Model’, in which environmental uses compete with all other uses of the water flow, and allocation towards environmental purposes from other uses requires sufficient compensation for previous rights holders and determination of the price of water for environmental

30 David Katz, “*Water Markets and Environmental Flows in Theory and in Practice*”, 3 (2008), http://www.ayto.zaragoza.es/contenidos/medioambiente/cajaAzul/10Conferencia_Magistral-1-David%20KatzACC.pdf, (visited on May 6, 2018).

31 *Ibid.*, p. 1.

32 *Ibid.*

33 *Ibid.*, p. 2; Article 6, THE UNITED NATIONS CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES, CUSTOMARY INTERNATIONAL LAW, AND THE INTERESTS OF DEVELOPING UPPER RIPARIANS, 36 ILM 700 (1997); G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th mtg., UN Doc A/RES/51/229 (1997).

34 *Ibid.*, p. 3.

35 *Ibid.*

36 *Ibid.*

use, the latter being especially challenging giving the difficulty in translating ecological value into direct economic value.³⁷

It shows that market mechanisms have the possibility of being used not just in the context of free trade in river water, but can provide a possible method of negotiating for ecosystem conservation, albeit by formulating the paradigm of environment conservation within the ambit of economic value, as opposed to its inherent ecological value.

Colorado Basin

Postel, while discussing the water allocations among the respective US states and Mexico, claims that the volume of water allocated in the treaties is more than the actual volume of water carried by the river, leading to no remaining flow of water “to sustain the delta ecosystem that American naturalist Aldo Leopold once called ‘a milk and honey wilderness’ and a land of ‘a hundred green lagoons’.”³⁸

Owen, in his recent work in 2017, agrees with Postel and describes how the right to use every galleon of water in the Colorado is either owned or claimed, in a way that theoretical rights and claims or “paper water”, are in excess of the actual flow of water in the river, referred to as “wet water.”³⁹ In his essay on the Colorado River, Owen points out how the total annual flow of the Colorado was estimated to be around 17 million acre-feet a year, in 1922 the year the Colorado River Compact was signed, and this estimate was based on research done in some of the wettest years since the seventeenth century, estimates which were subsequently proven incorrect based on tree-ring analysis.⁴⁰ The actual water in the river is far less than those estimates but the total allocations of water do not reflect that reduction. Owen cites the U.S. Bureau of Reclamation’s estimate that the Colorado has an annual average “structural deficit” of 1.2 million acre-feet.⁴¹ This deficit therefore calls into question the necessity and feasibility of market mechanisms and whether they can address the quandary of reduced water flow and allocations.

The Colorado basin is spread across seven states and two nations and is “governed by a complex mix of more than 100 laws, court decisions, operational guidelines and technical rules known as the Law of the River.”⁴² The over allocation of rights is caused by the projections of the Compact, because irrigated districts now have rights over water which do not align with

37 *Ibid.*

38 Sandra L. Postel, “*Entering an Era of Water Scarcity: The Challenges Ahead*”, *ECOLOGICAL APPLICATIONS*, Vol. 10, 2000, pp. 941, 945.

39 David Owen, *WHERE THE WATER GOES: LIFE AND DEATH ALONG THE COLORADO RIVER*, 1st ed. 2017, p. 6.

40 David Owen, “*Where the River Runs Dry*”, *THE NEW YORKER*, May, 2015, <https://www.newyorker.com/magazine/2015/05/25/the-disappearing-river>, (visited on May 6, 2018).

41 *Ibid.*

42 Dustin Garrick et al., “*Understanding the Evolution and Performance of Water Markets and Allocation Policy: A Transaction Costs Analysis Framework*”, *ECOLOGICAL ECONOMICS*, Vol. 88, 2013, pp. 195, 202.

the climate records.⁴³ The current research and development in market mechanisms is a direct consequence of over two decades of low rainfall, leading to developments of water banking between various states in the United States.⁴⁴ Due to existing water rights under the Compact, the Colorado basin faces extremely high costs for climate change adaptation due to the lack of flexibility in the original water sharing agreements.⁴⁵

The Centre for Strategic and International Studies published a report in 2003 which analysed the potential for market solutions between the United States and Mexico to address the allocation of water in the Colorado. The report stresses the need for both the United States and Mexico to have the institutional capacity for the same before embarking on collaborative water management and marketing schemes. The Report suggests that this could be achieved through the creation of binational water markets and water banks and the creation of a commission similar to the U.S-Canada International Joint Commission with joint monitoring authority.⁴⁶

In 2012, Minute 319⁴⁷ between the United States and Mexico included expansion in market mechanism schemes such as the creation of the Intentionally Created Mexican Allotments (ICMA) through which Mexico can store extra water from conservation or new sources within Lake Mead in the form of ICMA credits. Under Minute 319, Mexico can store a maximum of 250,000/acre-feet in credits and annually withdraw 200,000 provided that Lake Mead's depth is not less than 1025 feet. Although this water credit system is largely for environmental purposes, i.e., maintaining the pulse flow and base flow, it has the potential for expanding to other uses depending on its success. The United States is required to invest 21 million USD in Mexico, towards projects for water efficiency, and although Mexico will own the water generated through the programme, the US is entitled to a single allotment of 124,000/acre-feet. Minute 319 is a temporary measure in advance of a more detailed and sophisticated agreement on this subject and runs out this year in 2017.⁴⁸

In the Mexicali Irrigation District, water rights can be purchased from farmers using existing water market mechanisms in the Mexicali Valley, such as the right of one hectare of irrigated land to have an annual water right of 10,000

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

46 Center for Strategic and International Studies, "*US-Mexico Transboundary Water Management*", 2003, p. 11, https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/binational_council.pdf, (visited on May 6, 2018).

47 Minute 319 of the International Boundary and Water Commission (U.S. and Mexico), November 20, 2012, TIAS 12-1127.

48 COLORADO RIVER GOVERNANCE INITIATIVE, CROSS-BOUNDARY WATER TRANSFERS IN THE COLORADO RIVER BASIN: A REVIEW OF EFFORTS AND ISSUES ASSOCIATED WITH MARKETING WATER ACROSS STATE LINES OR RESERVATION BOUNDARIES, 2013, pp. 29-30, http://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1003&context=books_reports_studies#, (visited on May 6, 2018).

cubic meters.⁴⁹ The delinking of the land and water rights and the selective trade of water rights is currently authorised under the National Water Commission.⁵⁰ The Colorado River Delta Water Trust is an NGO which works to acquire water rights, both temporary and permanent, in order to restore the River Delta, thereby conserving the ecosystem and ensuring the long-term success of conservation initiatives through contracts for easements, usufructs and water use rights.⁵¹ This is done using the provisions under Mexican trust law, where the trust acts as an institutional fiduciary. Mexican trust law is similar to US trust law and researchers see tremendous promise in trust-based water rights acquisition and use, especially for the purpose of environmental conservation.⁵²

Rights of Indigenous Communities

There are thirty-four Native American reservations in the Colorado River basin, of which twenty-seven have underdeveloped water rights; together they have rights to over two million/acre-feet of Colorado water. There is effort underway by ten of these tribes to develop and market their water rights through the formation of the Colorado River Tribal Partnership.⁵³ There is speculation as to whether the tribes are permitted to market these rights for additional income outside the State in which they reside, and the exact status of their right to alienate the water right itself.⁵⁴ Since the tribes are sovereign entities, ostensibly they have a right to benefit from their resources; therefore, this additional supply of rights adds an additional layer of negotiation while establishing the binational market.⁵⁵

Liability

The article so far has discussed market mechanisms with respect to water allocation, but there also exists potential in employing market mechanisms to address international liability and consequent damages in matters such as ecosystem damage and pollution. One such mechanism is Environmental Damage Taxes (EDT). EDT would be levied by a bilateral authority through mitigation and restoration surcharges on use of water in both countries; these funds will be specifically allocated towards ecosystem protection and wildlife habitats.⁵⁶ Although this is not a direct attribution of liability, it directs market forces to consider the cost of ecosystem damage, and indirectly imposes financial liability on users who benefit from the water.

49 Francisco Zamora-Arroyo et al., “*Collaboration in Mexico: Renewed Hope for the Colorado River Delta*”, NEVADA LAW JOURNAL, Vol. 8, 2008, pp. 871, 876.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 Jennifer Pitt et al., “*Two Nations, One River: Managing Ecosystem Conservation in the Colorado River Delta*”, NATURAL JOURNAL, Vol. 40, 2000, pp. 819, 864.

54 Joe Gelt, “*Sharing Colorado River Water: History, Public Policy and the Colorado River Compact*”, ARROYO, Vol. 10, 1997, <https://wrrc.arizona.edu/publications/arroyo-newsletter/sharing-colorado-river-water-history-public-policy-and-colorado-river>, (visited on May 6, 2018).

55 *Ibid.*

56 *Supra* n. 53, p. 859.

Moreover, competitive pricing of water in a water market that depends not only on volume of water but also quality of water, would penalize the upstream states or country for polluting and releasing saline water, deterred by the low price at which bad quality water would eventually be traded.

NAFTA

Mexico and the United Nations, are both members of the North American Free Trade Agreement (NAFTA)⁵⁷ which came into effect in 1994. One of the prominent drivers of this agreement is the elimination of duties on products being traded between the three members (Canada, U.S. and Mexico), including agricultural produce. A side-agreement of the NAFTA is the North American Agreement on Environmental Cooperation which requires member states to uphold domestic laws, and provides Parties with the option of consulting with other parties to resolve disputes regarding their environmental compliance, and request for the appointment of an arbitral panel.⁵⁸ While NAFTA does not act as a market mechanism per se, the trade agreement is an illustration of how the free market in goods and services can be influenced by an environmental agenda. NAFTA is an international agreement, which obligates member states to uphold domestic environmental laws, placing it in a unique space between domestic and international environmental law. Introducing water markets under the aegis of NAFTA, or using NAFTA's dispute resolution mechanism to resolve liability disputes arising from international water markets, would integrate water markets within international law, considering that both Canada and Mexico share border rivers with the United States. Moreover, NAFTA could be amended to include private liability for environmental non-compliance within its framework, for polluting the Colorado.⁵⁹

Potential Solutions

The aforementioned regulatory options illustrate the competition between different kinds and values of water use, several of which compromise the environmental integrity of the riverine ecosystem, while some theoretically incorporate environmental protection within the ambit of water markets. Bennett proposes a theoretical economic model which accommodates both the need for a flexible water market, as well as the need to account for environmental quality, especially when there is trade between upstream and downstream users. She suggests that water rights take into account both quality and quantity of water at the trading stage, while factoring in decreasing productivity.⁶⁰ Since the US and Mexico are distinctly upstream and downstream users of the Colorado respectively, it is important that water trading

57 "North American Free Trade Agreement (U.S., Canada and Mexico)", INTERNATIONAL LEGAL MATERIALS, 1993, Vol. 32, p. 289.

58 See Farah Khakee, "The North American Free Trade Agreement: The Need to Protect Transboundary Water Resources", FORDHAM INTERNATIONAL LAW JOURNAL, Vol. 16, 1992, p. 876.

59 *Ibid.*, p. 892.

60 See Lynne Lewis Bennett, "The Integration of Water Quality into Trans Boundary Allocation Agreements: Lessons from the Southwestern United States", AGRICULTURAL ECONOMICS, Vol. 24, 2000, p. 120.

ensures equity with respect to the water quality, along with other pollution and salinity controls and statutes in place.

While we have discussed the possible advantages and disadvantages of market mechanisms being employed to allocate water between Mexico and the US, it must be emphasized that this cannot be the sole or even the most prominent approach in water allocation, because market-based solutions cannot rectify environmental degradation, and incentivise inequality of water use on the basis of wealth. The inequality ranges from individuals to communities, scaled up to nations, as in the case of international watercourses. This brings us to the question of whether water should be a right or whether it should be a purchasable commodity. In the current international financial system coupled with the international law regime, complete avoidance of market mechanisms is not feasible. However, there must be a strong push towards changing water consumption patterns such as the decrease in water intensive agriculture. Most importantly any market mechanisms at play must be strictly regulated by the state/s without altering the inherently public nature of the resource.⁶¹ Another possibility could be introducing water banks similar to cooperative banks, where users have a direct share and control over the resources.⁶²

Makridis, in his work on transboundary water markets between the United States and Mexico, proposes a transboundary water bank model. His model introduced tradable permits, in terms of water rights, and decoupled water rights from land rights. The model works on the assumption that both the United States and Mexico would contribute their pooled Colorado water rights to one transboundary bank, and would compete with each other to make their costs competitive for an open auction.⁶³ He suggests that there must be a regulator in place to relay data regarding current changes in prices and market behaviour, company information regarding compliance, and environmental information regarding the location of said permit; the regulators of said bank are to conduct bilateral audits.⁶⁴ However, he also points out the problems associated with the water bank, such as the possibility of monopolies when very few companies trade at the forum and the difficulty in pricing water at the exact optimal range to ensure internal profitability. In light of this model, Makridis suggests that both United States and Mexico demonstrate multiple levels of cooperation from creating legal structures to enable the auction scheme and ensure bilateral cost-benefit analysis for greater representation within the procedures.⁶⁵ He also suggests that there must be a cap on total water extraction before any trading takes place in order to optimise the working of the water bank.⁶⁶

61 *Supra* n. 46, p. 16.

62 See Claudia W. Sadoff and David Grey, "Cooperation on International Rivers: A Continuum for Securing and Sharing Benefits", *WATER INTERNATIONAL*, Vol.30, 2005, pp. 420-421.

63 Christos Makridis, "A Tale of Two Countries: Markets and Transboundary Water Governance Between the United States and Mexico", *INTERNATIONAL JOURNAL OF PUBLIC ADMINISTRATION*, Vol. 36, 2013, p. 626.

64 *Ibid.*, p. 632.

65 *Ibid.*, p. 634.

66 *Ibid.*

Conclusion

While it is convenient to make an argument that environmental use must compete with other uses in the water marketplace to conserve environmental flows, it is also true that ecological value does not equate to economic value and environmental interests therefore tend to be placed at the bottom of the value hierarchy, due to the absence of a direct transaction. Deriving this value is extremely difficult because it involves long term scientific research which involves studying the environmental flow required to restore, maintain and enhance ecosystem services in a way they can be quantified for the marketplace. However, state environmental agencies, non-governmental environmental research and conservation organisations have the possibility of acquiring water rights specifically for the purpose of maintaining environmental flow.⁶⁷

Along with environmental values, there are several cultural, social and public values vested in the Colorado waters. Several of the communities which own water rights might be from low-income groups such as agricultural families or indigenous groups, and this decreases their bargaining power in safeguarding those community rights when offered high water prices. In the event that the water market does work optimally toward mutual benefit, there is a shift of water use from low value to high value uses, creating secondary economic impacts of increased poverty and displacement of traditionally low value users such as agriculturists.⁶⁸ These secondary costs do not factor into any of the water market mechanisms we have discussed, ignoring the unique socio-cultural nature of river water as a resource, an especially crucial factor with respect to the Colorado, as a border river between the US and Mexico, given the political conflict between the two nations over legal and illegal immigration.

It is in the interest of the United States to negotiate a treaty which does not leave lower basin Mexican users devoid of sufficient rights over use of water, and ensures the flow of sufficient quality and quantity of water, with Mexico increasing its effort to report and comply with established environmental flow volumes. Pricing of the water could also indirectly impose liability on the polluting nation in cases such as excessive salinity of the water, with polluted water offering very low returns in the market, thereby penalising the polluter. It is apparent that a binational water market over the Colorado can work in the long run, if the long term environmental and ecosystem health of the river is ensured. This requires a bilateral scientific body that would decide on environmental flow quantities and then create a cap, trading the remaining water rights through a bilaterally regulated water bank. The crux of the debate regarding the viability of market mechanisms therefore depends almost entirely on how they account for low-value uses, environmental flows, and the rights of agriculturists and indigenous communities.

⁶⁷ See generally *supra* n. 30, p. 5.

⁶⁸ *Supra* n. 23, p. 368.

PASSIVE EUTHANASIA: AN ANALYSIS OF SUPREME COURT JUDGMENTS

Vidhi Singh*

Abstract

In this article, the author explores the concept of passive euthanasia, tracing its journey from the historical era to contemporary times. The article will explore the possibility of legalising passive euthanasia in India whilst analysing the judicial pronouncements of the Supreme Court. Initially, the author discusses the concepts of life and death as envisioned in theology and philosophy before moving on to deliberate upon its nuances in the current socioeconomic backdrop. The author also intends to scrutinise euthanasia through the lens of dignity and human life, sacrosanct aspects of the Constitution. At the end of the article, the author makes an attempt to critically appraise the journey towards the legalisation of passive euthanasia and the milestones yet to come.

Key Words: Passive Euthanasia, Dignified Death, Living Will, Principle of Self-Determination.

Introduction

Insight into Life and Death

*Life asked death, why do people love me but hate you? Death responded, because you are a beautiful lie and I am a painful truth.*¹

‘Life’ and ‘death’ are subjective conceptions. Lao Tzu expects us to understand that “life and death are one thread, the same line viewed from different sides.”² Marjory Stoneman Douglas, a women’s suffrage advocate, believes that “life should be lived so vividly and so intensely that thoughts of another life, or of a longer life, are not necessary”³. Nobody wishes to be laid in the grave, to enter into the silent and scary darkness forever. Every individual avoids thoughts of death and if happens to think of death, one wishes to have a painless death.

We desire to lead a peaceful, meaningful and quality life. Nevertheless, it is pertinent to understand as inscribed in Bhagavad Gita that “for one who has taken his birth, death is certain; and for one who is dead, birth is certain. Therefore, in the unavoidable discharge of your duty, you should not lament”⁴. Thus, life is not sempiternal and every living being has to perish. All dreams of

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1 Katherine Tellander, THE PHOENIX MUST BURN, 1st ed. 2018, p. 115.

2 Christine Spencer, PATHWAYS TO PEACE: UNDERSTANDING ‘DEATH’ AND EMBRACING LIFE, 1st ed. 2011, p. 16.

3 Marjory Stoneman Douglas, VOICE OF THE RIVER, 1st ed. 1987, p. 258.

4 Rosetta Williams, BHAGAVAD GITA, 2nd ed. 2010, p. 15.

happy life, but at times individuals live like corpses and life becomes a mere survival. In such situations, the former thought of avoiding death withers away and such an individual wishes to depart from this world painlessly. Thus, 'euthanasia'⁵ appears as a suitable solution to end the painful suffering of an individual as it allows him/her to die with dignity. Life is not mere living but living in health.⁶ Health is not the absence of illness but a glowing vitality-the feeling of wholeness with a capacity for continuous intellectual and spiritual growth.⁷ The author believes that it is the 'quality of life' that matters, rather than the 'longevity of life'.

Euthanasia: A Decision to Make

Leaving an individual in the stage of intolerable and immedicable suffering from agony is a conventional hypocritical ethic. Should such an individual not be allowed to depart from this world peacefully? Thus, arises a question of law whether an individual be provided with advanced medical treatment with life-saving drugs so that he/she stays alive: a mere 'physical existence' and not 'presence'. Should such an individual who is breathing every nanosecond in trouble, pain and discomfort be allowed to cease to exist peacefully? At this point, one is at a crossroad to choose a just path which would be in the interest of the sufferer. Influencing this choice are numerous factors such as family's rational decision to discontinue medication in the interest of the sufferer or for some other reasons like financial constraints, emotional breakdown or social traits. Under such circumstances, the family is not allowed to do so and is bound to continue with meaningless medical treatment. There are societal pressures if such a family chooses to stand by its decision. Further, investigating this issue from a different angle would reveal that some people misuse 'euthanasia' as they desire the patient's death as early as possible for property acquisition of the deceased. Undoubtedly pleasure and pains are corresponding to each other but sometimes the pain is too severe to explain not only to a particular but also for their near and dear along with the attached part of society, this type of pain is really questionable that whether it can be perfectly cured by any law by the end of subject matter or to left the subject matter in its position to fight with its pain.⁸

The core issues remain to be addressed that whether it is correct to accelerate the process of death of the sufferer and if it is legalised, then at which stage and to what magnitude. For the present article, the author will confine herself to delineating the merits and demerits of passive euthanasia by inquiring into its philosophical and pragmatic underpinnings. The subject of active euthanasia, while related to passive euthanasia, is nevertheless not explored in this article.

5 Bryan A. Garner, BLACK'S LAW DICTIONARY, 10th ed. 2014, p. 672, defines euthanasia as "the act or practice of causing or hastening the death of a person who suffers from an incurable or terminal disease or condition, esp. a painful one, for reasons of mercy".

6 Stanley Yeo, "Dying with Dignity: Case for Legalising Physician-Assisted Suicide", JILI, Vol. 50, No.3, 2008, p. 329.

7 *Ibid.*

8 Vaibhav Goel, "Euthanasia- A Dignified End of Life!" INTERNATIONAL NGO JOURNAL, Vol. 3, No.12, 2008, p. 224.

Historical, Theological and Philosophical Backdrop

Ever since the liberation of man from the shackles of religious bigotry and the subsequent development of critical spirit of enquiry (perhaps, the other name for scientific temperament) in the middle of the 19th century thanks to the publication of the ‘Theory of Origin of Species’ by Charles Darwin, ‘The manifesto of communist Party’ by Marx and Engels and the impact of industrial revolution, the scientific and technological advancement has been remarkable, bringing in its wake many unforeseen changes.⁹ Individuals who a few years ago would have died due to particular medical circumstances may now have their lives artificially sustained even though their suffering would lead them to choose not to prolong their lives.¹⁰ In circumstances wherein leading a life is not an option for the individual, there exists an advanced technology that allows him/ her to evade unbearable suffering and opt for a painless and peaceful death. It is recognised as ‘Euthanasia’, devised by Sir Francis Bacon in the early 17th century.¹¹ The history of the concept of euthanasia is closely associated with human dilemmas involved in advanced old age and severe illness.¹² Etymologically speaking, in the ancient times ‘euthanasia’ meant an ‘easy death’ without severe suffering.¹³ In classical Greece, the expressions ‘life’ and ‘death’ were interpreted in a significant manner using the terms ‘Eudaemonia’ for ‘good life’ and ‘Euthanasia’ (eu-good and Thanatos-death) to designate good death.¹⁴ The perception of the ancient Greeks and Romans was not in ‘preserving life’ instead in ‘living life’; consequently, if no relief could be provided to the sufferer, he was allowed to die. Therefore, in the west the primeval outlook towards ‘euthanasia’ was in proximity to ‘suicide’.

Jewish and Christian thinkers as Josephus, Augustine and Aquinas discouraged the practice of active euthanasia with their insistence on the natural life span.¹⁵ Nonetheless, gradually ‘euthanasia’ came to mean course of action adopted by the doctors which included the probability of even accelerating the death process. The Upanishads inscribed, “*for our body, give us freedom. For our dwelling, give us freedom. For our life, give us freedom*”¹⁶. Thus, according to ancient Hindu texts, every individual should possess the freedom to do whatever he/she wants to do with his/her body. The individual should be at

9 R. Venkata Rao, “Euthanasia- A Licence to Kill?”, INTERNATIONAL CONFERENCE ON GLOBAL HEALTH LAW, Vol. 57, 1997, http://14.139.60.114:8080/jspui/bitstream/123456789/1186/1/012_Euthanasia%20A%20licence%20To%20Kill.pdf, (visited on May 4, 2018).

10 Mustafa D. Sayid, “Euthanasia: A Comparison of the Criminal Laws of Germany, Switzerland and the United States”, BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW, Vol. 6, No.2, 1983, p. 536.

11 Robert Cliquet and Dragana Avramov, EVOLUTION SCIENCE AND ETHICS IN THE THIRD MILLENNIUM: CHALLENGES AND CHOICES FOR HUMANKIND, 1st ed. 2018, p.249.

12 Harold G. Coward et al., HINDU ETHICS: PURITY, ABORTION, AND EUTHANASIA, 1989, p.71.

13 Helga Kuhse et al. (eds.), BIOETHICS: AN ANTHOLOGY, 3rd ed. 2016, 236.

14 Archana Barua, “Euthanasia and the Contemporary Debate”, INDIAN PHILOSOPHICAL QUARTERLY, Vol. 23, No. 3&4, 1996, p. 467.

15 Subhash Chandra Singh, *Euthanasia and Assisted Suicide: Revisiting the Sanctity of Life Principle*, JILI, Vol. 54, No. 2, 2012, p. 198.

16 The Upanishads, Ca 8th – 4th Centuries BC, translated by Chinmoy Kumar Ghose, 1974.

liberty to depart from this world when life seems meaningless. The followers of Jainism denounce ‘corporeal violence in any form’ even so the rite of accelerating death is in fact accepted as an ‘affirmative action’. This practice of “fasting to death” or “self-killing” is known commonly as *samadhi-maran* (death while in meditation).¹⁷ Buddha tried to avoid acceptance of the heroic (self-willed) death so common in *Ksatriya* circles, he did allow self-willed death for the extremely ill persons as an act of compassion, that is, he endorsed euthanasia.¹⁸ The ideology of Muslim religion holds that it is only God ‘*Allah*’ who holds the authority to end one’s life. The followers of Sanatan Dharma believe euthanasia to be an intrusion of ‘*Karma*’ and instils to have reverence for life. Further, in the context of animals suffering an unbearable pain at *Sabarmati Asharam*, Gandhiji emphasised that it would have been useful if the act of taking once life was initiated by “*self-interest*”.¹⁹

In “Leviathan” Thomas Hobbes advocated the concept of “*Ethical Egoism*”. This concept implies that it is an ethical act if one desires to terminate his/her life by euthanasia, as such an act is supposed to be initiated in the requirement of “*self-benefit*”. It is believed that if an individual is experiencing tremendous pain, indescribable suffering and is not at any cost willing to carry on living, then it is not wrong to end his/her life. An individual holds the right to end its suffering and obtain death, as considered by John Stuart Mill, “*over himself, over his own body and mind, the individual is sovereign*”²⁰. If euthanasia is understood as the upholding of a patient’s best interest, then it is a catalyst to human flourishing.²¹ Therefore, the issue of ‘euthanasia’ has remained to be daunting even today.

Passive Euthanasia: Article 21 of the Constitution of India

We breathe in a society that keeps changing with time, “*the law must, therefore, in a changing society march in tune with the changed ideas and ideologies.*”²² Accordingly, the Constitution of India particularly fundamental rights enshrined therein should be interpreted in a dynamic way. It must be remembered that the emergence of Indian human rights jurisprudence is coeval with the International human rights jurisprudence, and the Universal Declaration of Human Rights, 1948 and Fundamental Rights edifice in the Constitution of India have radiated simultaneously in the firmament of human rights jurisprudence.²³ The fundamental rights in their connotative expanse are

17 Stuart Chambers, “*The Illusion of the “Slippery Slope”*: How Religion and Culture Shape Canadian Doctors’ Attitudes toward Euthanasia and Physician-Assisted Suicide”, OTTAWA JOURNAL OF RELIGION, 2011, p. 75.

18 *Supra* n. 15, p. 199.

19 *Common Cause (A Regd. Society) v. Union of India* AIR 2018 SC 1665, para. 247.

20 Robert Orfali, DEATH WITH DIGNITY: THE CASE FOR LEGALIZING PHYSICIAN-ASSISTED DYING AND EUTHANASIA, 1st ed. 2011, p. 14.

21 Josef Kuře (ed.), EUTHANASIA- THE “GOOD DEATH” CONTROVERSY IN HUMANS AND ANIMALS, 1st ed. 2011, p. 154.

22 Anton Maurer, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION: HISTORY, INTERPRETATION, AND APPLICATION, 2013, p. 259.

23 Ravulapati Madhavi, DEATH WITH DIGNITY- A DELUSION OR DILEMMA! (EUTHANASIA), 1st ed. 2014, p. 235.

bound to engulf certain rights which really flow from the same.²⁴ In *M. Nagaraj v. Union of India*,²⁵ the court observed, “constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs”²⁶.

Considering the above, it is explicit that “interpretation is inescapably a kind of legislation”²⁷. Life is to be infused in the golden text of Article 21 of the Constitution, to include ‘passive euthanasia’ within its sweep. Whilst the patient is suffering from irremediable disease or is in PVS then elongating his lifespan with the aid of life-sustaining treatment, subjecting him to intolerable suffering is divesting him of his dignity. Dignity of citizens continues to be safeguarded by the Constitution even when the “life is seemingly lost and questions about our own mortality confront us in the twilight of existence”.²⁸ In the case of the right to die with dignity being accorded to the dying patient, purely ‘passive euthanasia’ would fall under the realm of Article 21 and not active euthanasia.²⁹

Differentiating active and passive euthanasia, the former associate to undisguised action while the latter related to assented ‘omission’. This ‘omission’ is not considered as cause of death and death is attributed to the patient’s underlying condition.³⁰ The concept is based on non-prolongation of life where there is no cure for the state the patient is in and he, under no circumstances, would have liked to have such a degrading state.³¹ Herein, ‘no-cure’ implies that the sufferer stays in same condition of intolerable suffering or process of death is deferred by life-sustaining treatment. The dignity of life is denied to him as there is no other choice but to suffer an avoidable protracted treatment thereby thus indubitably casting a cloud and creating a dent in his right to live with dignity and face death with dignity, which is a preserved concept of bodily autonomy and right to privacy.³² To meet such situations, the court has a duty to interpret Article 21 in a further dynamic manner and it has to be stated without any trace of doubt that the right to life with dignity has to include the smoothening of the process of dying when the person is in a vegetative state or is living exclusively by the administration of artificial aid that prolongs the life by arresting the dignified and inevitable process of dying.³³ Therefore, the court fulfilling its obligation towards the citizens of India held that passive euthanasia forms part of Article 21.

24 *Supra n.* 19, para 147.

25 *M. Nagaraj v. Union of India* AIR 2007 SC 71.

26 *Ibid.*, para. 19.

27 Jerome Frank, “Words and Music: Some Remarks on Statutory Interpretation”, COLUMBIA LAW REVIEW, Vol. 47, No. 8, 1947, p. 1269.

28 VAS Inc, “Law & Justice”, THE HILLS TIMES, March 25, 2018 <http://www.thehillstimes.in/law-justice/> (visited on May 22, 2018).

29 *Supra n.* 19.

30 Faizan Mustafa, “Is the Right to Die an Issue for the Poor?”, THE WIRE, March 23, 2018, <https://thewire.in/law/is-the-right-to-die-an-issue-for-the-poor>, (visited on May 12, 2018).

31 *Supra n.* 19, para. 160.

32 *Ibid.*

33 *Ibid.*

Principle of Self-Determination

*Entry into this world is a chance but the exit must be by choice.*³⁴

The right to self-determination is basically a 'right to opt' that one possesses, it is on his discretion to decide the way he wishes to lead life.³⁵ Every individual who is reasonable and of sound mind comes to an age has an inherent right over his/her body, to render decision with respect to it without the intrusion of anybody.³⁶ This individual autonomy is recognised in *Reeves v. Commissioner of Police of the Metropolis*,³⁷ wherein the court observed, "autonomy means that every individual is sovereign over himself and cannot be denied the right to certain kinds of behaviour, even if intended to cause his own death"³⁸. In the milieu of medical field, this right to self-determination includes the right to make a choice be treated and to what extent should be treated or not to be treated at all, to choose among obtainable substitute treatment, if chosen to be treated.³⁹ Further, Lord Goff observed in *Airedale N.H.S. Trust v. Bland*⁴⁰ that the requisite of the right to self-determination is that if a patient of sound mind and competent age chooses not to undergo medication then even though it appears to be not in the interest of the patient still there rest a responsibility on the doctors to consent to it. The obligation of the doctor to proceed in the interest of the sufferer should be sanctioned by right of self-determination of the patient, as per Lord Goff.

When repugnancy arises among patient's right to refuse medication and state's decision of initiating treatment of such a patient in order to save his life, then in United Kingdom it is the former that prevails. This right to self-determination is also recognised in the legislations of the United States and even before these legislations existed, if an individual suffered from immedicable disease then such an individual had the 'right to die' as an auxiliary right to the 'right to privacy'.

Being in PVS, a girl of twenty-one years was lying on ventilator, there raised a repugnancy between girls' right to privacy and state's decision to save her life by proceeding with medication, thus, it was the prerogative of the court to weigh as to which would prevail in *In Re Quinlan*⁴¹. It was finally held that *first* that the right to privacy would prevail over the state's interest; and *secondly* right to privacy is wide enough to include the right to refuse medication. In *Re*

34 *Supra* n. 23, p. 369.

35 *F v. R* (1983) 33 SASR 189, 193; *Rogers v. Whitaker* [1992] HCA 58.

36 *Schloendorff v. Society of New York Hospital* (1914) 211 NY 125; *Secretary, Department of Health and Community Services v. J.W.B. and S.M.B.* [1992] HCA 15; *Reibl v. Hughes* [1980] 2 SCR 880.

37 *Reeves v. Commissioner of Police of the Metropolis* [2000] 1 AC 360.

38 Charles Foster, CHOOSING LIFE, CHOOSING DEATH: THE TYRANNY OF AUTONOMY IN MEDICAL ETHICS AND LAW, 2009, p. 86.

39 *Malette v. Shulman* 72 O.R. (2d) 417.

40 *Airedale N.H.S. Trust v. Bland* [1993] 1 All ER 821.

41 *In Re Quinlan* 70 N.J. 10; 355 A.2d 647 (1976).

*Jobes*⁴² the court recognised the ‘right to self-determination’ of patient’s in PVS.

Further, the court in *Aruna Ramchandra Shanbaug v. Union of India*⁴³ observed that the informed patient has complete discretion to choose/decide for himself/herself the tactic of treatment or to even refuse treatment, this liberty is nothing but the right to self-determination. Moreover, it is observed that *first*, if a patient is ‘capable’ of making a choice then he holds the right to exercise self-determination; *secondly*, if a patient is ‘not capable’ of making a choice for himself then either the ‘living will’ which indicates his choice expressed by him before in hand or the desire of his ‘surrogate’ should be taken into consideration. Herein, it is the duty of the surrogate to proceed to make a choice irrespective of being influenced by someone or personal intent in the best interest of the patient. The doctors who are compelled to give effect to desire/choice of the dying patient, should take into consideration the state of the patient whether or not suffering from incurable disease or if there exists any scope of recovery.⁴⁴

Euthanasia at the Crux of Law and Morality

Justice Oliver Wendell Holmes Jr. rightly emphasised in his legal philosophy that law and morality should be placed separately, i.e., there must be a difference between the two. Nevertheless, he assents to the fact that this difference amid law and morality fades in certain settings like that of euthanasia where the law cannot disunite with morality. Also, Lon Luvois Fuller presses on the point that it is the ‘morality’ which renders the ‘law’ viable.⁴⁵ Thus, the author finds it relevant that euthanasia is discussed from the perspective of moral principles.

Every person desires to exit tranquilly from this world. No one ever wishes to experience unbearable sufferings at the time of death. A person who dies painlessly is perceived to have breathed his life by adhering to moral principles. But all are not fortunate to have a peaceful death. As aging comes with numerous diseases, suffering which one perishes. But, not only aging brings along diseases, a person at any phase of life can suffer from incurable diseases. Further, exponents of liberalism contend that right to life guaranteed under Article 21 of the Constitution must embrace the collateral right to make a choice the minute sufferer senses that his life has turned intolerable and futile. He/she ought to hold on to the right to end his/her life. In contrast, adversaries, emphasizes on the principle of ‘sanctity of life’ and contend that the same is infringed when a person intentionally proceed to terminate his/her life. They believe that life is precious and should be safeguarded however it does not imply that life be elongated as far as is feasible. Accordingly, the law being in force acknowledges that halting life-sustaining treatment is at times reasonable

42 *In re Jobes* (1987) 108 N.J. 394.

43 *Aruna Ramchandra Shanbaug v. Union of India* AIR 2011 SC 1290.

44 *Supra* n. 19.

45 Lon L. Fuller, THE MORALITY OF LAW, rev. ed. 1969, pp. 33-94.

is not exactly an exception of the principle of sanctity of life instead of a personification of it.

Andrew Mcgee distinguishes between active and passive euthanasia, i.e., amid ‘act’ and ‘abstentions’ as “*euthanasia interferes with nature’s dominion, whereas withdrawal of treatment restores to nature her dominion*”⁴⁶. Contrariwise, John Finnis believes, “...in both the cases, it is an intentional act whether by omission or by intervention, to put an end to somebody’s life and, therefore, morally wrong”⁴⁷. But, again, the principle of sanctity of life forbids active euthanasia and confirms with passive euthanasia.⁴⁸ This implies that it is erroneous to inject lethal substance and actively cause the death of the sufferer while it is right to not do anything to save his life. This may salve some consciences, but it is very doubtful whether it ought to, since it often condemns the subject to a painful, lingering death, fighting for breath or dying of thirst, while those who could do something stand aside, withholding a merciful death.⁴⁹

Encapsulating it, there exist contradictory views on euthanasia, on philosophical grounds, one does not possess the right to terminate his life but one’s act of termination is warranted by his desire to obtain painless death with dignity whilst on moral grounds, one who is the creation of god, does not have the right to terminate his life by himself or by any other person. Thus, to get clarity on euthanasia it is pertinent to scrutinize it in the milieu of dignity.

Right to Dignified Death and Euthanasia

Euthanasia is simply to be able to die with dignity at a moment when life is devoid of it.

- Marya Mannes

Dignity is characterized as a *fundamental value* and foundation of all human rights that protects the core of fundamental rights and functions as an interpretive tool to feel the gaps and resolve conflicts between conflicting fundamental rights and find moral justifications in hard cases.⁵⁰ While asserting on human dignity, R. Dworkin emphasised on one to understand the cause of his/her existence in this world and the meaning and value of life. He advocated that leading life with dignity, independence and morale includes ending of life appropriately. Therefore, human being should have faith and belief in their lives and should be left to end their life with dignity. As death is not start of nothing but the end of everything.⁵¹ The Preamble in International Covenant as Civil

46 Belinda Brooks-Gordon, et al. (eds.), DEATH RITES AND RIGHTS, 1st ed. 2007, p. 52.

47 *Supra* n. 19, para 264.

48 Death by asphyxia, famishment, halting life-sustaining treatment, etc. is lawful as per the principle of sanctity of life whereas injecting lethal substances, i.e., actively proceeding to terminate patient’s life is forbidden.

49 Simon Blackburn, BEING GOOD: A SHORT INTRODUCTION TO ETHICS, 1st ed. 2002, p.72.

50 Márcio Ricardo Staffen and Mher Arshakyan, “*About the Principle of Dignity: Philosophical Foundations and Legal Aspects*”, SEQÜÊNCIA (FLORIANÓPOLIS), Vol. 75, 2017, p. 58 <http://www.scielo.br/pdf/seq/n75/0101-9562-seq-75-00043.pdf>, (visited on May 23, 2018).

51 *Supra* n. 19, para. 301.

and Political Rights, 1966, (ICCPR) and International Covenant of Economic, Social and Cultural Rights, 1966, (ICESCR) proclaims recognition of the inherent dignity and of the equal and inalienable rights of all members of this human family is the foundation of freedom, justice and peace of the world.⁵²

Dignity engenders a sense of serenity and powerfulness.⁵³ Every individual holds the right to die with dignity. Justice A.K. Sikri opined that there exists an indistinguishable connection amid death with dignity and passive euthanasia.⁵⁴ To be given a window open to depart from this world unburdened by interference of medically advanced treatment that unnecessarily prolong life, implies a dignified death. At present, patients are not only claimants for right to healthcare but also the right to make a choice of which sort of treatment to undergo and to exercise independence in taking any medical decision. An agonizing death on a dying patient is reasonable but suffering from inoperable disease is an insult to the dignity of the patient. Certainly, dignity means possessing the right to life and right to be unrestricted of bodily intrusion. When it comes to medical treatment, the general common law principle is that any medical treatment constitutes a trespass to the person which must be justified, by reference either to the patient's consent or to the necessity of saving life in circumstances where the patient is unable to decide whether or not to consent.⁵⁵ Patient is entitled to certain rights while undergoing medication: *one*, the patient has the 'right to know' the reality by his doctor as a part of medical services to which he is entitled; and *second*, to be given or not to be given medical treatment as per the desire of the patient. The patient cannot be forced to undergo any experimental treatment which would only expand the scientific knowledge and not benefit the intended person. Therefore, applying the doctrine of dignity, patient in PVS bearing unbearable pain is allowed to depart tranquilly.

Contemplating Euthanasia in the Milieu of Economic Principles

Jeet Narayan with his wife, daughter and four sons resides in Mirzapur district of Uttar Pradesh. Jeet's sons were suffering from muscular dystrophy due to which they were bedbound, and paralysed completely from below the neckline since the age of five. Consequently, the parents unable to see the pathetic condition⁵⁶ of their children, wrote to the then Hon'ble President of India, Mrs. Pratibha Devi Singh Patil begging for euthanasia to be given to their sons. Jeet, a farmer, vended his complete property for satisfying the exorbitant medical expenses. He said that "*our financial resources have been exhausted completely. I even sold the parental land. Moreover, I owe nearly Rs. 2/- lakh to*

52 Durga Das Basu, COMMENTARY ON THE CONSTITUTION OF INDIA, Vol. 5, 9th ed. 2015, p. 4747.

53 *Supra* n. 19, para. 302.

54 *Supra* n. 19.

55 *Supra* n. 19, para. 309.

56 The sons were unable to perform any task for themselves be it eating, bathing, etc. They were totally dependent on their parents for basic task to accomplish, i.e., they became 'virtual vegetables'. Even the medical team was unable to pull the sons out of distress by curing. Death seemed the last resort.

*moneylenders*⁵⁷. In spite of taking all possible efforts, going from one hospital to another no positive outcome was in sight. Unfortunately, the parents' request for euthanasia was declined.

The author intends to highlight with this case that when euthanasia is inspected within the framework of social and economic principles it would in turn lead to passive euthanasia being allowed to the dying patient who is suffering from untreatable disease. As it is pertinent to realize: *first*, people who are steeped in poverty are those who do not possess sufficient money to fulfil their basic needs such as square meals, education, health care, etc. Then, whether it is right to compel such people to expend extensively on exorbitant medication which they cannot afford. Doing thus, to vend their house and other possessions which might be their only source of living. *Secondly*, should people be compelled to expend majority of their earnings in medication of the dying patient who has no probability of recovery with finite medical facilities?

Poignantly our government health sector spending is perilously inadequate and is over burdened by huge population putting strain on the limited government resources.⁵⁸ India's expenditure on healthcare is the lowest in the world. The Economic Survey of 2017-18 shows that the government spends only 1.4% of its gross domestic product on health.⁵⁹ According to information available with the Union health ministry, out of pocket (OOP) expenditure in India is over 60% which leads to nearly 6 million families getting into poverty due to catastrophic health expenditures.⁶⁰ Visualising the healthcare system of our country and the economic burden that rests on the family to fund the treatment of the living corpse on the cost of their livelihood, the author opines that permitting euthanasia is pivotal.

Judicial Nuances of Euthanasia

*When a man's circumstances contain a preponderance of things in accordance with nature, it is appropriate for him to remain alive: when he possesses or sees in prospect a majority of the contrary things, it is appropriate for the wise man to quite life.*⁶¹ -Marcus Tullius Cicero

Euthanasia is basically an intentional premature termination of another person's life either by direct intervention (active euthanasia) or by withholding

57 "Poor Parents Seek Mercy Killing for Ill Sons", NEWS18, August 11, 2009) <https://www.news18.com/news/india/poor-parents-seek-mercy-killing-for-ill-sons-322431.html>, (visited on May 23, 2018).

58 H.T. Thejaswi et al., "Present Status of Euthanasia in India from Medico-Legal Perspective an Update", JOURNAL OF PUNJAB ACADEMY OF FORENSIC MEDICINE AND TOXICOLOGY, Vol. 14, No. 1, 2014, p. 61.

59 *Supra* n. 19, para. 314.

60 O.P. Choudhury, "Poor in India Have Made "Living Wills" for Ages, Not by Choice but by Compulsion", MEDI BULLETIN, March 25, 2018, <https://medibulletin.com/2018/03/25/poor-in-india-have-made-living-wills-for-ages-not-by-choice-but-by-compulsion/>, (visited on May 23, 2018).

61 Kalman J. Kaplan and Matthew B. Schwartz, A PSYCHOLOGY OF HOPE: A BIBLICAL RESPONSE TO TRAGEDY AND SUICIDE, 1st ed. 2008, p. 27.

life-prolonging measures and resources (passive euthanasia) either at the express or implied request of that person (voluntary euthanasia) or in the absence of such approval/consent (non-voluntary euthanasia).⁶² It is noteworthy to mention that active and passive euthanasia have been dealt extensively by the court in *Aruna Ramchandra Shanbaug v. Union of India*⁶³. The court observed that active euthanasia encompasses initiating particular steps, for instance, injecting sodium pentothal to the dying patient with effect that in fraction of seconds patient goes to sleep and dies without incurring any pain in the sleep itself; thus “*it amounts to killing a person by a positive act in order to end suffering of a person in a state of terminal illness*”⁶⁴. Conversely, passive euthanasia involves holding back of medication such as removing heart lung machine from the dying patient who is in coma without which the patient may die.⁶⁵ In active euthanasia, something is done to end the patient’s life’ while in passive euthanasia, something is not done that would have preserved the patient’s life.⁶⁶

Further, the court differentiated between ‘voluntary euthanasia’ and ‘non-voluntary euthanasia’ that in former dying patient itself gives ‘consent’ while in latter dying patient is unable to give ‘consent’ due to some reason, for instance, he is in coma. Furthermore, while drawing dissimilarity between ‘euthanasia’ and ‘physician assisted dying’, the court observed that the difference reclines on the datum as to who gives lethal substance. Lethal substance in former is given by doctors or any third person whereas in latter, the dying patient intakes lethal substance on the guidance of the doctor. Moreover, the court opened the folds of passive euthanasia while deliberating on *first*, ‘voluntary passive euthanasia’ wherein the dying patient prefer death due to monetary reason, agony, etc. as he ‘is capable’ of deciding so; and *secondly*, in ‘non-voluntary passive euthanasia’, the dying patient ‘does not possess the capability’ or potentiality to decide for himself. The court also investigated into legal status of both active and passive euthanasia wherein it was discovered that the former stands to be ‘illegal’ until there is a proper legislation allowing it, while the latter even without any law being in existence is ‘legal’ on a condition that certain safety net and measures are retained. Nevertheless, the author believes that notwithstanding the precise meaning of active and passive euthanasia, the same thread bonds them in unison. As Bruce Vodiga rightly said that “*euthanasia is the taking of human life, regardless of its motivation, or of whether it is an act or omission*”⁶⁷.

Referring to judicial pronouncements that are persuasive in nature, the court in *Dennis C. Vacco, Attorney General of New York, Et Al. v. Timothy E. Quill*

62 *Supra* n. 19, para. 44.

63 *Supra* n. 43.

64 Law Commission of India, 241st Report on “*Passive Euthanasia- A Relook*”, August 2012, p.1.

65 *Supra* n. 43, para. 38; Law Commission of India, 196th Report on “*Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)*”, March 2006, has extensively dealt with ‘passive euthanasia’.

66 *Supra* n. 43, para. 44.

67 Bruce Vodiga, “*Euthanasia and the Right to Die- Moral, Ethical and Legal Perspectives*”, CHICAGO-KENT LAW REVIEW, Vol. 51(1), 1974, p. 3.

Et Al,⁶⁸ differentiated active and passive euthanasia on the premises of 'intention'. The court observed that when a sufferer opts passive course he/she perishes from latent disease while opting active course the sufferer swallows' lethal substance suggested by the doctor and perishes from medication. The House of Lords dealt with the distinction on the premises of 'action' and 'non-action' in *Airedale N.H.S. Trust v. Bland*,⁶⁹ wherein Lord Goff opined that passive euthanasia involves instances where the doctor chooses to discontinue the medication to his patient which is extremely required for the continuation of patient's life, on the contrary, in active euthanasia the doctor vigorously brings the life of patient to an end either by giving a lethal substance or other means. Lord Goff further opined that passive euthanasia can be perceived to be 'lawful' since the doctor fulfils his dying patient's wish by holding back the medication and letting him end his life and even in situations where the patient doesn't have the capacity to deliver his consent. Nevertheless, active euthanasia is 'not permissible' in spite of it providing instant painless death. Active euthanasia is legal in Canada, the Netherlands, Switzerland.⁷⁰ In the United States, active euthanasia is illegal but physician-assisted death is legal in the States of Oregon, Colorado, Vermont, California, Washington and Montana.⁷¹

A Journey towards Legalizing Passive Euthanasia in India

This part of the essay traces the journey of euthanasia and its contours of legalising in India. Hormasji Maneckji Seervai opined that "neither the constitution nor any law confers the right to life. That right arises from the existence of a living human body."⁷² Further, the author explores judicial pronouncements wherein euthanasia is explored by the courts.

P. Rathinam v. Union of India

Blitzing on the constitutional legitimacy of Section 309 of the Indian Penal Code 1860 and considering it to be violative of Articles 14 and 21 of the Constitution of India, two writ petitions were filed in the Supreme Court before the two-judge bench in *P. Rathinam v. Union of India*⁷³. Whilst emphasizing, "*a person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking*"⁷⁴ the court held that Section 309 is violative of Article 21 on the premise that the 'right to life' includes within its ambit the 'right to not to live a forced life'.⁷⁵ As every person holds the fundamental right to die, i.e., the right to commit suicide as recognised to be the negative facet of Article 21. Further, the court while referring to *State of Himachal Pradesh v. Umed Ram Sharma*⁷⁶ observed that "*the right to life embraces not only physical existence but the quality of life as understood in its richness and fullness by the ambit of the*

68 *Dennis C. Vacco, Attorney General of New York. v. Timothy E. Quill* 521 U.S. 793 (1997).

69 *Supra* n. 40.

70 *Supra* n. 30.

71 *Supra* n. 30.

72 H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, 4th ed. 1993.

73 *P. Rathinam v. Union of India* AIR 1994 SC 1844.

74 *Ibid.*, para. 33.

75 *Ibid.*, para. 35.

76 *State of Himachal Pradesh v. Umed Ram Sharma* AIR 1986 SC 847.

*Constitution*⁷⁷. Essentially, the court opined that the term ‘life’ in the text of Article 21 means “right to live with human dignity and the same does not merely connote continued drudgery”⁷⁸.

Gian Kaur v. State of Punjab

The Constitution Bench of the Apex Court in *Gian Kaur v. State of Punjab*⁷⁹ re-examined the viability of the verdict⁸⁰ rendered in *P. Rathinam v. Union of India*⁸¹. The appellants relying on the verdict in *P. Rathinam v. Union of India*⁸² submitted that Section 306 of the Indian Penal Code is in contravention to Article 21 of the Constitution. Subsequently, a legal question relating to the interpretation of Article 21 arises with respect to the provision penalizing abetment of suicide (Section 306) to investigate into its validity. It was solely dependent on the Constitution Bench to decide whether Section 306 is constitutional or not. It is submitted that the court did not engage itself in dealing with the subject of euthanasia predominantly.

Right to Die: Article 21 of the Constitution of India

The fundamental rights enshrined in the Constitution have both positive and negative sides. On this premises, the Division Bench in *P. Rathinam v. Union of India*⁸³ held that the right to live under Article 21 has in its trail the right not to live a forced life.⁸⁴ But, the Constitution Bench disagreed with the above finding of the Division Bench and held that “the right to do an act includes also the right not to do an act in that manner”⁸⁵ as if the latter is exercised, there is no positive act. Therefore, the court held that the right to life naturally flows from the text of Article 21 whereas suicide is a deliberate act towards putting an end to life and does not fit within the prism of Article 21. The court also opined that ‘the sanctity of life’ cannot be left unnoticed. Determining the ambit of Article 21 and revealing it as to whether it includes ‘right to die’, the court observed:

The “right to life” including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a

77 *Supra* n. 73, para. 28.

78 *Supra* n. 73, para. 27.

79 *Gian Kaur v. State of Punjab* (1996) 2 SCC 648.

80 The Division Bench held that Article 21 of the Constitution of India includes within its realm ‘right to die’. If a person decides to end own life due to some reason like being on deathbed suffering from incurable disease in persistent vegetative state with no scope of recovery but unbearable sufferings, then such a person has the right to die as per the verdict of this Court. Further, if another person assists the person who is willing to die then the act of the former is justified on the premises that he is only aiding the latter to assert his fundamental right. This decision of the Court directly hits Sections 306 and 309 of the Indian Penal Code by rendering these provisions unconstitutional.

81 *Supra* n. 73.

82 *Supra* n. 73.

83 *Supra* n. 73.

84 *Supra* n. 73, para. 35.

85 *Supra* n. 79, para. 21.

*dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out.*⁸⁶

At this moment, the court highlighted the right to live with human dignity, which leads to the right to die with dignity. This right should not be understood equivalent to possessing the right to meet death before it is destined, thus reducing the usual stretch of life. After this, the court observed:

*A question may arise, in the context of a dying man who is terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the "right to die" with dignity as a part of right to live with dignity... The debate even in such cases to permit physician-assisted termination of life is inconclusive.*⁸⁷

Further, the court made reference to the notable observations of the House of Lords in *Airedale N.H.S. Trust v. Bland*⁸⁸ wherein it is observed that it is legally incorrect on the part of the physician to give poison to the patient in order to end his/her life despite the fact that the act is justified by humane wish to terminate his unbearable sufferings. So to act is to cross the rubicon which runs between on the one hand the care of the living and on the other hand euthanasia-actively causing his death to avoid or to end his suffering.⁸⁹ Furthermore, the court pronounced that euthanasia can float in India only after a law is made to deal with it. At the end, the Constitution Bench overruled the pronouncement of *P. Rathinam v. Union of India*⁹⁰ and held that Sections 309 and 306 of the Indian Penal Code are consistent with the provisions of the Constitution of India.

Aruna Ramchandra Shanbaug v. Union of India

*"One dies longing for death but death, despite being around is elusive."*⁹¹

Aruna was a nurse in KEM Hospital, Mumbai. On November 27, 1973 after completing her work she went to the dog lab to change her clothing, Sohanlal, a sweeper of the same hospital followed her to the dog lab and caught her tying the dog chain all around her neck, sodomised her. He left her in a wretched condition; next morning she was found brain dead on the floor. Thereafter, she was taken care by the KEM hospital but life became meaningless as she slipped into persistent vegetative state (PVS), became a virtually dead person. There was no scope of recovery. Thus, Pinki Virani, avowing to be the next friend of Aruna approached the court by filing a writ petition on behalf of Aruna, the petitioner. Filing for mercy killing, Pinki begged the court to allow Aruna to peacefully die by ceasing her nourishment. Accepting the petition, the court appointed three proficient doctors to inspect the cerebral and bodily conditions of the petitioner and the need for euthanasia in the present case.

86 *Supra* n. 79, para. 24.

87 *Supra* n. 79, para. 25.

88 *Supra* n. 40.

89 Neil M. Gorsuch, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA, 1st ed. 2006, p. 50.

90 *Supra* n. 73.

91 S.S. Das, LAW ON EUTHANASIA, 1st ed. 2015, p. 271.

The court considered observations of Mr. T.R. Andhyarujina that every individual who is rational and of sound mind has right to do whatever he wants with his body without any confinement or intrusion of other individual. Basically, he holds the right to refuse medication, also known as 'principle of self-determination' or 'informed consent'^{92, 93}. The court further considered that it is the responsibility of the proficient doctors to decide on halting life-sustaining treatment which primarily delays the death process, in the interest of the sufferer.

The court extensively dealt with active and passive euthanasia. The court perceives the latter as halting of medication with a cautious intention to end sufferer's life. Lord Browne-Wilkinson emphasised that if nasogastric tube is removed which the patient requires to survive is not a 'positive action' initiated by the doctor to cause death. In fact, this act is not the reason for death nevertheless it does not sustain life. Further, the court observed that in *Airedale N.H.S. Trust v. Bland*,⁹⁴ where passive euthanasia was affirmed, i.e., where a patient is terminally ill with no chance of recovery in an irreversible stage of unbearable suffering there it is lawful and acceptable to withdraw life-sustaining treatment based on medical opinion, in order to relieve such a person from intense pain by allowing him to die. The aspect of 'sanctity of life' which emphasises preservation of life was not considered by the House of Lords to be out rightly correct.

When the patient is in PVS, the question arises as to who is at right to decide the 'best interest' of the patient. The onus of making decision as to whether or not to halt medication of the dying patient rests on the family, relatives or the doctors. This as per the court is quite perilous as there can be misuse of this authority of deciding on behalf of the dying patient, for instance, it may be advantageous for the relatives and their greed for the dying patient's property. Whilst applying 'doctrine of *parens patriae*' in *Airedale N.H.S. Trust v. Bland*⁹⁵ it was decided that the onus of the decision rests on the judiciary. Additionally, the concerns of the family, relatives and the doctors shall also be taken into consideration on arriving at a just decision. Therefore, the court affirming to the decision made in *Airedale N.H.S. Trust v. Bland*⁹⁶ and referring to *Charan Lal Sahu v. Union of India*⁹⁷ and *State of Kerala v. N.M. Thomas*⁹⁸ pronounced that on an application being filed requesting for euthanasia it is the High Court which holds the authority to grant permission for halting medication in case of patient being in PVS. The court also detailed on the procedure for the same that the considerations of the family, relatives, doctors would be given due

92 Informed consent obtained by the medical practitioner in accordance to the principles relating to consent laid down in *Samira Kohli v. Dr. Prabha Manchanda* AIR 2008 SC 1385.

93 *Supra* n. 43, para. 23.

94 *Supra* n. 40.

95 *Supra* n. 40.

96 *Supra* n. 40.

97 *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480.

98 *State of Kerala v. N.M. Thomas* AIR 1976 SC 490.

weightage by the High Court, the High Court would deal with the issue speedily and certain other procedural aspects.

Although, the Supreme Court dismissed the petition of euthanasia and did not allow euthanasia in the present case because of the noble spirit, outstanding and unprecedented dedication of hospital staff in taking care of Aruna, but it cleared the way for many suffering who want to die with dignity.⁹⁹ This pronouncement of the court of floating passive euthanasia in India also came to be affirmed by the Law Commission of India when it submitted its report on 'Passive Euthanasia'.¹⁰⁰

Subsequently, a three-judge bench of the Supreme Court whilst assenting by Justice Markandey Katju that the Constitution Bench in *Gian Kaur v. State of Punjab*¹⁰¹ observing that euthanasia could become lawful in India merely by enacting a law on the same, is at variance with the pronouncement in *Aruna Ramchandra Shanbaug v. Union of India*¹⁰² and therefore, it was decided to refer the matter to the Constitution Bench of the Supreme Court.

Common Cause (A Regd. Society) v. Union of India

The Constitution Bench on March 9, 2018 rendered legal sanction to passive euthanasia in India. After taking food for thought, the author now analysis passive euthanasia in the following lines:

Passive Euthanasia: Right to Die as a trait of Right to Life

Whilst responding to whether 'right to life' embraces within its fold 'right to deace', a fine equilibrium is to be drawn amongst one's right to privacy on choices concerning his body against the paternalistic approach of the state. This discourse has travelled a lengthy voyage from *P. Rathinam v. Union of India*¹⁰³ to *Aruna Ramchandra Shanbaug v. Union of India*¹⁰⁴ and recently in *Common Cause (A Regd. Society) v. Union of India*¹⁰⁵ the court held that under certain situations the right to life with dignity embraces the 'right to die'. When a person is on deathbed breathing last set of life suffering intolerable pain through inoperable disease in agony or is in PVS in an irreversible condition, then hastening the death process for shortening the phase of suffering implies the right to life with dignity. Divesting a person of his dignity at the last phase of his life is admitted to be repudiating purposeful human existence. Therefore, a 'finite right to die' is recognised within the fold of 'right to life' guaranteed under Article 21 of the Constitution, in the shape of passive euthanasia. Additionally, the court conceded that sometimes the state's concern has to give way to person's choice.

99 Seema Sharma, "Legal Challenges to Euthanasia in India: A Critical Study", INTERNATIONAL JOURNAL OF RESEARCH IN ECONOMICS AND SOCIAL SCIENCES, Vol. 7(2), 2017, p. 227.

100 *Supra* n. 64.

101 *Supra* n. 79.

102 *Supra* n. 43.

103 *Supra* n. 73.

104 *Supra* n. 43.

105 *Supra* n. 18.

Review of Prior Judicial Pronouncements

Further, the court clarified: *first*, the case of *Gian Kaur v. State of Punjab*¹⁰⁶ did not express any precise view on euthanasia and has not indicated that euthanasia could be introduced merely through legislation as was held by the House of Lords in *Airedale N.H.S. Trust v. Bland*¹⁰⁷; *secondly*, halting life-sustaining treatment on the desire of the dying patient by the doctor was considered to be lawful in *Airedale N.H.S. Trust v. Bland*¹⁰⁸ and was also affirmed in *Gian Kaur v. State of Punjab*¹⁰⁹, on this erroneous premise the court in *Aruna Ramchandra Shanbaug v. Union of India*¹¹⁰ rendered legal sanction to passive euthanasia in India; *thirdly*, the court in *Gian Kaur v. State of Punjab*¹¹¹ merely referred to *Airedale N.H.S. Trust v. Bland*¹¹² and did not convey any view on its *ratio decidendi* or approved the verdict of the House of Lords. Presently, the court observed that ‘passive euthanasia’ can be introduced in India in distinct ways and not merely through legislation.

Right to Advance Directives: Living Will

Concerning passive euthanasia, the court legalized the concept of ‘advance directives’ a mechanism which are of two sorts: *first*, wherein the patient in conscious state of rendering decision executes a ‘living will’ and decides for himself/herself in advance as to the medication to undergo in near time to come, when he/she would not be able to render decision due to breathing in unconscious state or floating in PVS and at that phase the living will would take effect; and *secondly*, through ‘trustworthy medical power of attorney’ wherein the patient would propose a person who would render decision relating to medication on his behalf when the patient would slip into PVS becoming incapable of deciding for himself. Further, the court laid procedure to meet situations were there existing no prior directives by the dying patient, how the family can approach the court for seeking permission for halting life-sustaining treatment of the dying patient. The court held that “*a failure to legally recognize advance medical directives may amount to non-facilitation of the right to smoothen the dying process and the right to live with dignity*”,¹¹³. The court issued inclusive guidelines on advance directives including who should execute, contents to include, revocation and implementation procedure, and other related requirements which would remain in force till a law is made on the same.¹¹⁴ Herein, the ‘living will’¹¹⁵ is beneficial as “*it gives moral and social reassurance to the family members that the decision to withdraw*

106 *Supra* n. 79.

107 *Supra* n. 40.

108 *Supra* n. 40.

109 *Supra* n. 79.

110 *Supra* n. 43.

111 *Supra* n. 79.

112 *Supra* n. 40.

113 *Supra* n. 19, para. 195.

114 Earlier this court in *Vishaka v. State of Rajasthan* AIR 1997 SC 3011 issued guidelines on sexual harassment at work place till the law was made on the same.

115 ‘Living will’ has previously been acknowledged by the Mental Healthcare Act 2017.

treatment was in accordance with the patient's free will"¹¹⁶. Conversely, it is submitted that we live in a society peppered with illiterateness and ignorance, it is only well-educated members who can execute such living will, if not the rich. Further, authorizing advance directives relating to halting life-sustaining treatment has its effects on the draft of Medical Treatment of Terminally Ill Patient (Protection of Patients and Medical Practitioners) Bill 2016, pendant to come into force. The concept of advance directives is 'void' in conformity to Clause 11 of the aforementioned bill, to which Justice A.K. Sikri responded that such ban is 'disproportionate one'¹¹⁷. Justice D.Y. Chandrachud besides opined, "*advance directives needs periodic review and revision to ensure it is not utilized as a "subterfuge" for facilitating a succession to property*"¹¹⁸.

Right to Decline Medical Treatment

An individual's right to execute advance medical directives is an assertion of the right to bodily integrity and self-determination and does not depend on any recognition or legislation by a state.¹¹⁹ The court recognised the right to decline medical intrusion as one of the fundamental rights. A competent person who has come of age has the right to refuse specific treatment or all treatment or opt for an alternative treatment, even if such decision entails a risk of death.¹²⁰ But, if the patient is delivers consent under undue influence then such consent would not be considered.

When the patient's life is in danger and the patient is required to be medicated but it becomes impossible to obtain assent to medication from the patient, then the doctor in order to save the patient's life can proceed with medication even in the absence of assent. As this is warranted by the 'emergency principle' as recognised by the court. Lord Goff precisely opined in *F v. West Berkshire Health Authority*¹²¹ that for the abovementioned principle to take effect the prerequisites are: *first*, there should be 'necessity' to proceed with medication, when taking assent is impossible from the patient; and *secondly*, act of the doctor should be initiated in the interest of the patient and in consonance with the act of the prudent person if they had been in doctor's place. Lord Goff further clarified on the applicability of the emergency principle that it would not be applied in contra to the desire of the patient. It follows that the principle of necessity cannot be relied upon to justify a particular form of medical treatment where the patient has given an advance care directive specifying that he/she does not wish to be so treated and where there is no reasonable basis for doubting the validity and applicability of that directive.¹²²

116 *Supra* n. 30.

117 *Supra* n. 19, para. 327.

118 Sanjeev Sirohi, "*Passive Euthanasia Allowed in India Also*", PRESSREADER, May 20, 2018 <https://www.pressreader.com/india/alive/20180520/282673277991915>, (visited on May 20, 2018).

119 <http://scobserver.clpr.org.in/court-case/euthanasia-living-wills-and-the-right-to-die-with-dignity>, (visited on May 22, 2018).

120 *Supra* n. 73.

121 *F v. West Berkshire Health Authority* [1989] 2 All ER 545.

122 *Supra* n. 19, para. 136.

Conclusion: A Critical Appraisal of Legalizing Passive Euthanasia in India

*When all usefulness is over, when one is assured of unavoidable and imminent death, it is the simplest of human rights to choose a quick and easy death in place of a slow and horrible one.*¹²³

At this moment, passive euthanasia is legal in India by reason of the judicial precedent laid down by the court in *Common Cause (A Regd. Society) v. Union of India*¹²⁴. It is important to investigate as to whether the verdict of the court is of importance and what are its consequences on dying patients, suffering from incurable disease or floating in PVS?

It has been sufficiently established through historical texts that our society has upheld the values of freedom and liberty of one's own body, including life. The recent judgment recognises this freedom given by our ancient Indian literature to die with dignity by clearly pronouncing passive euthanasia to be legitimate and acceptable in our country. The author's opinion of exercising this right judiciously is cemented by Sadhguru Jaggi Vasudev's words, "*it is up to us, however, to ensure this freedom is not violated, and to exercise this right with rigour and responsibility*"¹²⁵.

Further, the authorization to the right to decline medication and halting life-sustaining treatment permits the medical practitioners to do so, minus dreading litigation, provided they adhere to the guiding principles issued by the court. While rendering legal sanction to 'living will' executed by the patient, the court also detailed on the procedure for the same which is to be adhered for effective implementation of the 'will'. The living will should be attested by two witnesses and thereafter by the Judicial Magistrate. Herein there arise problems, *first*, it is difficult on the part of the patient to finally make a decision of his death, so mostly it is his family who decides for him. Further, the pressure of society or monetary burden on the family do influence them to arrive at the decision. *Secondly*, arranging two witnesses to sign on the living will is a troublesome task for the patient and his family. *Thirdly*, even if the patient succeeds in getting attention of the witnesses thereafter getting it attested by the Judicial Magistrate is another procedural difficulty. Thus, indeed the court has taken efforts to provide revive to the sufferer by allowing him to depart from this world on his/her choice, recognizing the sufferer's autonomy, right of self-determination, right to decline medication and the right to privacy but this procedure doesn't appear to be practical or rather effective one. The author feels that this procedure would not benefit the uneducated/uninformed/downtrodden section of Indian society. Therefore, extra efforts are to be taken by the court to make this concept of living will effective one by either bringing awareness in the society or adopting some other course of action.

123 Cynthia J. Davis, CHARLOTTE PERKINS GILMAN: A BIOGRAPHY, 1st ed. 2010, p. 397.
124 *Supra* n. 19.

125 Sadhguru Jaggi Vasudev, "*The Right to Choose to Say Goodbye*", THE TIMES OF INDIA, June 15, 2018, <https://blogs.timesofindia.indiatimes.com/toi-edit-page/the-right-to-choose-to-say-goodbye/>, (visited on June 15, 2018).

According to the court, passive euthanasia is applicable to terminally ill patients, i.e., patients suffering from incurable diseases. Herein, the author indicates that the scope of applicability of passive euthanasia is finite. The phrase 'intensity of the suffering' is to be understood deeply as the intensity of pain that a dying patient to undergo while suffering from incurable disease is quite equivalent to, for instance, a soldier at the border, who as a result of blast incurred deep injuries. The soldier stained in blood suffering pain with no scope of recovery should also be given the right to euthanasia. As he also deserves the right to die with dignity by reducing his days of suffering and depart from this world peacefully. In fact, the soldier themselves request to put them out of intolerable suffering rather than leaving them to die at a very slow rate sensing deep agony.

When a patient is undergoing suffering due to his disease, there being no scope of recovery and the medical team lost hope on the patient, furthermore the patient desires to end his suffering by choosing the path of death then such a patient should be permitted to depart. Indeed, the court has acknowledged this but by legalising passive euthanasia instead of active euthanasia.

Keeping in mind the human history, socio-economic and legal development in the recent past, the author confines to the limited outfit of medico-legal sphere, wherein humans are made to survive on artificial support for a long time. However, state understands an individual's pain differently when the family of sufferer do not support or have anything to support financially the desired medical treatment to the patient. In such a situation, the state is supposed to come forward as *patria potestas* (guardian) and take care of the sufferer. If this is possible, then there is no need to think about active or passive euthanasia, but if this is not possible then the law of the land needs to see how the patient and his would be survivor(s) look in to the matter. As the joint families are diminishing fast in the Indian society, there is hardly anyone who could take care of the patient when he is struggling with life and death and surviving on the lifesaving drugs which are very costly.

After reviewing the statutory materials and judicial pronouncements, specifically judgment of the Supreme Court in *Aruna Ramchandra Shanbaug v. Union of India*, the sociologists, philosophers, anthropologists, economists, thinkers, jurists, academia may not accept the findings of the court immediately but when we look at the reality and practicality of the sufferings of the patient, financial conditions of the family members and non-playing actor-state, we are left with no other option but to accept the findings of the court on passive euthanasia. Though there are many ethical, moral and professional issues involved in the matter, yet well-being, sufferings, and last wishes of the patient are to be honoured. We are living in a world where death is mortal but no human being or agency has a control over death unless the law of the land permits otherwise. Hence, state should make a law to protect, prevent, and cure terminally illness but to control misuse of the law or its benefits.

MAKING OF A MODEL PROCEDURE OF INSTITUTIONAL ARBITRATION FOR DOMESTIC COMMERCIAL DISPUTES IN INDIA

Aaliyah Siddiqui*

Abstract

India has been improving the arbitration environment in the country through legislative measures, with the help of several constructive suggestions through Law Commission Reports. In spite of these efforts, it has made little progress. Several countries in Asia have been successful in creating a vibrant and convivial system for arbitration. This has not only resulted in providing an efficient dispute redressal mechanism in these economies, but also resulted in improving their overall business environment. Indian institutional arbitration needs concerted efforts from government, judiciary and arbitration institutions. As a first step in this direction, this study felt the need to establish an efficient system for resolving domestic commercial disputes through institutional arbitration. The Proposed Model Procedure for institutional arbitration is aimed at providing a harmonized system of arbitration in the country. A uniform and time bound arbitration procedure to be adopted by all the arbitration institutions in the country will clear the current apprehensive and ambiguous situation with respect to Institutional arbitration in the country. The pragmatic procedure has been proposed based on the UNCITRAL Model as well as by incorporating some of the best practices and rules of the prominent arbitration institutions across the world.

Key Words: Domestic Commercial Dispute, Institutional Arbitration, Arbitration Procedure, Model Procedure.

Introduction

‘Arbitration’ as a word has become the part of common dialect. With an increased attention on improving the current business environment along with the need expressed by the corporates, the government has amended the Arbitration Law of the country twice between 2015 and 2018. In countries like India and other developing countries, where there are problems of delay and pendency of cases in large numbers¹, arbitration as a dispute resolution mechanism has the potential to serve a larger purpose. It could prove to be of great service to the parties in dispute, especially in commercial matters.

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1 V.V.L.N. Sastry, “Are We Nearing Collapse in the Dispensation of Justice in India?”, February 7, 2018, <http://www.livelaw.in/nearing-collapse-dispensation-justice-india> (visited on February 18, 2018).

Arbitration has huge advantages which hitherto, remained unknown to the large masses.² Arbitration as a system is considered to be exclusive in nature and is confined to disputes which have high monetary value. The primary reason for arbitration being confined to the classes is perhaps the low levels of awareness amongst the masses. The reasons could be many. For instance, a common man still considers courts as the only alternative available for resolving disputes. The masses may have felt the pain of delayed justice, yet they have not relinquished the path of seeking justice through courts. Talking about the resolution of disputes beyond the courts in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*,³ where the concept of arbitrability was examined by the court, it was ruled that any matter which can be decided by a civil court can also be solved through arbitration. This decision has not seen any significant change on the ground and litigants continue to throng the corridors of the courts with matters of all dimensions and every character. Arbitration as a tool to seek justice has not yet been able to gain attractiveness, despite favour from the highest court.

The insertion of Section 89 of the Code of Civil Procedure enables courts to direct cases to the ADR process for an out of court settlement. Of course, certain exceptions were made to arbitration such as disputes arising out of criminal offences, certain matrimonial disputes, matters related to guardianship, matters of winding-up and firm's insolvency, testamentary matters and matters governed by special statutes such as those of tenancy and eviction. The matter related to serious allegations of malpractices and frauds shall also remain out of the purview of private forums. Considering this, one needs to probe the reasons behind arbitration not becoming popular despite it being an alternative to courts.

The article is presented in three different sections. The first section deals with the present situation of arbitration in India and explains the position of arbitration in context of institutional arbitration. The second section explores the possible means through which a widespread usage of arbitration can be achieved in India. This section also establishes the need to develop a procedure for institutional arbitration in India. The third and last section presents a Model Procedure for Institutional Arbitration for resolving domestic commercial disputes.

Current Scenario of Institutional Arbitration in India

Arbitration can be classified into two distinct types, ad hoc arbitration and institutional arbitration. Ad hoc arbitration is more commonly practised in India,⁴ for a variety of reasons. Firstly, the parties to the dispute believe that they have much better control over their matter and ad hoc arbitration offers

2 B. Debroy and S. Jain, "Strengthening Arbitration and its Enforcement in India- Resolve in India" NITI AAYOG http://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf, (visited on December 13, 2017).

3 (2011) 5 SCC 532.

4 Price Waterhouse Coopers, "Corporate Attitudes & Practices Towards Arbitration in India", 2013, p. 12, <https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf>, (visited on January 25, 2018).

greater confidentiality than institutional arbitration. Moreover, institutional arbitration in India has not been able to gain acceptability of the desired magnitude. This could be gauged from the fact that even LCIA (London Court for International Arbitration), which opened its India Centre in 2009, had to close down its operations in 2017. The reasons cited for its closure was the lack of caseloads.⁵

While LCIA is a leading institution globally, it could still not obtain a substantial amount of cases in India. Ironically, Indian parties are amongst the largest contributors to cases at the London seat of LCIA. The facts present a unique paradox where institutions in India fail to attract cases yet Indian parties often go to arbitration institutions on foreign shores.⁶ A lot is being done for amending the Indian Arbitration Act and the latest in the series of amendments⁷ aims to build an arbitration institution of global repute. Similarly, the Parliament has proposed to amend the current Act, in order to bring several changes that will provide greater ease and acceptability to Alternative Dispute Resolution as a whole and arbitration in particular. With this aim, the time is ripe to build a simplified yet effective arbitration procedure which can be adopted by all the existing and future arbitration institutions in India. The adoption of uniform procedures in arbitration institutions across the country can bring in better understanding of the arbitration system. Coupled with this, an effort on behalf of government and arbitration institutions could drive a large quantity of disputes into arbitration institutions.

Arbitration under the Code of Civil Procedure 1908

The Code of Civil Procedure (Amendment) Act 1999, which came into effect from July 1, 2002 inserted a provision for alternative dispute resolution. Section 89 was incorporated in the Code with the aim to resolve commercial disputes through the ADR process. This was made in pursuance of the recommendations made in the “129th Law Commission Report” as well as the “Malimath Committee’s Recommendations” to make provision for courts to refer disputes for resolution through alternate means. The object of Section 89 was to promote extra judicial methods of dispute resolution. There was a clear distinction in case of arbitration in comparison to the other modes. For instance, the decisions made by an arbitral tribunal were final and binding on the parties while in the other modes of ADR, the final decisions were substantially dependent on the parties to the dispute as to accept or reject such decision. This meant that there was an increased focus to give greater strength to arbitration as it provides better closure and finality to the outcomes of ADR as compared to the other modes. Inserting Section 89 and the corresponding rules by Act

5 Bill Rowley, LCIA Board Chairman, <https://www.legallyindia.com/the-bench-and-the-bar/london-court-of-international-arbitration-lcia-shuts-down-in-india-after-tiny-uptake-20160407-7417>, (visited on May 2, 2018).

6 SIAC Annual Report 2016, “*India as a Single Largest Country Contributing to the Case Loads at Singapore International Arbitration Centre*”, http://siac.org.sg/images/stories/articles/annual_report/SIAC_AR_2016_24pp_WEBversion_edited.pdf, (visited on November 6, 2017)

7 NDIAC Bill (2018), <http://www.prsindia.org/billtrack/the-new-delhi-international-arbitration-centre-bill-2018-5036/>, (visited on April 15, 2018).

number 46 of 1999 was a major step towards promoting the alternative modes of dispute resolution in the country.

In *BOC India Ltd v. Instant Sales Pvt Ltd*, it was ruled that arbitration can be performed with the consent of the parties in dispute and in absence of such consent between the parties, the courts cannot exercise the power of referring disputes for arbitration.⁸ It may be noted that constitutional validity of Section 89 of CPC was challenged in *Salem Bar Association v. Union of India*⁹. This landmark case was decided in two sets of orders by the court. In the first order in the case, the Supreme Court ordered formation of a committee to inter-alia, devise rules and regulations to be followed in case of ADR referred under Section 89 of CPC. These rules and regulations were considered in the second order by the Supreme Court¹⁰. The rules were thereafter adopted by various High Courts (West Bengal and Bombay High Court in 2007, Patna High Court in 2008, Allahabad High Court in 2009) while exercising the power under Section 89 of CPC. While this decision made a significant contribution in deciding upon the rules and regulations for the ADR process, even greater gain was that the constitutional validity of Section 89 was upheld via these decisions of the Supreme Court.

Surprisingly, the Supreme Court did not notice the 'error' at that point of time. The error in drafting was noted by the court in the *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Company Pvt. Ltd.*¹¹ (known as *Afcons case*). In this case the Supreme Court brought several changes by interpreting, and in certain cases, even altering the definitions to make ADR processes under Section 89 of CPC to be more effective and practicable. It was stated by the court that arbitration is an ADR process which can be initiated on the basis of a prior agreement between the parties or by filing a joint memo in absence of any such agreement. This case is an example of the intentions and inclination of the courts towards easing the roads to arbitration for parties to a dispute.

The settlement arrived by the Presiding Officers of the arbitration process shall have the same effect as that of the decree of the court.¹² Thus the process of arbitration received a firm ground after this position of the Supreme Court and the incongruities that existed in Section 89 were also overcome, clearing the deck for the courts to refer commercial disputes to arbitration amongst other means of ADR. It may be noted here that the courts are not under obligation to refer the dispute to arbitration, but it is left open to the parties to opt for any of the ADR process including arbitration and conciliation etc.

Popularising Arbitration in Domestic Commercial Disputes in India

Arbitration provides great amount of benefits to the parties in dispute, yet it remains an ignored mode of dispute resolution. Perhaps an effort on the part of

8 AIR 2007 Cal 275.

9 AIR 2003 SC 189.

10 AIR 2005 SC 3353.

11 (2010) 8 SCC 24.

12 Section 36 of the Arbitration and Conciliation Act 1996.

Government and its agencies to popularise this ADR mechanism could go a long way in building awareness amongst the masses. This awareness could mean establishment of institutions at district level on the lines of District Legal Service Authority to dispense information as well as proactively support the parties in commercial disputes.

One very essential element in order to get the desired level of awareness amongst masses is simplification of arbitration process and procedures. This simplification means providing a simplified set of rules and procedures which could be in a language and articulated in such a manner that the masses could easily follow. This article is an attempt to articulate such a procedure, which could be communicated in a simplified manner for easy acceptability of arbitration amongst the masses.

Making Arbitration Compulsory in Commercial Contracts Involving the Government

In the recent development¹³ the government of Maharashtra announced that any government contract above rupees five crore must compulsorily have an arbitration clause. Any such dispute which involves government owned enterprises or any agencies of the government must aim to resolve their commercial disputes, if any, through the process of arbitration. It further gave recognition, through a government resolution to Mumbai Centre for International Arbitration as the 'Institution for Arbitration'. This move on the part of government of Maharashtra is a major step forward in the direction of building an effective Institutional Arbitration Mechanism in the country. The specific resolution with a greater amount of clarity for practicing arbitration is what is needed on part of all the state governments as well as for central government owned Public Sector companies.

This study wants to emphasise that all government contracts must have an arbitration clause and further any dispute arising in such commercial contracts must compulsorily be subjected to arbitration before such matters are referred to the judiciary for adjudication. The 126th Law Commission Report¹⁴ has specifically recommended that the central government must issue directions to the Public Sector Companies that in the matter concerning the PSUs and the government, there shall be binding clause for referring the disputes to arbitration. Going forward, such directions can also be issued by the State government with regards to arbitration. Although exceptions can be made wherever there are private parties involved in the dispute.

13 K. Narayan, "Maharashtra Government Makes Institutional Arbitration Compulsory for Contract Above R.5 Crores", THE INDIAN EXPRESS, <http://indianexpress.com/article/business/economy/maharashtra-government-makes-institutional-arbitration-mandatory-for-contracts-above-rs-5-crore-4604321/>, (visited on November 29, 2017).

14 Law Commission, 126th Report on "Government and Public Sector Undertakings Litigation Policies and Strategies", 1988.

Need of Procedure for Arbitration

It is a common practice that when there is a commercial dispute between parties and they submit the dispute for arbitration, they are required to determine a procedure for the arbitration. This ironically is an impediment in the process of arbitration. When the parties are in dispute, expecting them to arrive at a procedure through consensus is in itself wishful thinking. Although the arrangement of providing parties in dispute the freedom to determine their own procedure has its own benefits, yet, realistically, it proves to be an impediment. So, a simplified procedure which can be used to augment the arbitration process needs to be built and administered by the Arbitration Institution.

Recently, a High Level Committee (HLC hereinafter) was appointed by the Government of India under the Chairmanship of Justice B. N. Srikrishna (retd.) which submitted the report in the month of January 2017. This report includes *inter-alia* the Model Arbitration Rules. These rules can be a source of setting a direction for creating a commonly accepted procedure for arbitration. This article uses the stated Model Rules in HLC¹⁵ and the UNCITRAL Model Rules¹⁶, to create a procedure which can be used as a normative model for institutional arbitration in the country. This procedure will help transform the present complex arbitration procedure into a simplified process which gains the desired level of understanding of hitherto unreached parties.

Making of a Model Procedure for Domestic Institutional Arbitrations

As stated in the previous paragraph, a robust and well-structured arbitration procedure for institutions is essential. It is also vital that such a procedure must be based on internationally accepted norms as well as those in practice in the leading arbitration institutions of the world. In this context, it is also imperative to build such a procedure based on the UNCITRAL model which is the most acceptable model in practice across the jurisdictions. Hence, some of the institutional models as well as the UNCITRAL model along with the rules proposed in HLC shall be used for creating a model procedure for institutional arbitration.

The proposed model procedure for institutional arbitration to be adopted by arbitral institution has been specified hereunder. The model procedure is made in order to provide preliminary set of procedures as is followed in the process of arbitration. The model procedure is proposed for Domestic Commercial Arbitration in India. The domestic commercial disputes in India can be resolved with a relative ease if this model procedure is adopted. The proposed procedure can potentially be adopted by all institutions dealing with domestic commercial

15 High Level Committee, "*Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*", <http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf>, (visited on April 25, 2018).

16 UNCITRAL Model Rules as amended in 2010, <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf>, (visited on April 27, 2018).

disputes in India. If this happens, such an adoption could result in establishing a unified arbitral procedure for domestic commercial disputes in India.

Needless to say that such a procedure would bring in better understanding of arbitration procedures amongst a large number of parties in dispute, who so far have remained disinclined towards arbitration. Similarly, such a unified procedure will also ensure that the procedural differences amongst various arbitration institutions across the country can be harmonised. This could lead to an assurance to the parties to the arbitration that the rules and the time required for the process shall bring them higher benefits as compared to the litigations in the courts. The arbitrators can also ensure uniformity in judgement while arbitrating in cases of similar nature. Lastly, it will not be erroneous to assume that such a uniform procedure can lead to creating a large pool of arbitrators which in turn will ensure the right mass of arbitrators in the country.

The above justifications make it amply clear that a uniform and a well-defined procedure will give the much needed thrust to the hitherto noticed ignorance and indifference towards arbitration. It is also a fact that the arbitration procedure written in a codified manner and a textual format in the books of law does not get immediate acceptance amongst many sections of commercial establishments. A simplified and self-explanatory graphical illustration of the arbitration procedure can be of great help. The time limit for completion of the Arbitration process shall be 12 months from the date of filing of application, unless the parties expressly agree for a fast track Arbitration for which the duration shall be 3 months.

Proposed Procedure for Institutional Arbitration for Domestic Commercial Disputes

While it remains a fact that judiciary and government plays a vital role in promoting institutional arbitration in India,¹⁷ an effective institutional arbitration mechanism drives the whole system of arbitration. A well-defined and transparent set of procedures in turn drives the Arbitration Institutions. The procedures for domestic commercial disputes must not just follow Indian Arbitration laws but must also provide the necessary understanding of the foundation of the law in a simplified manner. Such procedure should be uniform across the nation and all arbitration institutions must adopt such a procedure. Such a procedure can potentially bring benefits to all stakeholders including Parties to the dispute, Arbitrators, Arbitration Institutions and even the Judiciary, by developing transparent, stable and uniform rules for all. An attempt is being made to define such a procedure in this part of the study.

The Arbitration Institution (*hereafter referred as AI*) shall use this model procedure for conduct of the arbitration. To the extent possible, the AI must make the Procedure available to the public at large. Similarly, extensive use of

17 President Pranab Mukherjee's address at the Global Conference on "National Initiative towards Strengthening Arbitration and Enforcement in India", October 21, 2016, <http://www.livelaw.in/need-basic-institutional-reforms-strengthen-our-arbitration-framework-president-pranab-mukherjee/>, (visited on May 2, 2018).

the Graphical Representation (as in figure 1, must be done by the AI to propagate the procedure.

Stage One: Pre Proceeding Stage

- *Arbitration Agreement / Arbitration Clause:* There is no particular prescribed form of an arbitration agreement. The Arbitration and Conciliation Act states that it can be in the form of an arbitration clause in a contract or it may in the form of a separate agreement and the narrations of the arbitration agreement stating that the parties want to resolve their disputes by way of arbitration shall be sufficient.¹⁸
- *Writing of Arbitration Clause :* The arbitration clause or the arbitration agreement for the settlement of disputes by arbitration established between the parties shall be mandatorily in Writing.¹⁹ This shall remain the only rational necessity for an arbitration agreement.
- *Number of Arbitrators:* An Arbitral tribunal shall mean a sole or any such odd number of arbitrators as may be deemed necessary to be appointed by the AI. But when the disputes shall be under Rupees one crore t hen, only one arbitrator shall be appointed and shall be termed as an Arbitral Tribunal.
- *Appointment of Arbitrator:* The AI shall establish and maintain a ‘Panel of Arbitrators’²⁰ and the Arbitral Tribunal for any dispute shall be nominated from the Panel of Arbitrators only.
- *Disclosure:* A statement of declaration shall be signed and submitted by the nominated arbitrator to AI which shall be forwarding the same to the parties in dispute. The statement of declaration shall be made by the Arbitrator shall *inter-alia* include any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. The statement of declaration shall be submitted by the arbitrator at the time of accepting the appointment as an arbitrator for the dispute.²¹
- *Language of the Arbitration Proceedings:* The language of arbitration proceedings shall remain English for the AI.
- *Hearing by the Arbitral Tribunal:* The Arbitral tribunal shall only accept the written submissions from the parties for the purpose of hearing. Under exceptional circumstances, and if deemed necessary by the tribunal, oral hearing of the parties shall be considered. If the need for

18 S. Ravi Shankar, “*Arbitration Agreement (Domestic & International Arbitrations)*”, <http://www.lawsenate.com/publications/articles/arbitration-agreement-domestic-international.pdf>, (visited on May 8, 2018).

19 Section 7 of the Arbitration and Conciliation Act 1996.

20 Article 26 of the China International Economic and Trade Arbitration Commission (CIETAC) Rules.

21 Article 31 of the China International Economic and Trade Arbitration Commission (CIETAC) Rules.

oral hearing is necessitated, then the tribunal shall record the reasons in writing for holding the oral hearing.

- *Filing of Application for Arbitration by Claimant:* The claimant shall be moving the application to the AI, which shall enclose all essential documents as may be required and considered as relevant data and information in the case of arbitration. The declaration of claims in the form of statement of claims shall also be enclosed with the application for arbitration. The application shall also include the facts and grounds on which the claim is based. The application must mention the name and contact details of all parties including mailing address, telephone and fax numbers and e-mail, if any. A copy of the signed contract and its effective date shall also be enclosed. Elementary information demonstrating that there is a legal dispute arising directly out of the contract must also be mentioned within the application.²²
- *Examination of the Application and Submission of the Requisite Fee:* Once the application is received by AI, the claimant shall be required to pay a registration fee in advance to AI in accordance with its Schedule of the Fee. After this the examination of the application shall be done by the AI to check whether the application is valid and complete and in conformance with the guidelines of AI. If the application is incomplete or there is a need for some additional information, then the claimant shall be requested to provide the same.
- *Approval and Admission of the Case:* Upon satisfactory compliance of the application process and preliminary appraisal of the application, if the AI finds the case appropriate for submission, the AI shall approve and admit the case for arbitration. In case of any discrepancies are noticed at this stage a further clarification in writing can be sought from the claimant.
- *Appointment of Arbitrator / Formation of Arbitral Tribunal:* Once the case is approved and admitted by AI, it shall form the Arbitral Tribunal by nominating Arbitrator/s from its panel of Arbitrators.
- *Notice of Arbitration to the Respondent:* The Arbitral Tribunal shall prepare a Notice of Arbitration with the help of the details as submitted by the claimant, and the notice of Arbitration shall be served to the respondent/s to seek the reply. The notice shall be in writing and shall be delivered by expedited postal or courier service, e-mail or other means of communication that provide a record thereof.²³ The respondent shall be given 30 days' time to file the response to such a notice.

22 "Rules for Filing the Request for Arbitration of International Centre for Settlement of Industrial Disputes", <https://icsid.worldbank.org/en/Pages/process/How-to-File-a-Request-for-Arbitration-Convention.aspx>, (visited on April 20, 2018).

23 Article 4(a) of the WIPO Arbitration Rules 2014, <http://www.wipo.int/amc/en/arbitration/rules/>, (visited on May 5, 2018).

- *Response to the Notice of Arbitration by Respondent:* Once the notice is delivered, the notice shall be considered to be received by the respondent. Thus, the respondent needs to submit a reply to the notice of Arbitration within 30 days²⁴ from the date of receipt of the application. The case of Arbitration shall proceed further even if the respondent does not file the reply. If the respondent files the reply then it should be in the form of Statement of Defence and Statement of Counterclaim, if any.
- *Statement of Defence:* The reply by the respondent, within the specified time shall be deemed as the acceptance of the arbitration proceedings and can be termed as the 'Statement of Defence'. The Statement of Defence shall reach to the Arbitral Tribunal within 15 days from the day of delivery of the application of Arbitration by the Arbitral Tribunal and shall comprise of the replies to the claimant's claim or the request of setting-off defence. If the respondent/s does not reply, the proceedings shall be continued and an ex-parte decision shall be made. The statement of defence shall be signed by the party and shall contain the name and domicile of the respondent, a brief statement of its defence, the evidence, if any, in support of the statement of defence and all documents that the party deems useful and appropriate to produce.²⁵
- *Statement of Counterclaim:* The respondent can also file a counterclaim, if any, to the Arbitral Tribunal along with the statement of defence. The application for the counterclaim should have all the necessary information enclosed with the same specifying the claims in details and mentioning the grounds and basis on which the counterclaim is made apart from performing all other formalities such as advance payment of fees. A statement of counterclaim shall also mention their value and the evidence, in support of the statement of counterclaim, if any.²⁶
- *Formulation of Terms of Mandate by Arbitrator / Arbitral Tribunal:* The Arbitral Tribunal shall formulate the terms of mandate for the arbitration. The mandate is to be provided to the parties to the arbitration for their acceptance. The arbitration proceeding shall begin only after obtaining the consent of the parties.

Stage Two: Proceeding Stage / Conducting Arbitration

- *Preliminary Hearing:* A preliminary hearing shall be conducted by the Arbitral Tribunal as early as possible and within 20 days of his/her appointment. The preliminary hearing shall aim to identify the matters in dispute as the primary objective. Other important matters related to costs, fees, deposits and other such matter as may be helpful in expediting the arbitration process in an efficient manner shall also be included in the

24 UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf, (visited on May 02, 2018).

25 Article 10 of the Chamber of Arbitration of Milan Rules 2010.

26 *Ibid.*

preliminary hearing. The agreements or order made at the preliminary meetings shall be then communicated to the parties within a period of 5 days by the Arbitral Tribunal.²⁷

- *Question of Jurisdiction:* Any objection that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in while making the statement of claim or in a joinder; or at any appropriate stage of the proceedings, as is determined by the Arbitral Tribunal. The objections regarding the Arbitral Tribunal exceeding the scope of its jurisdiction shall be raised by the party within 15 days, of the matter being alleged to arise. Although the Arbitral Tribunal may accept such objections outside this limit, if justified grounds for such delays exists. Also the objecting parties shall not be precluded from raising objections on the grounds that it has participated in the process of nomination or nominated the Arbitrator in the Arbitral Tribunal.²⁸
- *Plea of Bias:* Both before and during the dispute resolution process, a member (Arbitration Tribunal) shall disclose all relationships, interests, and all such matters, which are likely to affect the impartiality or independence of the member or which might be perceived by the parties as likely to do so.²⁹ An arbitrator may be challenged only in two situations. First, if circumstances exist that give rise to justifiable grounds as to his independence or impartiality; second, if he does not possess the qualifications agreed to by the parties. A challenge is required to be made within 15 days of the petitioner becoming aware of the constitution of the arbitral tribunal or of the circumstances furnishing grounds for challenge. Further, subject to the parties' agreement, it is the arbitral tribunal (and not the court) which shall decide on the challenge. If the challenge is not successful the Arbitral Tribunal shall continue with the arbitral proceedings and render the award, which can then be challenged by an aggrieved party at that stage.³⁰
- *Joinder of Parties:* A third party may request the Arbitral Tribunal to be joined as an additional party to the arbitration or a party already in arbitration proceeding may express its desire to join an additional party to arbitration. The application requesting the same shall clearly mention the relation of the third party with the case with sufficient supporting evidence, which shall be attached with the application. The application shall have a declaration of its Claim or Defence. The decision of whether to join the third party to the arbitration shall rest with the Arbitral Tribunal. This was ruled in *P.R Shah, Shares & Stock Broker (P) Ltd. v. M/s. B.H.H Securities (P) Ltd.*³¹

27 "Domestic Arbitration Process British Columbia International Commercial Arbitration Centre", <http://bcicac.com/>, (visited on May 4, 2018).

28 Rule 25 of the SIAC Investment Arbitration Rules 2017.

29 Rule 3 of the CI Arb Code of Professional and Ethical Conduct for Members 2009.

30 Article 13 of UNCITRAL Model Law 1985.

31 (2012) 1 SCC 594.

- *Proceeding of Arbitration Work:* The Arbitral Tribunal shall commence the process of conducting the arbitration by making a provisional timetable. The decision on method of inspecting the case shall remain with the Arbitral Tribunal. The Arbitral Tribunal shall examine the case only on the basis of written submission. However, in certain conditions, if the Arbitral Tribunal deems it fit and inevitable, it may hold oral hearings also.³²
- *Production and Exchange of Information:* The Arbitral Tribunal shall begin the proceedings and shall manage the interchange of information among the parties if necessary for achieving solution to the disputes between the parties. While doing so, the Arbitral Tribunal shall remain absolutely unbiased and give equal opportunity to both the parties to present their respective claims and defences. Witnesses shall also be presented by the parties to support their stance and are subjected to cross-examination. If deemed suitable, the Arbitral Tribunal may permit video conferencing, telephonic conferences or any other mean for exchange of information.³³
- *Evidence:* All evidences, which the arbitral tribunal may deem necessary for understanding and determination of the dispute, shall be taken in the presence of the parties, except where any of the parties is absent, in default, or has waived the right to be present. The significance and thus the acceptability of the evidence presented shall be determined by the arbitral Tribunal. The Arbitral Tribunal may reject evidence considered to be insignificant or irrelevant. Neither the Code of Civil Procedure 1908 nor the Indian Evidence Act 1872 apply to arbitrations.³⁴
- *Inspection or Investigation:* If at any point, the Arbitral Tribunal finds it imperative to make an inspection or investigation in connection with the arbitration, it shall fix the date and time and the same shall be notified to the parties at least eight days prior to the date of inspection. Any party, which so desires, may be present at such an inspection or investigation. Experts may be appointed for the purpose of carrying out such an inspection.³⁵ The Arbitral Tribunal shall make a written report to the parties if one or all parties are not present at the inspection or investigation. The Arbitral Tribunal shall also offer them an opportunity to comment on the written report within guided timeline.

32 UNCITRAL, “Notes on Organizing Arbitral Proceedings March”, 2012, <https://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>, (visited on May 2, 2018).

33 American Arbitration Association, “Commercial Arbitration Rules and Mediation Procedures”, 2016, https://www.adr.org/sites/default/files/document_repository/commercial_rules.pdf, (visited on May 4, 2018).

34 Section 19 of Arbitration and Conciliation Act 1996.

35 Section 26 of Arbitration and Conciliation Act 1996.

- *Default of a Party:* A Party which defaults³⁶ or does not contribute shall have no reason for grievance after the communication made to it by the Arbitral Tribunal and thus an ex – parte decision shall be made.
- *Interim Measures:* A party may request the court³⁷ for seeking interim measures.³⁸ The parties seeking such a measure shall notify the Arbitral Tribunal about the interim relief being so sought through the courts. The parties shall be free to make request of interim measures at any stage of the proceeding, beyond this stage, till the finality and even after pronouncement, but before the enforcement of the award.³⁹
- *Closure of Proceedings and Making of Arbitral Award:* After the completion of the process of collection and examination of the documents submitted and examination of witnesses, once the Arbitral Tribunal is contented that both the parties have been given ample opportunity to present their case, the Arbitral Tribunal shall be delivering its verdict by closing the arbitral proceedings and making the award.⁴⁰

Stage Three: Post-Award Stage

- *Correction and Interpretation of Arbitral Award:* Any of the Party/Parties can make an application to the Arbitral Tribunal for seeking any correction due to typographical error or any form of manual correction.⁴¹ The parties can also seek the interpretation of the award from the Arbitral Tribunal.
- *Finality and Enforcement of Arbitral Award:* The arbitral award shall be final and binding on the parties and persons claiming under them respectively. Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.⁴²
- *Appeal:* An appeal lies after the final award is made for setting aside the award. The award can be set aside on the following grounds:⁴³ (1) The party making the application was under some incapacity; or (2) the arbitration agreement was not valid under the law agreed to by the parties (or applicable law); or (3) the party making the application was not given

36 Section 25 of Arbitration and Conciliation Act 1996.

37 Section 2(1) (e) of Arbitration and Conciliation Act 1996, defines ‘Court’ as: “to mean the principal civil court of original jurisdiction, having jurisdiction to decide the question forming the subject matter of the arbitration (if the same had been the subject matter of a suit). This would thus mean either the District Court or the High Court of a state (as in some states, High Courts have original civil jurisdiction beyond a certain pecuniary limit)”.

38 Section 9 of the Arbitration and Conciliation Act 1996.

39 *Ibid.*

40 Section 32 of Arbitration and Conciliation Act 1996.

41 Section 33 of the Arbitration and Conciliation Act 1996.

42 *Supra* n. 9.

43 Sections 35 and Section 36 of the Arbitration and Conciliation Act 1996.

proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (4) the award deals with a dispute not contemplated by or falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions to arbitration; or (5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or (6) the subject matter of the dispute was not capable of settlement by arbitration; or (7) the arbitral award is in conflict with the public policy of India.

Conclusion

The commercial disputes in India are being largely submitted for adjudication in the courts. Arbitration as a mechanism of resolving commercial disputes is arguably the best alternative for out of court settlements. When the parties are in dispute, expecting the parties to agree on several aspects including, the procedure, choice of Arbitrators etc. will be counterproductive. On the other hand, a variation in procedures of various Arbitration Institutions also induces an element of apprehensiveness in the minds of parties in dispute.

A well-defined and simplified procedure which is devoid of any flaw and which is commonly practiced across all the institutions in case of domestic arbitration in the country shall prove to be of great help in building confidence of the parties in dispute. A timely and amicable settlement of commercial disputes outside the courts shall also free up the time of judiciary, benefiting other litigants.

The proposed procedure is a combination of UNCITRAL Model Law, the Arbitration and Conciliation Act 1996 (as amended in 2015) as well as practices of some of the most vibrant and trustworthy arbitration institution in the world. If such a common procedure is adopted by all the arbitration institutions in India, harmonizing the institutional practices across the country, a unified system could be build. Moreover, the speed and economy at which the arbitration process shall deliver the results will attract more disputing parties. The scenario of arbitration will change from present 'Elitist' to a more inclusive common practice in India, which perhaps is the need of the nation and that of businesses as well.

AN ENTWINEMENT OF SUSTAINABLE DEVELOPMENT AND INTERNATIONAL TRADE: ANALYSIS THROUGH THE LENS OF PARIS CLIMATE CONVENTION

*Kaustub Neil Singh Bhati** and *Prankul Boobana**

Abstract

Climate change is posing an impending doom like situation over the world right now. To mitigate our own over-exploitation of mother nature, the world came together to agree upon the Paris Agreement, the latest edition to the international efforts against climate change. It is an ambitious agreement which aims to control temperature increase well below two degrees Celsius and achieve net zero emissions by latter half of the century. Although considered to be a failure till now due to its non-binding obligations and other serious failures, the agreement, if implemented solemnly by the parties, has the potential to alter the currently dismal future of our planet. Climate change policies affect international trade due to conflict between these two distinct policy roadmaps. Together, they rope-in sustainable development as both climate change and trade affect basic human rights like right to life, food and shelter. This article seeks to explore the connection between sustainable development and international trade where climate change is seen through the Paris Agreement as the connecting link.

Keywords: The Paris Agreement, SDGs, Climate Change, International Trade, Sustainable Development, Human Rights.

Introduction

Homo Sapiens, considered to be at the top of the biological chain, have always sought to tame mother nature. This colloquial practice of taming the environment, has resulted in eradication of horrendous diseases and an improvement in the quality of life over the course of time but has also spawned much worse complications, the contemporary examples of which are global warming and climate change. The ramifications of climate change are vast and varied on an individual level and when seen on a global platform, they pose a humungous political and policy problem as well as a conceptual challenge.¹ The theories and ideas regarding climate change are well known and relatively undisputed, however, a global public policy change requires engagement with a plethora of questions such as the intersectionality between climate change and regimes of trade, human rights and sustainable development.²

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1 Navroz K. Dubash, HANDBOOK OF CLIMATE CHANGE IN INDIA, 1st ed. 2012, pp 1, 3.

2 *Ibid*, p. 5.

Evolution of International Environmental Regime

The United Nations Framework Convention on Climate Change (UNFCCC) is one of the “Rio Convention” adopted in 1992. The primary objective specified by the Convention is “*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.*” Though it does not prescribe any legal obligations for the furtherance of the objectives set out. Further negotiations to stipulate mitigation targets led to adoption of Kyoto Protocol (1995).³ This protocol with near global participation requires developed countries to collectively reduce average GHG emissions by 5.2% during 2008-12, the commitment period of the same was extended to 2013-2020 by the Doha Amendment, 2012.⁴

In 2009, the world-leaders were negotiating the Copenhagen Accord (2009) in Denmark while hoping that it would become the legally binding successor to the Kyoto Protocol. However, the accord failed to generate any legal obligation and turned out to be a mere political understanding. One major feature of both the Kyoto Protocol and the Copenhagen Accord was that of differential responsibility i.e. the developing countries were not posed with any mitigation or reduction targets while the developed countries were. Although a failure, it was the first instance where the parties called for more progressive and specific actions to be decided by themselves to curb GHG emissions, thus adding a “bottoms-up” approach which later became a bedrock for the Paris Climate Agreement.

It took 6 years for the world to come together at the 21st Conference of Parties (COP21) at Paris in 2015 and negotiate the rightful successor of the erstwhile Kyoto Protocol. The Paris Climate Agreement, lauded as a landmark achievement of global negotiation in world history, is a hybrid concoction of the “bottoms-up” approach of the Copenhagen Accord and the top-down rules system already tested by the Kyoto Protocol. The Agreement has three specific goals; *first*, achieving a temperature increase cap of 1.5 degrees above pre-industrial levels; *second*, to increase adaptability to climate change and *third*, to ensure finances for R&D in climate resilience development. A novel proposition included in the Agreement was the exclusion of the Annexures and promulgation of equal responsibility of every nation, both developed and developing, towards reversing climate change.

This proposition is practically applied by letting the countries decide their own climate change goals in the form of Nationally Determined Contributions (NDC), keeping in mind their own national capabilities and restrictions, to be revised every 5 years. The implementation mechanism in the transparent

3 United Nations Climate Change, “*First steps to a safer future: Introducing The United Nations Framework Convention on Climate Change*”, http://unfccc.int/essential_background/convention/items/6036.php. (visited on April 1, 2018).

4 United Nations Climate Change, “*Kyoto Protocol*”, http://unfccc.int/kyoto_protocol/items/2830.php. (visited on April 1, 2018.)

framework of the Agreement is done in a non-adversarial and non-punitive fashion. It ingeniously relies on public perception turned political pressure through the frequent data collection and global stocktake every 5 years coupled with the clause of “no backsliding” i.e. that every NDC should be more progressive than its predecessor.

Trade and the Agreement

The Agreement does not involve any direct interactions and conflicts with the trade sphere. However, it does necessarily involve spaces where the engagements between the two would be crucial. The trade policy is strategically important because it can promote the development of climate-friendly goods and services and boost both the invention and use of clean technologies. However, they can also serve as a barrier to each other since the principles and policies of the two are not always cooperative and can even be conflicting.⁵

The role of trade in the realm of climate change can be seen from what parties envision to do; In the NDCs submitted by parties, well-nigh half of the countries proposed to provide financial incentives for increasing the renewable energy consumption. Some of them sought to improve industrial processes in their effort to curb GHG emissions, a few looked towards imposing carbon tax and another few proposed to impose labelling standards and restrictions on imports of products that are energy inefficient.⁶

Since the agreement does not specify anything explicitly about the ways and methods parties have to undertake to achieve their NDCs, trade flows become more important in relevance to establishing a green world. Achieving the “well below 2-degree” target specified in the agreement, would require a drastic transformation from how the world economy has been growing since the industrial revolution. This entails humongous expansion in investment in the areas of energy, transportation, construction, agriculture and many more, which will have to be brought about in both public and private sector.⁷

Various policy methods may be deployed by the parties for implementing the NDCs. Some of these methods are:

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- 5 S. Droege, et al., “*The Trade System and Climate Action: Ways Forward under the Paris Agreement*”, SOUTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND BUSINESS, Vol. 13, 2017, pp. 195, 195 http://heinonline.org/HOL/Page?handle=hein.journals/scjilb13&div=12&start_page=195&collection=journals&set_as_cursor=0&men_tab=srchresuIts#, (visited on April 1, 2018).
 - 6 C. Leva and X. Shi, “*The Paris Agreement and the International Trade Regime: Considerations for Harmonization*”, SUSTAINABLE DEVELOPMENT LAW & POLICY, Vol. 17, 2017, p. 20 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1585&context=sdlp>, (visited on April 1, 2018).
 - 7 A. Cosby, “*The Paris Climate Agreement: What Implications for Trade?*” THE COMMONWEALTH TRADE HOT TOPICS, Vol. 129, 2016, pp. 1-2, <https://www.oecd-ilibrary.org/docserver/5jlz7nd44q8r-en.pdf?expires=1522837639&id=id&acname=guest&checksum=5F4DD9DB216C0E000F5033E054C07691>, (visited on April 1, 2018).

- ***Border Carbon Adjustments (BCA)***

BCAs charge imports to adjust their price as if they had been produced under domestic climate regulations. On exports, it reimburses the amount added due to climate regulation, if the same had not been imposed on foreign producers in the importing country. BCAs are used because otherwise it will put the producers in domestic market at a competitive disadvantage against the ones in countries where there is little or no climate policy tools. This also leads to carbon leakage by shifting the emissions from one country to the other.

- ***Subsidies***

These are another important sources for implementing the agreement for two reasons; first, subsidies can foster investment and subsequently production in the field of renewable energy; second, fossil fuel subsidies promote non-climate policies removing which can collide with trade rules. Further, subsidies can be used to aid the infant industries grow, leading to stimulating the cleaner and greener energies.⁸

- ***Carbon Standards***

Carbon dioxide emissions released from the product over the course of its life from production to disposal is called Product Carbon Footprint. Purchases both by the government and the private sector can be based on this criterion.

The agreement itself provides for cooperative approaches between the parties to the Agreement in Article 6. It identifies voluntary cooperation for mitigation, adaptation, implementation of NDCs, coordinating actions and rules as well as linking their systems.⁹ The agreement specifies as well as emphasizes at various places that industrialized countries should provide the developing countries with means of implementation such as technology, capacity building etc. In transfer of climate technology, various facets of problem are involved. First, the meaning of the term technology is vague, which in turn impacts the applicability of trade rules. Technology transfer is mostly compared with sale of a product, but also such transfer is neither sold in embodied form, nor it is fully codifiable, so confusions arise.¹⁰ Further, it raises Intellectual Property Rights (IPR) issues. The tussle goes on between the proponents of strong IPRs, who on one side propound that IPRs will enhance the ease and stimulate transfer of technology while on the other side, the rest believe that strong IPRs will make transfers problematic.¹¹ One area which the agreement completely overlooks is the international emission sources such as airplanes and marine vessels. They are prominent in providing cross border services and cause disagreements on the territorial and jurisdictional aspects.¹²

8 *Ibid*, p. 3.

9 *Supra* n. 5, p. 229.

10 *Supra* n. 5, p. 232.

11 *Supra* n. 5, p. 233.

12 *Supra* n. 5, p. 236.

The parties can now undertake some policy interventions to enhance the purpose of agreement through the trade regime. Various kind of efforts for that can be taken, for example, assessing the green industrial policy, attracting climate specific investment, enhancing the sustainability standards, and making trade and climate mutually supportive.¹³

Sustainable Development and the Agreement

The United Nations defines sustainable development as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*”.¹⁴ The UN has envisioned a 2030 Agenda which consists of 17 Sustainable Development Goals of varied nature. The Agreement and Agenda 2030 were negotiated separately and their implementation is handled by the Environmental Agency and Foreign Affairs Ministry respectively.¹⁵ Nevertheless, there are areas in which they coincide and recognition of which would help in building a more elaborate and better plan of action. Cooperation is especially relevant because two agendas having similar goals might develop isolated to each other, resulting in administrative complications and improper use of national resources because of institutional oversight.

According to a recent study, all the Intended Nationally Determined Contributions (INDCs) that have been submitted (representing 189 countries) have an unprecedented alignment with 154 of the 169 sustainable development targets of the UN.¹⁶ For some targets there is a higher alignment with INDCs of various nations while for others there is not; this is due to the geographical and cultural differences between nations. For instance, countries with coastlines would concentrate more towards sustainable goals regarding “life in water” and reduction of pollution of oceans by hazardous substances. The Agreement has essentially allowed countries around the world to treat world-wide problems such as poverty, gender equality, hunger etc.

The Sustainable Development Goals in their own unique manners are stated in their INDCs. A few examples of this are as follows: Zambia has intended to reduce poverty by job creation through the field of sustainable forest management; Mexico plans to diversify climate-resistant agricultural practices through conservation of native species;¹⁷ China envisions to enhance education for all citizens on a low-carbon way of life; Peru, with its rocky mountain-sides, plans to rehabilitate road infrastructure to promote resilience to climate change;

13 *Supra* n. 7, p. 4.

14 United Nations Sustainable Development Agenda, “*United Nations Sustainable Development Goals: 17 Goals to Transform our World*”, <http://www.un.org/sustainabledevelopment/development-agenda/>, (visited on April 1, 2018).

15 E. Northrop et al., “*Examining the Alignment Between the Intended Nationally Determined Contributions and Sustainable Development Goals*”, WORLD RESOURCES INSTITUTE, WORKING PAPER, 2016, p. 10.

16 *Ibid*, p. 2.

17 *Ibid*, p. 4.

and Egypt has planned to fight every form of corruption and enable relevant legislative measures.¹⁸ Every example is a unique approach from every continent to tackle different aspects of a sustainable development and mitigate/adapt to impacts of climate change. All of this is possible because of the will of the member states and the novel mechanism of the Agreement which allows such flexibility.

The INDCs prepared by various countries are very innovative and ambitious on paper but in reality, the Agreement is ‘toothless’. The INDCs and NDCs are neither a formal part of the agreement nor do they have any obligation to follow through on them.¹⁹ The peer review and transparency model can work for only so long without punitive legal sanctions as is shown by the whimsical withdrawal of the US (one of the largest GHG emitter) from the Agreement post-presidential elections. The Agreement is also either silent or ambiguous, i.e., it does not provide a clear emission goal and only says “well below 2-degree Celsius”. One issue that frequently cropped up in negotiations was that of adequate finance. While the Climate Adaptation Fund has been expanded and further financial flows have been diverted towards it still lacks in terms of the massive investment needed to help developing countries adapt through infrastructure and technology. A manifestation of this inadequacy in funds is the fact that approximately 166 million people have been forced to leave their homes due to climate change between 2008 and 2013.²⁰ Another example of vague terminology is the use of the ‘decarbonisation’, which does not have any defined meaning as per the Agreement.²¹ According to studies, the currently submitted INDCs are likely to have a negligible effect on temperature reduction by the year 2100 and the century is likely to see an increase of 3-5 degree Celsius.²² These weak and essentially negligible INDCs could be seen as another example of the faults of non-punitive agreements solely relying on diplomacy and political activism, which at best are fickle things.

The aim of the Agreement, apart from adaptation and mitigation of climate change, is to help achieve other sustainability goals, one of which is in furtherance of human rights. The Agreement specifically recognizes the preservation of human rights in its Preamble²³, which could have positive implications for litigation, both domestic and international. But since no specific

18 *Ibid*, p. 5.

19 R. Bodle et al., “*The Paris Agreement: Analysis, Assessment and Outlook*”, CARBON AND CLIMATE LAW REVIEW, Vol. 1, 2016, p. 13 http://www.jstor.org/stable/43860128?seq=1#page_scan_tab_contents, (visited on April 2, 2018).

20 M. Picchi, “*Climate Change and the Protection of Human Rights: The Issue of Climate Refugees*”, US-CHINA LAW REVIEW, Vol. 13, 2016, p. 576, http://heinonline.org/HOL/Page?handle=hein.journals/uschinalrw13&div=44&start_page=576&collection=journals&set_as_cursor=0&men_tab=srchresults, (visited on April 1, 2018).

21 *Supra* n. 18, p. 20.

22 L. Bergkamp, “*The Paris Agreement on Climate Change: A Risk Regulation Perspective*”, EUROPEAN JOURNAL OF RISK REGULATION, Vol. 7, 2016, p. 35, http://heinonline.org/HOL/Page?handle=hein.journals/ejrr2016&div=10&g_sent=1&casa_token=&collection=journals, (visited on April 2, 2018).

23 Recital 2 of the Paris Agreement.

measures are incorporated, the effect on protection and advancement of human rights would be relatively small. There are three categories in which reference to human rights in the agreement can be classified. *Firstly*, provisions portraying an affinity between objectives of climate change and human rights such as adaptation, health benefit and food security.²⁴ *Secondly*, provisions which promote the integration of human rights within climate change policy i.e., gender responsiveness in committees formed under Article 15 of the agreement. *Thirdly*,²⁵ provisions which just mention human rights without context and importance, for example, discourse on whether human rights would be a hindrance or conducive to the climate change regime. In spite of so many references to human rights within the agreement, the provisions are vague and repeated *ad nauseam*, which frustrates any real progress.

Sustainable Goal no.16 talks about peace and justice, and with respect to human rights, there are three categories of distributive justices within the agreement. *Firstly*, the agreement disregards the distribution of burden among nations and neglects the injustice of causation of climate change by developed nations.²⁶ *Secondly*, it has been the duty of developed nations to help developing nations meet mitigation targets through financial, technological and capacity building aid, while this aspect is absent in the current agreement.²⁷ *Thirdly*, the question of intergenerational justice crops up which demands that emissions be cut as rapidly as possible because the ill-effects of today's pollution would be borne by future generations and would hamper their rights.²⁸

The Agreement in its current stage, is vague and ineffective but there are possible solutions that can effectively rectify this problem. There are three possible lines of action that might help make the agreement more fruitful; *first*, we can establish a link between human rights and environmental efforts so incidents such oil-spills would be punished as violation of human rights.²⁹ *Second*, we can import human rights into all policies, projects and activities at all level of government actor regarding climate change, which would provide participation in decision making and access to justice on environmental affairs. *Third* would be the vulnerability approach in which states would be bound to address vulnerabilities caused by climate change in matters i.e., right to life, housing and food.³⁰

24 M. Benoit, "Human Rights in the Paris Agreement", CLIMATE LAW, Vol. 6, 2016, p. 115, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2914124, (visited on April 1, 2018).

25 *Ibid.*, p. 116.

26 I. Ajiade, "Distributive Justice and Human Rights in Climate Policy: The Long Road to Paris", JOURNAL OF SUSTAINABLE DEVELOPMENT LAW & POLICY, Vol. 7, 2016, p. 69, http://heinonline.org/HOL/Page?handle=hein.journals/jsusdvp7&div=22&start_page=65&collection=journals&set_as_cursor=0&men_tab=srchresults, (visited on April 2, 2018).

27 *Ibid.*, p. 70.

28 *Ibid.*, p. 72.

29 *Ibid.*, p. 74.

30 *Ibid.*, p. 77.

Conclusion

Paris agreement is undoubtedly a landmark in the history of climate justice, but as we have realised, it is a failure on different pedestals of reality. It is a vague document, showing its dereliction on the standards of equity and justice. The “*bottoms-up*” approach, which is one of the defining characteristics of the agreement, is increasing the scope for enhanced interaction of trade and climate change. However, as the recent studies show, it is evident that parties to the agreement have not been able to fully realise the potential of the liberty which the agreement grants them. Moreover, reaching sustainable development is a far cry if the worst-case scenarios of climate change are not precluded or their impact on the vulnerable groups is not prepared for.

Many of the climate related policies that further the UN SDGs in varied fields such as energy sector or agriculture sector favour more localised ownership and operations because they bring economic benefits such as jobs and self-sufficiency. According to studies,³¹ local ownership is 50-240 % more beneficial than foreign, especially in the energy sector. It is considered as a “just transition” to a low carbon, low GHG future,³² if local money is used to create job opportunities and local industries, which promote sustainable development by providing opportunities to the people to work and earn a livelihood. This leads to chances for them to come out of poverty and hunger. However, the present global trade framework, e.g., WTO Rules and GATT guidelines, make it obligatory for member nations to open up their markets to foreign goods without any discrimination, thereby stifling local production capacity. Meanwhile, the IPR regime encumbers rights of farmers to store and share diverse seeds (which help combat climate change) to promote multinational seed corporations.³³ Also, certain rules limit a country such as India from promoting its indigenous solar program by labelling it as discriminatory while the prosecuting developed countries, like US, themselves indulge in similar practices.³⁴ These are prime examples of the intersectionality between trade, sustainable development and human rights. It is necessary that every state learns to balance these spheres because a state’s true development can only blossom when these three form a successful trinity.

31 J. Farrell, “*Advantage Local: Why Local Energy Ownership Matters*”, INSTITUTE FOR LOCAL SELF RELIANCE, 2014, p. 2, https://ilsr.org/wp-content/uploads/downloads/2014/09/Advantage_Local-FINAL.pdf, (visited on April 2, 2018).

32 B. Lilliston, “*The Climate Cost of Free Trade: How the TPP and Trade Deals Undermine the Paris Climate Agreement*”, INSTITUTE FOR AGRICULTURE AND TRADE POLICY, 2016, p. 3, https://www.iatp.org/sites/default/files/2016_09_06_ClimateCostFreeTrade.pdf, (visited on April 2, 2018).

33 *Ibid*, p. 6.

34 *Solar Panel Case: To Counter US at WTO, India Seeks Compliance Panel*, THE HINDU: BUSINESS LINE, January 30, 2018, <https://www.thehindubusinessline.com/economy/policy/india-seeks-compliance-panel-in-solar-dispute-with-us/article22598186.ece>, (visited on April 4, 2018).

REGULATING REAL ESTATE SECTOR IN INDIA: A PARADIGM SHIFT FROM BUILDER'S DOMINANCE TO BUYER CENTRIC

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Abstract

The growth of real estate sector has always been crucial for the growth of Indian economy. However, with increasing population and its requirement for shelter, it had become extremely important to bring in the legislation regulating Indian real estate sector to boost investment and to protect the interest of the customers. Therefore, to provide relief to the buyers who have been suffering from deceiving acts of the builders followed by the years of litigation, the Real Estate (Regulation and Development) Act 2016 was enacted to protect innocent buyers and to provide speedy dispute redressal mechanism. RERA is of extreme importance to all persons who are seeking to invest and those who have invested in the real estate sector. This paper attempts to highlight the key provisions of RERA providing protection to the buyers while making an investment in any real estate project in India which includes the obligations of the promoters, developers and builders as well as the rights of the buyers under RERA. Further, this paper analyses the provisions of RERA dealing with speedy redressal of the disputes in real estate sector in context of relief to the customers from the excessively lengthy legal proceedings.

Key Words: Customer Protection, Real Estate, Developer, RERA, Dispute Redressal Mechanism.

Introduction

In today's progressive world, the real estate sector has become significant for enhancing the socio-economic structure of any country. The term 'Real Estate' refers to the immovable property, i.e., the land which includes both aerial and below ground level demarcation of the land as well as the building which includes any structures on the land.¹ The term 'Real Estate Project' means the development of building or apartment or development of land into plot or residential housing. The Indian Real Estate Industry hereinafter referred as IREI has played a key role in the development of the country after the liberalization of the Indian economy. Rising business opportunities and migration of people as a labor force, increases the demand for the commercial

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1 Ashish Mittal, AN OVERVIEW OF REAL ESTATE, 1st ed. 2011, p. 1.

as well as housing space and particularly the rented housing.² The population of urban area is increasing rapidly, approximately 51 per cent, i.e., 3.6 billion people of the world population reside in urban area which are expected to reach 6.3 billion by 2050.³ Therefore, the real estate sector is one of the booming industries of the present times in India and it is assumed that the real estate market has the potential to attract the foreign direct investment from all major investors in the world and thereby giving a boost to the Indian economy.⁴

The growth of real estate sector has always been crucial for the growth of the Indian economy as it is the second most significant sector after agriculture in terms of employment creation, GDP growth, etc. linked with the basic ingredients of dignified human survival, i.e., '*roti, kapda or makaan*'.⁵ Similarly, the real estate sector is a crucial element in the overall development of the Indian infrastructure and plays a significant role in revenue generation in India.⁶ But, with the increase in population and their requirement for shelter, it compelled to enact a legislation to control, regulate and develop the real estate sector in a systematic manner to build a confidence among the investors as well as to protect their interests. Although, the state laws were already governing the real estate sector, these laws were inadequate to bring accountability and transparency in the real estate transactions.⁷ Consequently, the real estate sector was mostly unregulated and the investors were left frustrated due to various reasons.

The relationship between buyers and the builders, prior to the enactment of RERA, was governed only by agreements signed between them and therefore; the people entering into the real estate sector did not use to possess any prior experience or confirmation related to the financial capability of the builder to execute the concerned projects. The hard earned money of the investors has

2 Ayush Banerjee, "*Housing in India with RERA (Real Estate Act)*", INPRA, 2017, <http://inpra.in/2017/05/01/housing-in-india-with-rera-real-estate-act/>, (visited on March 18, 2018).

3 Kaushik Basu and Annemie Maertens, *THE NEW OXFORD COMPANION TO ECONOMICS OF INDIA*, Vol. 2, 1st ed. 2012, p. 725.

4 Alan Billingsley, "*RREEF Global Real Estate Investment Outlook and Market Perspective 2011*", http://realestate.deutscheam.com/content/_media/RREEF_Global_Investment_Outlook_Market_Perspective_2011.pdf, (visited on March 18, 2018).

5 Ministry of Housing and Urban Poverty Alleviation, "*Report of the Committee of Streamlining Approval Procedures for Real Estate Projects in India*", Vol. I, January 2013, <http://www.naredco.in/notification/pdfs/SAPREP-march.pdf>, (visited on March 18, 2018).

6 Shradhanjali Parida, "*Real Estate in Indian Context-Opportunities and Challenges*", *JOURNAL OF RESEARCH IN COMMERCE AND MANAGEMENT*, Vol. 2, No. 2, 2016, pp. 81-86.

7 Rajkumar Adukia, *REAL ESTATE – LAW, PRACTICE AND PROCEDURE*, 3rd ed. 2013.

been stuck in the real estate projects for years without any clear indication of the date of completion or handing over of possession of their property.⁸ Similarly, the home customers suffered due to the demand of a portion of the purchase price of real estate in cash as an advance payment which was excessive for the middle income group. Further, there were no minimum eligibility requirements or guidelines for an individual to become a builder. Therefore, due to lack of monitoring mechanism in the real estate sector, builders keep on exploiting the customers over the years.⁹

The Government of India after analysing all the problems faced by the customers in the domestic real estate market, enacted the Real Estate (Regulation and Development) Act 2016 hereinafter referred as RERA 2016.¹⁰ This Act introduced the obligation of the real estate developer and agents and also describes the rights and duties of the customers and if any of the party defaults in these obligations the Act also has the provisions dealing with the penal liabilities.¹¹

The present paper is an attempt to study and analyse the regulation governing the real estate sector in India based on the primary and secondary sources using the official documents of Ministry of Finance, Legislative provisions for real estate sector, reports, academic research papers and factual and statistical data of growth of real estate sector in India.

The author argues that the RERA brings in a paradigm shift in the real estate business from the builder's dominance to buyer centric approach. The entire study is propelled by the key assumption that the real estate regulation in India is an attempt to establish more transparent and accountable environment in the real estate business due to the buyer centric approach of the legislators by introducing preventive measures in the provisions of the law to ensure customer protection while investing in the real estate sector in India. In the light of this assumption, the paper tries to analyse various provisions of the RERA 2016 in relation to the customer protection and attempts to gauge investor's satisfaction level in the post RERA regime.

8 *Ibid.*

9 *Ibid.*

10 Both Rajya Sabha and Lok Sabha passed on March 10, 2016 and March 15, 2016 respectively and finally it received assent of the President of India on March 25, 2016. It came into effect on May 01, 2017.

11 M.V. Durga Prasad, *LAW RELATING TO REAL ESTATE REGULATION IN INDIA*, 4th ed. 2017.

Real Estate (Regulation and Development) Act 2016 and Customer Protection

The enactment of the RERA, in the opinion of many, appears to be a knight in shining armour for the innocent buyers, most of which belong to middle income group, and they invest their hard earned money into real estate sector.¹² In order to address the regulatory lacuna in the real estate sector, the RERA contains several provisions, some of which are extremely stringent, and completely reverse the unequal bargaining power in favour of the buyers, which are discussed hereafter:

The real estate projects are required to register themselves even before starting the marketing process of the concerned project with State regulatory authority established under RERA,¹³ except the projects where the area of land to be developed does not exceed 500 square meter or eight apartments.¹⁴ It is significant to note that the projects which are already started but not yet received the completion certificate are also required to be registered under the Act.¹⁵

The builder while registering under RERA has to comply with the provisions dealing with the proforma of the agreements to be followed while structuring of agreement to sale with the buyer.¹⁶ Similarly, the builder has to file an affidavit mentioning the time period within which the builder undertakes to complete the project¹⁷ as well as the undertaking stating that seventy percent of the amount accumulated from the buyers for the real estate project would be duly deposited in a separate bank account.¹⁸ This is to cover the cost of acquiring land and construction of the project, and therefore, it can only be used for the purpose of developing the concerned project.

The builders under the RERA have to adhere to various compliances and reporting requirements. The builders have to provide updates related to the development of the projects at regular intervals and also the builders are required to create a webpage on the website of the regulatory authority, in

12 “*Indian Realty Sector Projects Investor-Friendly Image*”, INDIA INVESTMENT JOURNAL, <http://www.indiainvestmentjournal.indiaincorporated.com/indian-realty-sector-projects-investor-friendly-image/>, (visited on March 18, 2018).

13 Section 3(1) of the Real Estate (Regulation and Development) Act 2016.

14 Section 3(2)(a) of the Real Estate (Regulation and Development) Act 2016.

15 Section 3(1) of the Real Estate (Regulation and Development) Act 2016.

16 Section 4(2)(g) of the Real Estate (Regulation and Development) Act 2016.

17 Section 4(2)(1)(C) of the Real Estate (Regulation and Development) Act 2016.

18 Section 4(2)(1)(D) of the Real Estate (Regulation and Development) Act 2016.

which, details of the project are to be uploaded and updated.¹⁹ One of the key highlights of the RERA is that, it covers the real estate agents within its ambit,²⁰ which were completely unregulated prior to RERA and were exempted from any kind of legal liabilities. These agents or the brokers are now required to register with the RERA before they can facilitate the sale or purchase of any property, and are also required to quote their registration number every time they indulge in facilitating any real estate transaction.²¹ Further, it becomes mandatory for the agents to maintain the books of accounts, various records and documents²² along with the detachment from the unfair trade practices.²³

The RERA introduces the definition of carpet area²⁴ which was the lacuna in the earlier legislations related to real estate transactions and hence, the interpretation of carpet area was subjective. The lack of clarity regarding the carpet area, prior to RERA, leads to the conflict between the buyers and the sellers who indulged in the real estate transaction. The builders used to determine the price of the apartment based on the carpet area and not based on the super built up area, therefore, defining carpet area under the RERA removes the scope of confusion for the customers or misinterpretation of carpet area by the builder.

The introduction of RERA revolutionizes the relationship between the developers and the customers in the real estate transaction by making a significant change in the requirement of advance payment by the customer. The builders are no more allowed to accept the sum of more than ten percent of the cost of the apartment, plot or building as an advance payment in the form of application fees from the customers.²⁵ This change would increase the liquidity among of the customers and also enhance their capability to structure their investment in the project.

Similarly, it has been observed in the pre RERA era that, most of the builders and developers were transferring their rights and liabilities to the third party and the allottees gets the information regarding the transfer only after a significant amount of money had been paid by the customers. In most of such cases, it has been observed that the allottees were uncomfortable with the

19 Section 11(1) of the Real Estate (Regulation and Development) Act 2016.

20 Section 9(1) of the Real Estate (Regulation and Development) Act 2016.

21 Section 9(5) of the Real Estate (Regulation and Development) Act 2016.

22 Section 10(b) of the Real Estate (Regulation and Development) Act 2016.

23 Section 10(c) of the Real Estate (Regulation and Development) Act 2016.

24 Section 2(k) of the Real Estate (Regulation and Development) Act 2016.

25 Section 13(1) of the Real Estate (Regulation and Development) Act 2016.

introduction of third party for various reasons such as the reputation, creditworthiness, ability to deliver, etc. of the third party. The RERA tries to address this concern as it does not permit the promoter to transfer his rights and liabilities to the third party without the consent of at least 2/3rd of the allottees along with the prior consent of the regulatory authority.²⁶ Similarly, the builders are under a strict legal obligation to develop the project in accordance with the sanctioned layout plan approved by the competent authority and if the builder intends to make changes in the plan, he is not allowed to make the changes in the plan without the consent of the 2/3rd number of allottees.²⁷ The builders are required to execute a conveyance deed in favour of the allottee at the time of delivering property. The builder is also required to execute the sale deed in favour of the buyer within three months from the date of obtaining the occupancy certificate.²⁸

The RERA creates a merciless environment for the builders as it provides the right to the buyers to seek refund of the entire payment along with the interest and the compensation decided by the authority,²⁹ in case the builder fails to give possession to the allottee within the stipulated period or if the builder tries to attract potential buyers by using misleading advertisement or commits misrepresentation in the prospectus, brochures, catalogs, etc. or if the buyer wants to withdraw from the project for any reason such as delay in completion of project, delay in possession of property, non-compliance by builder in terms of quality of construction, etc.

The quality of work of the builders is always a crucial feature in the real estate market. It is point worthy to mention that the liability of the builder to build a quality project. The RERA tries to address this concern by creating a liability of the builder to redevelop any structural defect in the property of the buyer even if the defect is brought to the notice of the builder within five years from the date of handing over of possession.³⁰

Thus, it has been observed that prior to RERA, the rights of the buyers were not given statutory recognition and hence, huge number of buyers were exploited by the builders in the past. But, with the introduction of RERA 2016, it has been assumed by many that the legislatures used a buyer centric approach while introducing legislation for quality control of the real estate market by

26 Section 15(1) of the Real Estate (Regulation and Development) Act 2016.

27 Section 14(2)(ii) of the Real Estate (Regulation and Development) Act 2016.

28 Section 17(1) of the Real Estate (Regulation and Development) Act 2016.

29 Section 18(1) of the Real Estate (Regulation and Development) Act 2016.

30 Section 14 (3) of the Real Estate (Regulation and Development) Act 2016.

creating various legal obligations for the builders and tries to protect the buyers in the builder dominant sector.

Real Estate (Regulation and Development) Act 2016 and Dispute Redressal Mechanism

The dispute redressal in real estate transactions, prior to RERA, was facilitated mostly by the consumer forum. The consumer forum was sensitive enough to protect the rights of the customers, but most of the customers suffered due to excessively lengthy litigation process in India.³¹ This delay in litigation was exploited by the builder in their advantage and adopted a policy of experimenting with the customers in the hope of paying only a meagre amount through the inadequate settlement and also the customers were hugely frustrated due to the delay in legal proceedings, and hence, most of the customers withdraw the legal claims. The initial stage for the buyers was to approach the district forum followed by state forum and finally the national forum, which causes delay and it became economically burdensome more for the buyers than the builders.³² The contract between the buyers and the builders was also mostly favouring the builders, as most of the builders, especially those who are considered to be big conglomerates, use to hire specialised legal counsel to draft the lopsided contract by incorporating the builder's dominance which includes arbitration clause to prevent the buyers from the litigation.³³

Therefore, the key objective of enacting the RERA was to provide a specialised body to facilitate the speedy dispute redressal of the real estate sector. The dedicated body has been established under RERA for the real estate disputes.³⁴ Similarly, the strict timeline has also been provided for disposing of the dispute, such as, the appellate tribunal has to dispose the appeals within sixty days.³⁵ This strict timeline not only ensures the speedy redressal, but it also reduces the frustration for the customers as they no more have to face the delay before the consumer forum.

31 Ramya Tirumalai and Kavya Murthy, "The Long, Expensive Road to Justice", INDIA TODAY, April 27, 2016, <https://www.indiatoday.in/magazine/cover-story/story/20160509-judicial-system-judiciary-cji-law-cases-the-long-expensive-road-to-justice-828810-2016-04-27>, (visited on March 28, 2018).

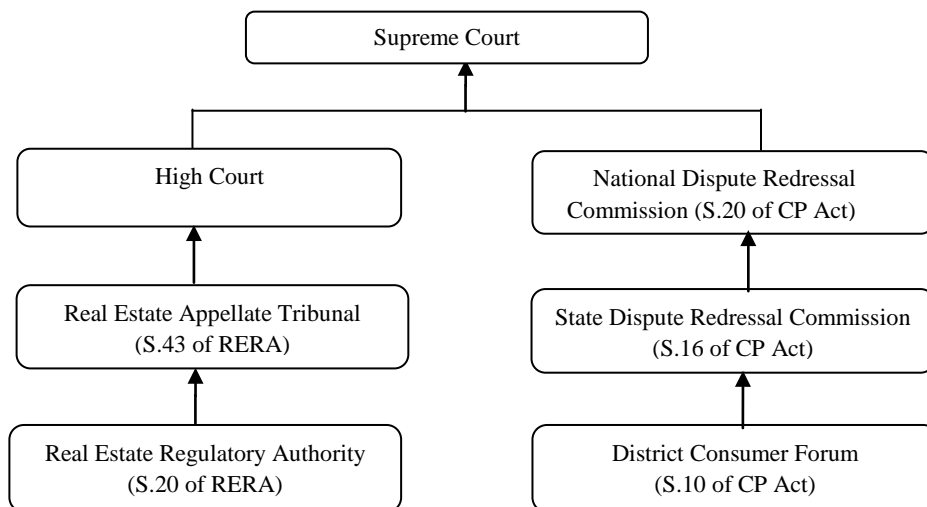
32 Sections 10, 15, 16, 19, 20, and 23 of the Consumer Protection Act 1986.

33 The Chambers of Law, "Do Not Fall Prey to One-Sided Builder Agreements", <http://www.tclindia.in/do-not-fall-prey-to-one-sided-builder-agreements-indianlaws/>, (visited on March 28, 2018).

34 Section 20 (1) of the Real Estate (Regulation and Development) Act 2016.

35 Section 44 (5) of the Real Estate (Regulation and Development) Act 2016.

Dispute Redressal Mechanism



The function of the regulatory authority is not restricted with only adjudication of disputes but it also includes the regulating, monitoring and promoting the real estate sector in India.³⁶ RERA has two separate point of complaint for the redressal and enforcement of rights, i.e., regulatory authority and adjudicating officer. The buyers can approach regulatory authority as well as adjudicating officer in case of filing a complaint with respect to the violation of the provisions of the Act or in case of claims of compensation.³⁷ The introduction of two separate point of complaint for the redressal and enforcement of rights reduces the time in adjudicating appeals and ensure the speedy redressal of disputes. Another important aspect of the real estate dispute redressal mechanism under RERA is that it retains the jurisdiction of consumer forum.³⁸ But, it allowed the buyers to withdraw their pending appeals from consumer forum and file a complaint for compensation before the adjudicating officer established under RERA.

The Act also empowers the regulatory authority to take the *suo moto* action against the violation of the provisions of the Act by promoter or real estate agents.³⁹ Hence, the redressal system under the regime of RERA is more of a proactive in its nature as it protects the buyers from the abuse of their interest and restricts the market dominance of the builders and agents.

36 Section 32 of the Real Estate (Regulation and Development) Act 2016.

37 Section 31(1) of the Real Estate (Regulation and Development) Act 2016.

38 Section 88 of the Real Estate (Regulation and Development) Act 2016.

39 Section 35(1) of the Real Estate (Regulation and Development) Act 2016.

Therefore, the redressal system under RERA is a motivating factor from the customer's point of view, as it provides the specific authority dealing with the redressal system for the real estate disputes. The redressal system became favourable for the customers due to its cost effective and speedy nature of litigation process, which stimulates increasing confidence of the investors while investing in the real estate projects.

Conclusion

The introduction of RERA is a welcome step to boost the investment in real estate sector with a lot more secure and sound atmosphere. The objectives of RERA are ensuring protection to the buyers in builder dominated real estate market in the country. The legislation is an attempt to bring transparency and accountability while the real estate transaction takes place. The Act introduces many liabilities of the builders and promoters. Although, most of these liabilities were followed even prior to the enactment of RERA, all such obligations were only enforceable as per the contract and the contractual provisions used to be a lopsided agreement favouring the builders, promoters and developer. Therefore, with the introduction of the liabilities and obligations of the builders in the Act, makes it easier for the buyer to have a legal recourse which was missing in the contractual obligations earlier and the buyers now can freely negotiate the agreement while investing in a real estate project.

The establishment of the regulatory authority and adjudicating officers is considered to be a mitigating factor for creating secured environment in the real estate market. It is a huge relief for the innocent buyers as their hard earned money is now invested in a much safer and protected real estate market. Similarly, due to the statutory assistance, the buyers are not required to run from pillar to post for getting their possession or refund of their money from the builder.

The Act has introduced several statutory thresholds for the builder while starting the project such as limiting the advance money that can be received, blocking of seventy-five percent of the capital with the bank, etc. These thresholds make it difficult for the builders to commence the project related work without having the necessary capital to execute the project as well as it ensures the completion of the project within a time period specified by the builder which prevents the customer's hard-earned money from getting siphoning off into some other projects.

The legislation clearly indicates that the law makers have realised the practical problems faced by the real estate customers which are mostly the middle income group and tried to address the concern of the buyer in the best possible manner. The RERA appears to be an attempt towards the progressive

step for the welfare of the buyers as contrast to the earlier provisions where the buyers were completely helpless in case of the legal scenario. The introduction of authorities having requisite expertise and experience in the real estate sector also suggests a constructive development in the area of regulating the real estate sector in a more efficient and professional manner. Due to this, it is assumed that the legislation may prove to be an encouraging move for the development of real estate sector in India as well as helps in achieving the objectives of increasing investment in the real estate sector in the times to come.

It is undeniable, that the Act has changed the socio-legal scenario of the real estate sector in India as it creates an investment friendly environment in the real estate sector by making the level playing field for the builders as well as buyers. Although, the implementation of various provisions would experience the challenges of the market in near future, it has been assumed to be an attempt towards boosting the confidence of investors due to the buyer centric approach of the legislatives to reduce the dominance of the builders and promoters in the real estate market of India.

LIABILITY OF INTERMEDIARIES IN INDIA

Pallavi Khanna*

Abstract

The Information Technology has changed the means, methods and modes of transactions in our lives. All social, economic and personal information is travelling through the technology. In today's era the intermediaries equally participate in processing and transforming of the information in the cyber space. The pertinent question arises regarding their accountability towards the individual and society, especially liability for third party data or information made available on their network in the light of privacy and security. The objective of this paper is to focus on the need to regulate online content; assess the implications on privacy of individuals in the light of interception by intermediaries and evaluate the legal regime governing intermediaries in India. This paper argues that the compliances imposed on intermediaries facilitate state surveillance as well as self-censorship, thereby encroaching on the rights of individuals. Further, study traces scope of improvement and possible solutions regarding legal regime governing intermediaries.

Key Words: Intermediaries, IT Act and Rules, Liability, State Interference, Third Parties, Privacy, IPR, Infringement, Cyber Café, Websites, Free Speech.

Introduction

The internet has played a major role in creating unprecedented avenues for accessing information and sharing diverse interests across geographical boundaries. In light of the expanding user base, the intermediaries have a role that enables socio-political and economic interactions between users in a global network. Intermediaries have been significant to the way the internet functions since many producers as well as users of content are often dependent on third parties i.e., the intermediary. An intermediary provides services ranging from provision of internet connectivity through communication links to more advanced options such as providing storage, sharing of content, etc. The intermediaries try to make the best of the economic activity by decreasing costs, enhancing competition by lowering the threshold for participation and encouraging innovation by contributing more to the ICT sector, and by developing the internet infrastructure to meet the demands of new users. The intermediary platforms also extend benefits to the society by empowering users and enhancing their choice via social networks and web services that promote engagement and creative expression, thus establishing a regime of trust, respect

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for human rights and privacy. However the benefits of online intermediaries are contingent on a framework of protecting them against legal liability for communicating and distributing content.¹ E-commerce have seeped into our lives in very surreal ways. Growing consumer preferences and need for convenience have resulted in a belief that e-commerce business has a long way to go. The need for intermediary liability arises because information is being exchanged on a much larger scale now. This facilitates commission of several unlawful acts like privacy invasion, defamation, infringement of IPR etc. The intermediaries are handling an increasing amount of data while providing services online. There are risks arising in relation to interception and security breach and hence the potential of harm is also much more. This makes it even more important for us to frame a proper system that clearly establishes the liability of intermediaries.

Through the course of the paper, the researcher seeks to present a nuanced understanding of the law governing intermediaries in India while focussing on the IT Act, Intermediary Rules, Cyber Café Rules, state interference, third party intervention, social media and e-commerce.

Information Technology Act

The Act was inspired by the EU E-Commerce Directive² and seeks to extend the safe harbour protection to services that are mere transmission conduits, host content, cache and exercise due diligence in acting in accordance with the Act.³ However, the scope of safe harbour immunity is not certain since some courts tend to preclude secondary liability of intermediaries for infringement while others don't.⁴

The IT Act had broadened the scope of intermediary under Section 2(w)⁵ by the amendment of 2008 to include not only those who are receiving, storing and

1 http://www.intgovforum.org/cms/wks2014/uploads/proposal_background_paper/Background_Paper_Towards_an_evidence_based_intermediary_liability_policy_framework.doc1.pdf, (visited on December 16, 2018).

2 Directive 2000/31/EC of the European Parliament and of the Council, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML>, (visited on December 16, 2018).

3 Section 79 of the IT Act, prior to amendment: For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, Rules or Regulations made thereunder for any third party information or data made available by him if he proves that the offense or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offense or contravention.

Now, Section 79 of the IT Act begins with "Notwithstanding anything contained in any law for the time being in force...an intermediary shall not be liable..."

4 D. Bhattacharya and S. Dutt, "Contributory Liability vis-a-vis Strict Liability: Analysing World Trends in ISP Liability Regime with Respect to Indian Position, GNLU LAW REVIEW, Vol. 4, 2013.

5 The definition of 'Intermediary' in the IT Act, prior to 2008 amendment, read as follows:

transmitting records or proving related services but also telecom service providers, internet service providers, network service providers, web hosting services, search engines, online payment and auction sites, market places and also cyber cafes. It ensured that intermediaries were protected from being liable under any law in operation, which meant that the applicability of the provisions of the Indian Penal Code was finally excluded and hence the strict liability principle associated with it was also done away with. The amendment also meant that the safe harbour protection will apply unless any evidence is given to the contrary. Hence, whoever brought an action to make the intermediary liable would have to prove that he had not fulfilled the conditions that would make him immune from liability.⁶

The intermediary can be made liable for infringing or offensive content once it is proved that he failed to take down the content despite being notified or if he assisted in committing the unlawful act. If this safe harbour doesn't apply then the intermediary may be held liable for defamation, sedition, obscenity, etc. depending on the nature of the content.⁷

Section 79 states that the intermediary is not liable for third party information that he makes available or hosts if he is a mere conduit, doesn't participate in the transmission and is following due diligence requirements. However, it's not a blanket immunity which is given to intermediaries. If the intermediary has obtained a license to alter the content on its website, hosted advertisements on the said matter or not followed essential due diligence requirements under the IT Act then he cannot avail of the benefits under Section 79. Moreover if he does nothing to disable access to content which is notified to him as being unlawful, he cannot claim any protection under Section 79.⁸

The idea of intermediary liability saw a lot of attention being given to it in the case of *Ranjit Udeshi v. State of Maharashtra*,⁹ where it was held that intermediaries will be governed by the principle of strict liability in order to restrict obscene material from circulating. However, we have made a lot of progress since then and have moved away from the standard of strict liability.

“Intermediary- with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.”

6 REPORT OF THE EXPERT COMMITTEE, PROPOSED AMENDMENTS TO INFORMATION TECHNOLOGY ACT, 2000, August 2005, http://www.prsindia.org/uploads/media/Information%20Technology%20bill93_2008122693_Report_of_Expert_Committee.pdf, (visited on December 12, 2018).

7 R. Kumar and L.R. Nair, “*Information Technology Act, 2000 and the Copyright Act, 1957: Searching for the Safest Harbour*”, NUJS LAW REVIEW, Vol. 5, 2012.

8 See Section 79 of the Information Technology (Amendment) Act 2008.

9 AIR 1965 SC 881: 1965 SCR (1) 65.

In the *Avnish Bajaj v. State (N.C.T) of Delhi*¹⁰ known as Bazeed.com case the managing director of a website was made personally liable for selling an obscene video. Following this, the IT Act was amended. The Delhi High Court had rejected his bail application since his site continued hosting the content despite being notified of the nature of the content and thus held him strictly liable. On appeal, this decision was reversed on procedural grounds by stating that though criminal liability of corporate is recognised under the IT Act, the representative of the company cannot be made an accused when the company is not made an accused in the matter.¹¹

In *Shreya Singhal v. Union of India*¹² the court observed that when search engines receive knowledge of illegal content and remove it, then they become immune from prosecution. Here Section 79(3)(b) was under challenge since it requires the intermediary to use his personal discretion on receiving knowledge that a given information is used for unlawful acts. The implications of this provision on the freedom of users under Article 19(1)(a) was also discussed. The court declared Section 66A¹³ to be unconstitutional because of the vagueness in standards concerning blocking and removal. It was held that notification to take down content is only permissible through an executive or judicial order, hence divesting intermediaries of their judicial functions.¹⁴

Intermediaries are involved in infringement suits several times. This may take place when the information received by them is disclosed either unknowingly or deliberately and they are held liable for direct infringement. When the service of the intermediary is being used by third party to commit acts infringing the privacy of anyone and the intermediary is unable to show that he

10 (2005) 3 Comp LJ 364 Del: 116 (2005) DLT 427: 2005 (79) DRJ 576.

11 *Ibid.*

12 (2015) 5 SCC 1: AIR 2015 SC 1523.

13 Section 66A of the IT Act states as: "Punishment for sending offensive messages through communication service, etc.

Any person who sends, by means of a computer resource or a communication device-

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation- For the purpose of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message."

14 S. Abraham, "*Shreya Singhal and 66A- A Cup Half Full and Half Empty*", ECONOMIC AND POLITICAL WEEKLY, <http://cis-india.org/internet-governance/blog/shreya-singhal-judgment.pdf>, (visited on December 18, 2018).

had exercised a reasonable degree of care in monitoring of the content it hosts, then he may be made liable for secondary infringement. Hence when the intermediary has been negligent in maintaining¹⁵ some reasonable practices to ensure security of data and this causes wrongful loss to any person, this will attract Section 43A¹⁶ of the Act. When the intermediary intentionally discloses personal information that may reveal the identity of any user, then section 72 A¹⁷ of the IT Act is attracted since the disclosure was without the consent of and in breach of the contract.¹⁸

The 2000 Act was under criticism for the lack of clarity. As opposed to the goal of encouraging free expression, the act seemed to promote private injunctions for censoring free expression.¹⁹ The rules were also regarded as being uncertain in their criteria and procedure to be followed for takedowns.²⁰ Hence the intermediaries were compelled to be overcautious and over comply with the takedown notices for limiting their liability. This attitude in turn suppressed legitimate and free expression. Moreover the rules did not put in place sufficient safeguards for preventing the misuse of takedowns.²¹

Rules under the Information Technology Act

The Intermediary Guidelines of 2011 clearly define the due diligence obligations of the intermediary under Rule 3. They state that the intermediary should publish the rules, user agreements and policies. The intermediary must not knowingly host, transmit or publish any infringing matter. He also has an

15 See Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011.

16 43A. "Compensation for failure to protect data. - Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation, not exceeding five crore rupees, to the person so affected."

17 72A. "Punishment for disclosure of information in breach of lawful contract. -Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both".

18 Also see *supra* n. 15.

19 Centre for Democracy and Technology, "*Intermediary Liability: Protecting Internet Platforms for Expression and Innovation*", April 2010, <https://www.cdt.org/files/file/Intermediary-Liability-6p.pdf>, (visited on November 18, 2018).

20 Shobhalata et al., "*Intermediary Liability*", ZENITH INTERNATIONAL JOURNAL OF BUSINESS ECONOMICS & MANAGEMENT RESEARCH, Vol. 2, No. 5, 2012 <http://zenithresearch.org.in/>, (visited on December 16, 2018).

21 Stephen E. Blythe, "*A Critique of India's Information Technology Act and Recommendations for Improvement*", SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE, Vol. 34, 2006-2007, p. 1.

obligation to take down the infringing content on receiving actual knowledge of it.²²

The 2011 Rules have been criticised for their broad scope since they require intermediaries to adopt terms and conditions which prohibit users from hosting, publishing, sharing content that is not only obscene or infringing but also that which is a threat to national unity, public order or is offensive, unlawful, disparaging, etc. This kind of a broad standard doesn't have clear limits on the kind of content that can be removed and hence is capable of being misused. The takedown procedure is also regarded as being harsh since the intermediary, once notified that the content is proscribed, is required to disable it within 36 hours and preserve records for 3 months; he may also terminate access immediately, precluding investigation into the legitimacy of the company.²³

Jurisdictions like India see cyber cafes being subject to legal requirements which end up facilitating state surveillance, i.e., collection of government id cards, retention of browsing history, etc. Information Technology (Guidelines for Cyber Cafe) Rules, 2011 have been criticised for the wide definition of cyber cafes which brings a lot of places which are not essentially 'cyber cafe' also within its ambit. Moreover, they did not introduce any new registration requirements (which the Shops and Establishments Act already dealt with) and did not necessitate a licensing system. Since even credit and debit cards were used for user identification, the chances of fraud were high. There were no measures for protecting the collected photographs and information of users.²⁴

Interference by the State and Implications on Rights of Individuals

State intervention in online content is also an important consideration while discussing the liability of intermediaries. Section 69 deals with the interception and collection of information in computers in the interest of sovereignty, foreign relations, national security, public order, etc. The Information Technology Rules on Interception and Monitoring of 2009, which establish related procedures and safeguards, also become relevant in this context. Section 69A deals with blocking access to information. There are corresponding rules for this as well. Section 69B moreover pertains to collection and monitoring of traffic for enhancing cyber security. The rules state that an officer must be designated

22 P.R. Advani, "Intermediary Liability in India", ECONOMIC AND POLITICAL WEEKLY, 2013.

23 S. Chopra et al., "An Analysis of Liability of Intermediaries Under Information Technology (Intermediaries Guidelines) 2011", INTERNATIONAL JOURNAL OF MANAGEMENT, IT AND ENGINEERING, 2012.

24 B. Acharya, "Comments on Cyber Cafe Guidelines", <http://cis-india.org/internet-governance/blog/comments-on-the-it-guidelines-for-cyber-cafe-rules-2011> (visited on December 19, 2018).

to handle all these requests and there is no need for obtaining permission before disclosing if the government is seeking disclosure under the law.²⁵

Internet intermediaries play a crucial role in enhancing user experience in practicing their right to free speech and accessing information. States have often tried to extend control over their activities because intermediaries play an unprecedented role in what gets circulated on the internet and in what manner. Intermediaries across the world are now turning into checkpoints for free expression online. They are being subject to increasing compliances by demands of governments and private citizens due to their involvement in infringement of online content and are now being asked to filter content, protect privacy of users, etc.²⁶

It is still undefined to what extent the internet intermediaries will be liable for content that is posted by the users. This is prevalent in developing countries where the growth of internet has been rapid and only recently have policymakers tried to confront these concerns and lay down rules specifying steps they need to take to avoid liability in case of infringing, obscene, defamatory or illegal content posted by users online. Law enforcement agencies have been often criticised for saddling intermediaries with strict obligations with respect to taking down content, retaining data for investigation, etc.²⁷

Most intermediaries, out of fear of prosecution, tend to over comply by taking down content without verifying its authenticity. This creates a chilling effect in case an artist is unable to produce copyright certificates for all their work.²⁸ Intermediaries argue that it is unfeasible for them to police so many users, or look for links that violate copyrights of others; hence they are able to seek recourse to the safe harbour provisions when they are merely acting as forums and if they promptly respond to notices about violations.²⁹

25 See P. Prakash, "Short Note on the IT Amendment Act 2008", <http://cis-india.org/internet-governance/publications/it-act/short-note-on-amendment-act-2008>, (visited on December 19, 2018).

26 Pranesh Prakash: "Invisible Censorship: How the Government Censors Without Being Seen," THE CENTRE FOR INTERNET AND SOCIETY, December 14, 2011, <http://cisindia.org/internet-governance/blog/invisiblecensorship>, (visited on December 19, 2018).

27 C. Arun, "Gatekeeper Liability and Article 19(1)(A) of the Constitution of India", <http://nludelhiac.in/download/2015/events/Chinmayi%20Arun-%20draft%2011.pdf>, (visited on December 15, 2018).

28 Rishabh Dara, "Intermediary Liability in India: Chilling Effects on Free Expression on the Internet", April 10, 2012, <http://cis-india.org/internet-governance/chilling-effects-on-free-expression-on-internet>, (visited on December 15, 2018).

29 P. Mishra and A. Dutta, "Striking a Balance Between Liability of Internet Service Providers of Copyright over the Internet: A Need of the Hour", JOURNAL OF INTERLECTUAL PROPERTY RIGHTS, Vol. 14, July 2009.

Section 81 of the IT Act³⁰ states that nothing under this legislation would restrict any right conferred under the Copyright Act. Hence copyright law will have precedence over Section 79. However, even though the Copyright Act provides immunities for intermediaries, they are limited to digital content which can be stored only and arguably doesn't encompass sale of products. Section 63 and 52 of the copyright when read in conjunction, make infringement or abetment of infringement of copyright work with knowledge an offence.³¹

In 2008, T-series had filed a case against MySpace³² on the grounds that users on social networks had uploaded T-series music illegally. Here the safe harbour provisions were not applied because of the advertisements to the music uploaded and hence the website had modified it, acting beyond its role of merely providing forums. The only solution that MySpace could have used for avoiding liability is that they should have done a proper due diligence and verified that no copyright violation was taking place. Therefore, ultimately, MySpace was held liable.

The idea of intermediary liability forms one of the important aspects of free speech in the digital arena. Being immune to this kind of liability is regarded as an important part for successful exercise of freedom of speech. In case of strict liability, if the intermediary knows that there's a risk of operations shutting down because it is hosting some risky content, it may refuse to host it to avoid the risk of prosecution or it could remove content as soon as it receives a complaint, without checking its veracity either. This not only creates a chilling effect on free expression but also creates a grey area legally, since there is no absolute way to determine when free speech is said to be restricted. Intermediaries thus tend to err on the side of caution. Hence they should be allowed to avail of protections absolving them from liability for content simply being hosted by them, which they do not directly support or promote, in order to mitigate the chilling effect. Though compliance with take down requests is what determines the liability of intermediary, the choice to ascertain the validity of these requests lies with the ISPs. In a study by CIS it was revealed that 6 out of every 7 intermediaries tend to over comply with takedown requests.³³

Websites and Intermediary Liability

What is problematic is that the terms and conditions or user agreements binding users are often not an option that users can avoid if they want to access

30 Section 81 of the Information Technology Act 2000, "Act to have overriding effect: The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

31 A. Padmanabhan, "Give Me My Space and Take Down His", INDIAN JOURNAL OF LAW AND TECHNOLOGY, Vol. 9, 2013.

32 *Super Cassettes Industries Ltd. v. MySpace Inc.* CS (OS) No. 2682/2008 (Delhi HC).

33 <http://hir.harvard.edu/intermediary-liability-and-the-freezing-effects-on-speech-the-indian-predicament/>, (visited on December 18, 2018).

a website, some terms also have multiple user content that authorises websites to share the personal information of users with third parties to expand their business while the user himself or herself may not be in a position to identify who these third parties are; the IT Act deals with the concept of privacy only from a limited point of view, that is, data protection. In case of lack of a data protection law, what recourse can a user take when his information is misused by third parties?³⁴ Validity and recognition of e-contracts and the never ending terms and conditions of websites must also be reconsidered. Since the IT Act provides that electronic contracts cannot be unenforced just on the basis that they were made in an electronic form, it means that the Indian Contract Act, 1872 and all conditions therein will apply to it. It's impossible to check or verify the age of users transacting online. Do these make e-contracts unconscionable? India suffers from a lack of jurisprudence in this area.³⁵

The government has often reminded intermediaries of their duty to disable harmful information and illegal information when they are notified about it.³⁶ Social media platforms are also required to appoint offices to address grievances and the Indian Computer Emergency Response Team (CERT-IN) also collaborates with the social networking websites for disabling the fake accounts.³⁷ Further, the IT rules state that the body corporate collecting information is required to create privacy policies for handling this data. The privacy policy is required to state its practices, kinds of information collected, purpose for which it is used and the circumstances in which the information is disclosed.³⁸

E-commerce websites fall within the definition of intermediaries as per the IT Act.³⁹ Intermediaries are persons who receive, store or transmit electronic records or provide related services. The IT Act exempts intermediary from liability for third party data or links hosted by it. This implies that the websites absolve themselves of liability possibly arising when users click on advertisements and use their services.⁴⁰

34 See "Google Transparency Report", <https://www.google.com/transparencyreport/removals/government/>, (visited on December 18, 2018).

35 Thaker and Ranga, "Indian Digital Economy Needs Clear Laws", <http://www.financialexpress.com/opinion/indian-digital-economy-needs-clear-laws/59626/>, (visited on December 18, 2018).

36 A. Celestine, "Social Media Sites May Face New Challenges in India and Elsewhere", <http://economictimes.indiatimes.com/tech/internet/social-media-sites-may-face-new-challenge-in-india-and-elsewhere/articleshow/11062445.cms?inttarget=no>, (visited on December 18, 2018).

37 CERT-IN Rules 2013, [http://meity.gov.in/sites/upload_files/dit/files/G_S_R%2020%20\(E\)2.pdf](http://meity.gov.in/sites/upload_files/dit/files/G_S_R%2020%20(E)2.pdf), (visited on December 18, 2018).

38 S. Singh and C. Arun, NOC ONLINE INTERMEDIARIES CASE STUDIES SERIES: ONLINE INTERMEDIARIES IN INDIA, 2015.

39 Section 2(1)(w) of the Information Technology (Amendment) Act 2008.

40 *Supra* n. 35.

Since E-commerce companies generally follow a marketplace model that connects buyers and sellers, merely acting as facilitators, their liability is limited to disclaiming liability for product quality, creditworthiness, etc. since the products are sourced from agents which are third parties.⁴¹

Some apps and websites have policies with respect to intermediary liability. For instance, Make My Trip clearly states that the user is availing the service at his own risk and since MMT is only an agent acting for the third party, it will not be liable for the standard of service provided.⁴² In fact Flipkart also states that it will not be responsible for breach or non-performance of contract between buyers and sellers since it is a mere platform to reach more customers.⁴³

Another issue arising in relation to this is whether the online user can be regarded as a consumer.⁴⁴ Though there is no separate law specifically regulating online transactions, the liability under the Consumer Protection Act arises in cases where there is either deficiency in service or unfair trade practice or a defect in goods. The Consumer Protection act excludes free services from its ambit. In *Vinay Narain v. LG Electronics India Pvt Limited*⁴⁵ it was held that online shopping platforms are for facilitating interactions between buyers and sellers for shopping and the intermediary or the website has no duty with respect to the quality of products and the manufacturers are to be responsible for the product since the website performs its duty by allowing returns and replacement for buyers.

In the EU, the European Commission vide its E-Commerce Directive of 2000 introduced a harmonised regime on intermediary liability.⁴⁶ Defences of hosting, caching and absence of obligation to monitor are prevalent even in the EC regulations, 2002 in the UK. It however includes even those service providers who do not charge any fee and held that Google will qualify as an ISP despite being a free search engine.⁴⁷ This rationale, in the opinion of the author, can even apply to making Google liable in the suit for advertisement of sex determination kits where last year, in response to PILs filed against Google and

41 OECD, “*The Economic and Social Role of Internet Intermediaries*”, April 2010, <http://www.oecd.org/sti/ieconomy/44949023.pdf>, (visited on December 18, 2018).

42 See website of Make My Trip at www.makemytrip.com, (visited on December 18, 2018).

43 See www.flipkart.com, (visited on December 18, 2018).

44 *The Role of Internet Intermediaries in Advancing Public Policy Objectives, Forging Partnerships For Advancing Policy Objectives For The Internet Economy*, Part II, DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY COMMITTEE FOR INFORMATION, COMPUTER AND COMMUNICATIONS POLICY, Organisation for Economic Co-operation and Development, June 22, 2011.

45 Case No. 270/2010 of Delhi State Consumer Disputes Redressal Commission.

46 P.A. Baistrochhi, “*Liability of Intermediary Service Providers in The EU Directive On Electronic Commerce*” Santa Clara Computer and High Technology Law Journal 111 (2002)

47 *Metropolitan v. Google* [2009] EWHC 1765 QB.

Yahoo for allegedly displaying sex determination kits' advertisements, the SC acknowledged the need to control publishing matter which went against the law of the land.⁴⁸

In *L'oreal v. eBay*,⁴⁹ the CJEU held that the website operator can lose its defence if it is actively part of an illegal activity or is aware of the circumstances giving rise to the illegal activity.⁵⁰ Hence, certain factors must be considered i.e. extent of control over the data, assistance to promote an online sale taking place illegally, etc.

Conclusion

Those opposing the imposition of liability of intermediaries often say "don't shoot the messenger" since they merely give access.⁵¹ In addition, it is impossible to regulate the vast array of content. Even in *Cubby v. CompuServe*,⁵² it was held that it is impractical for the intermediary to monitor all content and should not be liable if there was no knowledge. Another issue is how the intermediary can be made liable when the host is located in another country. Imposing liability on the intermediary creates a chilling effect and it becomes less likely that they will host content falling into the grey areas of the law. This has further implications on the freedom of speech and trade. More importantly, it is unreasonable to make the intermediary liable if he has no direct involvement in a transaction. In *Zippo Mfg. Co. v. Zippo Dot Com Inc.*,⁵³ while making a distinction between active and passive websites it was held that when websites are not actively participating in transforming information then they should be exempted from liability.

It is seen that the courts are mostly trying to protect intermediaries by having a flexible approach. The Government has attempted to create a framework that balances the rights of the users with the need to protect intermediaries. The safe harbour protections however have not succeeded in achieving the objectives set out because of the huge number of obligations it imposes for matters such as licensing, notice and takedown, etc. and this compels the intermediaries to adopt a cautious strategy which ends up affecting free speech. We need objective rather than subjective standards to assess intermediary liability. Safeguards need to be increased against possible misuse of takedown notices, uncertainty in the

48 See also *Google India Pvt. Ltd. v. M/S Visaka Industries Ltd* Cr. P. No. 7207 of 2009 (Andhra Pradesh HC) where google was under scrutiny for allegations of hosting defamatory content against some politicians and not removing access when notice was sent.

49 C-324/09, Judgement of the Court (Grand Chamber), July 12, 2011.

50 See also *Google Inc. v. Louis Vuitton*, C-236/08, Judgement of the Court (Grand Chamber), March 23, 2010.

51 *Religious Technology Center v. Netcom On-line Communication Services Inc.*, 907 F.Supp.1361(N.D. Cal. 1995).

52 No. 90 Civ. 6571. United States District Court, S.D. New York.

53 952 F Supp 1119 (WD Pa, 1997).

process needs to be reduced, and principles of natural justice need to be incorporated in the procedure for takedown. There is a need to address the problem of the lack of mechanisms to determine if content is unlawful before the intermediary which is required to take it down. Given the delay in having a system to check this, the intermediary can safely take the recourse of following the IT Act and Guidelines strictly and having agreements in place so users do not publish unlawful content. Intermediaries should restrict their role to facilitating publication of content and attempt to work promptly when they need to disable access on being notified it is unlawful.

The author feels that the Manila Principles are wholesome in nature and should form the guiding agents to define intermediary liability in all regimes. As per these guidelines, the law should shield intermediaries from liability in case of third party content. The content should be restricted only by orders from a judicial authority and the request for these restrictions should follow due process, be clear and unambiguous. The orders must also comply with the test of necessity and proportionality. There must be transparency and accountability clearly built into the law.

PERSONS WITH DISABILITIES AND INCLUSIVE EDUCATION IN INDIA: A CRITICAL ANALYSIS (WITH SPECIAL REFERENCE TO HEARING IMPAIRMENT)

Avanika Gupta*

Abstract

Education is essential for development of human ability and potential. Equally important is the system of education especially for the persons with disabilities. Historically, children with disabilities have been denied mainstream educational opportunities. With the rise in human rights issues and the new social movements, the modern welfare state recognized the right to education of the persons with disabilities as well. But the question about the method for imparting education remains unanswered as the most popularly accepted inclusive system of education is still an evolving concept among the disability scholars and policy makers. This article is an attempt to understand the educational needs of the persons with disabilities, specifically the persons with hearing impairment. In doing so, it tries to define the 'most suitable system of education' for the persons with hearing impairment, a model that is based on supported decision making rather than the substitute decision making. It seeks to outline the essential parameters for the same so that the present gaps can be bridged.

Keywords: Education, Inclusive Education, Persons with Disabilities, Persons with Hearing Impairment.

Introduction

Education plays a significant and remedial role in balancing the socio-economic fabric of the Country.¹ The human right to education was first reflected in the United Nations Universal Declaration of Human Rights (UDHR)² and was further elaborated in a range of instruments i.e., "International Covenant on Economic, Social and Cultural Rights" (ICESCR)³,

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1 Ministry of Human Resource and Development, Government of India, <http://mhrd.gov.in/about-mhrd>, (visited on May 7, 2018).

2 According to Article 26 of UDHR, "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit".

3 Article 13 is the most comprehensive article on the right to education. It recognizes the universal right to education without discrimination of any kind and sets forward a framework to achieve the full realization of this right, including: free compulsory primary education, generally available and accessible secondary education by the progressive introduction of free education, equal access to higher education on the basis of capacity, measures to literacy and quality improvement.

“World Declaration on Education for All”⁴, “Convention on the Rights of the Child” (CRC)⁵ and more recently the “Sustainable Development Goals”.⁶

“The United Nations Convention on the Rights of the Persons with Disabilities”⁷ also recognizes the essence of education in overall development of all individuals and hence explicitly dedicates one entire article to education⁸ with various other general ones with disabilities for a long period of time denying the educational opportunities.⁹ The history of the treatment of children with disabilities within the public education system is horrific, until nineteenth century, most individuals with disabilities deprived of education, because they were feared and shunned by.¹⁰ Even today, many children with disabilities are unable to attend schools as only 2 % of children with disabilities have access to any kind of education.¹¹ While discrimination is not intended, the system indirectly excludes with disabilities by not taking their needs into account.¹²

Excluding children with disabilities from educational and employment opportunities has high social and economic costs. For example, adults with disabilities tend to be poorer than those without disabilities, moreover education weakens this association.¹³ The correlation between low educational outcomes and having a disability is often stronger than the correlations between low educational outcome and other characteristics i.e., gender, rural residence, and

4 Article 1 of EFA states that every person – child, youth and adult – should be able to benefit from educational opportunities designed to meet their basic needs.

5 Article 28 of UNCRC states that the “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.”

6 SDG 4 is to ensure ‘inclusive and equitable quality education and promote lifelong learning opportunities for all’.

7 CRPD is a legal disability reform, directly involving people with disabilities using a human rights framework. Its core message is that people with disabilities should not be considered “objects” to be managed but “subjects” deserving of equal respect and enjoyment of human rights.

8 According to Article 24 (1) of UNCRPD, States Parties must ensure the realization of the right of persons with disabilities to education through an inclusive education system at all levels including preschool, primary, secondary, tertiary education, vocational training and lifelong learning, extracurricular and social activities and for all students, including persons with disabilities, without discrimination and on the basis of equal opportunity.

9 Martha Minow, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW*, 1990, pp. 81–86 (discussing education for children with disabilities); Ruth Colher, *WHEN SEPARATE IS EQUAL*, 1st ed. 2009, p.14.

10 Robert L. Osgood, *THE HISTORY OF INCLUSION IN THE UNITED STATES*, 1st ed. 2015, p. 18.

11 National Centre for Promotion of Employment of Disabled People is a cross-disability, non-profit organization working as an interface between the government, industry, internal agencies and the voluntary sector towards the empowerment of the persons with disabilities, <http://www.ncpedp.org/Employment>, (visited on May 8, 2018).

12 World Bank and World Health Organization, *WORLD DISABILITY REPORT*, 2011, p.30.

13 Deon Filmer, “*Disability, Poverty and Schooling in Developing Countries: Result from 14 Household Surveys*”, *THE WORLD BANK ECONOMIC REVIEW*, Vol. 22, No. 1, pp. 141–163.

low economic status.¹⁴ Thus, education is the tool for development, especially for the persons with disabilities. The type of impairment also affects the enrolment rates in school as the children with physical impairment generally fare better than those with intellectual or sensory impairments like the children with hearing impairment.

One of the most important reasons for this deprivation is lack of consensus among the disability scholars and the policy makers about the parameters which are necessary for formulating a suitable method for imparting education to the persons with disabilities. It is a common saying that how you learn depends a lot on where you learn! Hence the system of learning is crucial for overall development of an individual.

Systems of Imparting Education

- ***Segregated Education***

The mode of education based on the separation or isolation of a race, class, or ethnic group by enforced or voluntary residence in a restricted area, by barriers to social intercourse, by separate educational or by other discriminatory means can be broadly described as segregated education.¹⁵ In this system an individual is separated from the mainstream education system because of his/her perceived inability. Based on the medical model of disability, it identifies the child with impairment as the problem in the system, hence focuses on different curriculum, assessment methods, teaching methods and curricular activities. This was the traditional system of education for the persons with disabilities.

Many disability rights scholars have opined that segregated education results in inferior educational outcomes for the persons with disabilities. They argue that this system of education is in the interests of the able bodied policy makers, teachers and persons rather than persons with disabilities. Thus, they justified educational segregation as a means to benefit the normal persons by removing disruptive elements.¹⁶ This led to the development of integrated educational policies for the persons with disabilities.

- ***Integrated Education***

Integration is the process of placing persons with disabilities in existing mainstream educational institutions with the understanding that they can adjust to the standardized requirements of such institutions.¹⁷ In India, this system was

14 *Ibid.*

15 *Supra* n.12, p. 208.

16 Ruth Colher, *WHEN SEPARATE IS UNEQUAL*, 1st ed. 2009, p.27.

17 *See A/HRC/25/29 and Corr. 1, para. 4; see also United Nations Children's Fund, THE RIGHT OF CHILDREN WITH DISABILITIES TO EDUCATION: A RIGHTS-BASED APPROACH TO INCLUSIVE EDUCATION*, 2012.

formally introduced in 1974 with the formulation of the 'Integrated Education for Disabled Children Scheme' (IEDC). The World Declaration on 'Education for All' which was adopted in 1990 gave further boost to integrated education in India. Till date it is the most prevalent system of education for the persons with disabilities, especially persons with hearing impairment. It is regarded as less expensive than the segregated model of schooling as the infrastructure for all the persons remain same.

Major criticism of this method of imparting education is that it fails to accommodate the needs of the persons with disabilities. This model neglects the essence of the Disability Rights Movement that the people with disabilities have right to equal opportunities on an equal basis with others.¹⁸ This notion of 'equality with others' requires the authorities to make the required changes in the curriculum, school buildings, assessment procedures, staffing, school ethos and the extra-curricular activities. But no such change was made in the integrated system of education making it clear that integration is not inclusion.¹⁹ Thus, while trying to be a step closer to inclusion, this system seems a step closer to the segregated mode of education.

- ***Special Needs Education***

The category of education covered by the terms special needs education, special education needs and special education is broader than education of the children with disabilities, because it includes children with other needs as well. For example, through disadvantages resulting from gender, ethnicity, poverty, war trauma or orphanhood.²⁰ This system thus accepts the fact that every child has unique characteristics, interests, abilities and learning needs and affirms that without accepting these fundamental notions true development of a child is impossible.

Different needs of different persons are taken care of in this system of education. It is based on homogenous groups of persons with perceived same needs. Many scholars believe that this mode of education strengthens the solidarity among the persons which prepares them for the world which is different from their own. It emphasizes that people with disabilities are a form of human diversity and should be respected as same rather than being treated as objects of charity.

Despite its merits, this system of education has its own cons as the word 'special' has long been recognized by the Disability Rights community as a way

18 Article 12 of the UNCRPD reaffirms that the States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

19 *Supra* n. 16., p. 35.

20 Organization for Economic Co-operation and Development, *STUDENTS WITH DISABILITIES, LEARNING DIFFICULTIES AND DISADVANTAGES: POLICIES, STATISTICS AND INDICATORS*, 2007.

of stigmatizing accommodations, and retaining a flavour of segregation for facilities that are designed to integrate people with different functional abilities.²¹ Though this system accepts the needs of various marginalized groups, it is based primarily on the concept of anti-subordination.²²

Thus, special needs education system concentrates on ending the malice of subordination rather than simply assuming integration and substantive equality as the two sides of same coin.

- ***Inclusive Education***

According to the Rights of the Persons with Disability Act²³, Inclusive Education means “a system of education wherein persons with and without disability learn together and the system of teaching and learning is suitably adapted to meet the learning needs of different types of persons with disabilities”. It is thus modification of the integrated system of education. It involves change in the mainstream education system with respect to curriculum, assessment methods and the teaching methods with the diverse needs of all the persons irrespective of their impairment or any other difference. Inclusive Education is meant to make schools as centers of learning and educational systems as caring, nurturing, and supportive educational communities where the needs of all persons with different abilities can be catered.²⁴ This system is considered to have good features of both the integrated as well as the segregated models of education.

UNCRPD, UNESCO’s the Salamanca Statement and Framework for Action on Special Needs Education²⁵, The Dakar Framework for Action²⁶ as well as the Indian Rights of Persons with Disabilities Act²⁷ encourages governments to adopt inclusive education as one of the main strategies to address the marginalization and exclusion of the children/learners with disabilities. Even

21 Ron Amundson and Shari Treky, “Bioethics and Disability Rights: Conflicting Values and Perspectives”, *BIO ETHICAL ENQUIRY*, Vol. 5, 2008, p. 120.

22 An anti-subordination perspective does not accept the premise that “separate is inherently unequal” because it recognizes an important role for gender-specific and race-specific policies in our society as a means of helping create substantive equality.

23 The Rights of Persons with Disability Act 2016 received assent of the President on December 27, 2016. This Act gives effect to the provisions of the UNCRPD and for the matters connected therewith or incidental thereto.

24 Dowlath Khan, “A Comparative Study of Hearing Impaired Students Studying in Integrated and Special School” PUBLISHED PH.D. THESIS, SRI VENKATESHWAR UNIVERSITY, 2006, p. 24.

25 More than 300 participants representing 92 governments and 25 international organisations met in Salamanca in 1994 to further the objective of Education for All by considering the fundamental policy shifts required to promote the approach of inclusive education, namely enabling schools to serve all children, particularly those with special educational needs.

26 UNESCO World Education Forum, *THE DAKAR FRAMEWORK FOR ACTION: EDUCATION FOR ALL – MEETING OUR COLLECTIVE COMMITMENTS*, 2000.

27 *Supra* n. 23.

the Right to Education Act²⁸ and the recent Ministry of Human Resource and Development Guidelines²⁹ support this system on education for all Indian persons.

Nexus between Education and Disability for Hearing Impaired Persons

There are no universally agreed definitions for such concepts as special needs education and inclusive education.³⁰ Thus, it is difficult to understand the needs of the children with disabilities because of differences in definitions, classifications, and categorizations.³¹ Definitions and methods for measuring disability vary across countries based on assumptions about the human differences and disabilities and the importance given to the different aspects of disability – impairments³², activity limitations³³ and participation restriction³⁴, related health condition and environmental factors. A debate about the benefits of integrated mode of education versus the segregated mode began to develop within the disability community in the 1940s and 1950s. In 1945, the International Council for Exceptional Children held a panel entitled “Segregation versus Non-Segregation of Exceptional Children.”³⁵

Almost all the International and National legislations promote mainstreaming and inclusive education for the children with disabilities. But, the Deaf persons argue that mainstreaming is not always a positive experience.³⁶ Even the World Federation of the Deaf³⁷ (WFD) argues that often the best environment for academic and social development for a Deaf child is a school where both persons and teachers use sign language for all

28 The Right of Children to Free and Compulsory Education Act 2009 provides free and compulsory education to all children in the age group of 6-14 years.

29 Inclusive Education of the Disabled at Secondary Stage (IEDSS) provides assistance for the inclusive education of the disabled children in classes IX-XII. Since 2013, it has been subsumed under the Rashtriya Madhyamik Shiksha Abhiyan (RMSA).

30 *Supra* n. 12, p. 209.

31 L. Florian et al. “*Cross-Cultural Perspectives on the Classification of Children with Disabilities: Part I Issues in the Classification of Children with Disabilities*” THE JOURNAL OF SPECIAL EDUCATION, Vol. 40, 2006, doi:10.1177/00224669060400010401.

32 According to the World Health Organization, International Classification Functioning, Disability and Health Model, impairment is an organ malfunction.

33 According to the World Health Organization, International Classification Functioning, Disability and Health Model, activity limitation is dependent on disability. It is based on the medical model of disability.

34 According to the World Health Organization, International Classification Functioning, Disability and Health Model, participation restriction is the process because of which an individual is unable to participate in the society because of the barriers imposed on that individual by the society and not vice versa.

35 *Supra* n. 16, p. 56.

36 Susan Foster and Greg Emerton, “*Mainstreaming the Deaf Student- A Blessing or a Curse?*”, JOURNAL OF DISABILITY POLICY STUDIES, Vol. 2, 1991.

37 The World Federation of the Deaf is an international non-profit and non-governmental organization of deaf associations from 133 countries. It has consultative status with United Nations.

communication. They state that attending regular schools (mainstream schools), without meaningful interaction with classmates and professionals, would exclude the Deaf learners from education as well as the society. Thus the Federation promotes special schools instead of inclusive education as mainstream education seems a fatal blow for the deaf community. Sign language is dependent on the interaction among the deaf people and inclusive education without proper implementation violates this human right of the persons with hearing impairment.

UNESCO claims that Inclusive schools can change attitudes towards those who are in some way different by educating all children together which will help in creating a just society without any discrimination. But many children with hearing impairment, who had gained some academic advantage in mainstream education, had a sense of self suffering.³⁸ Education in special schools would have given them a sense of belonging which would have made them more confident and at par with the Hearing world. Special schools provide persons with Hearing Impairment not only the will of steel but also someone who can provide that steel in difficult times.

Inclusive schools also try to instil internalized ableism³⁹ in persons with hearing impairment. From the moment a child is born, he/she/zhe⁴⁰ starts receiving messages that to be disabled is to be less with respect to something. Although this something is negative in nature, it is rarely defined. Consequently, the child learns that he/she/zhe is part of a world where disability may be tolerated but in the final instance, is inherently negative. This either results in dispersion⁴¹ where they try to isolate themselves from the cruel world including the ones with similar conditions or results in defensive othering.⁴² These principles create a lot of psychological stress for the persons with disabilities, especially persons with hearing impairment.

38 Sulantari Rahatjo, "Hearing Impairment: Invisible Disability", J. Suzuki, et al. (eds.), HEARING IMPAIRMENT AN INVISIBLE DISABILITY HOW YOU CAN LIVE WITH A HEARING IMPAIRMENT, 1st ed. 2004, p.16.

39 Concept developed by Fiona Campbell states that Instead of embracing disability at the level of beingness (i.e. as an intrinsic part of the person's Self), the processes of ableism, like those of racism, induce an internalization or self-loathing which devalues disablement. CONTOURS OF ABLEISM, 1st ed. 2009, p. 20.

40 Pronoun used for the transgender.

41 The greater the number, severity, and/or variety of deviances or stigmata of an individual person, or the greater number of deviant/stigmatized persons there are in a group, the more impactful it is to: (a) reduce one or few of the individual stigmata within the group, (b) reduce the proportion or number of deviant people in the group, or (c) balance (compensate for) the stigmata or deviances by the presence, or addition, of positively valued manifestations as mentioned in *supra* n. 39, p. 23.

42 Defensive Othering occurs when the marginalised person attempts to emulate the hegemonic norm, whiteness or ableism, and assumes the 'legitimacy of a devalued identity imposed by the dominant group, but then saying, in effect, "there are indeed Others to whom this applies, but it does not apply to me"', *ibid*, p. 24.

Distance has always been an issue with the special schools. As in the earlier days residential special schools were the only option for the persons with hearing impairment, their families had no option but to give up their child to the school at the tender age of 3 or 4, only seeing the child at holidays and during summer.⁴³ These special schools were miles away from the residential area and coupled with the less time spent with the biological family resulted in the children with hearing impairments finding surrogate family within the institution. This made these persons more reluctant to visit homes at the end of the semester which further distanced them not only from their families but also from the hearing world as a whole.

With proclamation of the right to education⁴⁴ as the fundamental right⁴⁵ in the Indian Constitution inclusive education seemed the better way for ensuring educational opportunities to the children with hearing disabilities. The right ensured that all persons irrespective of their social, economic, cultural, linguist, mental, sensory or physical background can attend schools in their vicinity. It also enables the out-of- school children belonging to the disadvantaged communities like scheduled castes, scheduled tribes, Muslim minorities, migrants, children with special needs, urban deprived children, working children, children in difficult circumstances, for example, those living in difficult terrain, children from displaced families, and areas affected by civil strife, etc. to be admitted to an age appropriate class and complete elementary education.⁴⁶ Thus, this right popularized inclusive education as is easy to establish mainstream schools with standard infrastructure, curriculum and teaching methods and with specific changes to accommodate persons with special needs including the persons with hearing impairment.

Special schools are considered more expensive than the mainstream schools.⁴⁷ Regular schools have more or less same infrastructure, curriculum, teaching methods, academic calendar as well as extra -curricular activities. All these factors contribute a big change financially in the continuance of the special schools. Although there is still a debate among the disability scholars that the special schools seem a costly affair because the inclusive schools are not inclusive in true sense of the word. If inclusive schools practice what they intend to do, their expenses would have been much more than the special schools. Persons with hearing impairment face discrimination even further because of financial crunch. UNCRPD, RPWD Act, RTE Act as well as the

43 *Supra* n. 36, p. 64.

44 *Supra*. n. 28.

45 Article 21(a) of the Indian Constitution.

46 Ministry of Human Resource and Development, “*Right to Education Act*”, mhrd.gov.in/sites/upload_files/mhrd/files/.../RTE_Section_wise_rationale_rev_0.pdf, (visited on May 9, 2018).

47 *Supra* n. 12, p. 254.

recently launched Accessible India Campaign⁴⁸ state that the infrastructure of schools for persons with disabilities should be barrier free. Accordingly, most of the public buildings have constructed ramps for accessibility for the persons with locomotive impairments and visual impairment respectively. But no such provision has been made for educating the common man as well as persons with hearing impairment with the Indian Sign Language.

Without sign language it is difficult for the persons with hearing impairment to sustain in mainstream schools. Most of their concentration is on trying to decipher what the teacher is saying. This leaves a very less scope for them to understand the concepts discussed in the class. This makes anxious parents to withdraw their kids from the schools imparting inclusive education and become special educators themselves. Most of the sign language trainers and audiologist thus have a personal connection with their chosen field or had to be part of these professions because of family history.

Educational Barriers for Hearing Impaired Persons

• *Division in Ministries*

The Department of School Education and Literacy in the Ministry of Human Resource and Development, Government of India is responsible for the universalisation of education in the country.⁴⁹ But the important institutions responsible for providing education to the persons with disabilities work (although as autonomous organizations) under the Ministry of Social Justice and Empowerment. Institutions like the Rehabilitation Council of India⁵⁰, Ali Yavar Jung National Institute for Hearing Handicapped⁵¹ are under the aegis of the Department of Empowerment of persons with Disabilities (Diyangjan)⁵².

The category of special schools thus falls under the responsibility of the Ministry of Social Justice and Empowerment while the responsibility of literacy of all children and development of their school education lies with the Ministry of Social Justice and Empowerment.

48 Accessible India Campaign (AIC) is the nationwide flagship campaign of the Department of Empowerment of Persons with Disabilities (DEPwD) and Ministry of Social Justice and Empowerment. The aim of the Campaign is to make a barrier free and conducive environment for *Divyangjans* all over the country, according to the Press India Bureau.

49 Ministry of Human Resource and Development, Government of India, <http://mhrd.gov.in/about-mhrd>, (visited on May 8, 2018).

50 The Rehabilitation Council of India (RCI) is a statutory body whose mandate is to regulate and monitor services given to persons with disability and to standardise syllabi, <http://rehabcouncil.nic.in/> (visited on May 8, 2018).

51 It is an autonomous organization under the Department of Empowerment of Persons with Disabilities (*Divyangjan*) and Ministry of Social Justice and Empowerment, Government of India, New Delhi.

52 *Ibid.*

This further deprives persons with disabilities in general and the persons with hearing impairment in particular their right to educational opportunities. This division reflects the cultural perception that children with disabilities are in need of welfare rather than equality of opportunity⁵³. This is not only against the social model of disability⁵⁴ but also against the human rights framework of the UNCRPD. It tends to further segregate persons with hearing impairment, shifting the focus from education and achieving socio-economic inclusion to social isolation.

- ***Inadequate Resources***

For a developing country like India, resources are always an issue of concern and the graver issue is distribution of those resources in just and equitable manner. India spends less than three percent of its GDP in the education sector⁵⁵ and less than that in the health sector. With the prevalence of charity as well as the medical model of disability, it is difficult for persons with disabilities, especially persons with invisible disability to have adequate resources. Many international instruments direct the State to take measures to ensure accessibility to all the persons with disabilities. But resource crunch not only hinders the State's responsibility of ensuring this accommodation but also makes it difficult for the State to invest in various research programs which can help it to understand the needs of the with disabilities and make rehabilitation policies for them accordingly.

- ***School problems***

In most of the Indian schools, focus is on the academic achievement instead of the individual progress. This further restricts the educational dreams of the persons with disabilities. One of the gravest problems faced by the persons with hearing impairment is that half of their concentration is on trying to understand what the teacher is saying. This leaves a very less scope for them to understand the concepts discussed in the class.

Usually in integrated schools, curricula and teaching methods are rigid and there are inadequate teaching materials for example, where information is not delivered in the most appropriate mode such as sign language and teaching materials are not available in alternative formats such as Braille – children with

53 World Bank, *PEOPLE WITH DISABILITIES IN INDIA: FROM COMMITMENTS TO OUTCOMES*, Human Development Unit, South Asia, 2009.

54 This model of disability states that an individual is merely impaired while the society makes person disabled or handicapped.

55 Express News Service, "*Economic Survey: Government spending on education less than 3% of GDP*", INDIAN EXPRESS, January 31, 2018 <http://indianexpress.com/article/education/economic-survey-government-spending-on-education-less-than-3-per-cent-of-gdp-5045498/>, (visited on May 3, 2018).

disabilities are at increased risk of exclusion⁵⁶. Hence flexible approaches to education are needed where the diverse needs of all the persons can be addressed

- ***Inadequate Training and Support for Teachers***

Working conditions of special educators are not conducive. Rather some schools have no teachers at all. It is a common observation that in mainstream educational institutions teachers employed for special education are not treated with same dignity as the other teachers.

Indian Sign Language (ISL) is a Human Right of Deaf.⁵⁷ But in a linguistically diverse country like India it is difficult to maintain a uniform sign language hence teacher training programs are unable to orient teachers towards teaching methods that use ISL. There is hardly any teaching material that incorporates the sign language. Progress in the sign language of one region hence cannot be shared with another as one action can have different interpretations in different regions. This lack of consolidation of data further limits the scope of research and development of new teaching techniques for the persons with hearing impairment. Furthermore, due to lack of awareness there are very few trainers and interpreters in India.⁵⁸

- ***Attitudinal Barriers***

Despite acceptance of the Human Rights framework and the social model of disability, the with disabilities are still seen as the objects of charity and welfare rather individuals with right to dignity. Even today a large section of society believes that people are born with disabilities or acquire disabilities because of their past deeds.⁵⁹ It is although very ironic in nature because the same set of people believe that serving persons with disabilities would help them rectifying their past life deeds and would give them a good life in their next birth. This behaviour makes persons with disabilities subject to contempt. Many abled people sympathize with persons with disabilities. Sadly, persons with hearing impairment are usually rebuked because of their invisible disability.

Generally, most of the individuals do not even consider hearing impairment a disability. Since persons with hearing impairment look healthy and vigorous,

56 United Nations Educational, Scientific and Cultural Organization, POLICY GUIDELINES ON INCLUSION IN EDUCATION, 2009.

57 Indian Sign Language Research and Training Centre, Department of Empowerment of Persons with Disabilities (*Divyangjan*), and Ministry of Social Justice and Empowerment, Government of India, <http://205.147.97.190/islrtcapp/history-0>, (visited on May 8, 2018).

58 According to the official ISLRTC website, ISL interpreters are an urgent requirement at institutes and places where communication between deaf and hearing people takes place but India has less than 300 certified interpreters.

59 Philip O'Keefe, "People with Disabilities in India: From Commitments to Outcomes", World Bank, 2007, <http://documents.worldbank.org/curated/en/358151468268839622/People-with-disabilities-in-Indiafrom-commitments-to-outcomes>, (visited on May 5, 2018).

they have difficulty convincing most people that they have a problem. The reason for this is that many people associate disability with something that is 'visible' therefore do not consider hearing loss to be a serious disability. But hearing loss cannot be seen and therefore such people dismiss it and label hard of hearing people as inattentive, inconsiderate and even deliberately rude for not understanding what they are told by the people around them. This unfair attitude further isolates the persons with hearing impairment.

Suggestions to Address Educational Issues and Challenges

For the Policy makers

- *Support Decision Making Model:* Most of the decisions for the educational needs of the persons with disabilities are taken by the abled bodied policy makers. This method of substitution decision making must be replaced. Disability scholars often claim 'Nothing about us, without us'.
- *Create Awareness/ Accurate Knowledge About Persons with Hearing Impairment:* Lack of information about the needs of the persons with hearing impairment results in their marginalization in society. Awareness regarding the Deaf culture, their contribution to society, more research on their problems would certainly be beneficial for all. Awareness about the hearing aid devices as well as funding for low budget hearing aid devices is an important step which needs to be taken by the policy makers.

For the Able Bodied

- *Attitudinal/Behavioral Change:* The gap between policy formulation and implementation can be narrowed with the changed perception and positive attitude towards the persons with hearing impairment at large. People should understand that persons with hearing impairment lip read so instead of talking loudly or shouting at them (which is the usual perception) people should speak slowly while facing them. These small changes can bring a huge change in the day to day activities of the persons with hearing impairment. They can thus feel more included part of the society. If this long term change occurs, then surely we can have a substantive and inclusive democracy in true sense.

For Persons with Disabilities

- *Greater Political Representation:* There is not a single political party in India, which is solely represented by the persons with disabilities. Expressing views is an important aspect of the support based decision making in the education system. This would make our democracy inclusive in true sense of the word.

- *Faith in Changing Times:* From being treated as objects of charity, persons with disabilities are now recognized as the important contributors of the society. Although a lot more needs to be done, it is a good start that the first human right convention of the millennium was the Convention on the Rights of the Persons with Disabilities.

For Health Professionals

- *Educating Masses:* Along with the routine workshops on the causes of hearing loss, the health professionals can educate the people about the risk of hearing loss. Many people associate disability with something that is 'visible' therefore do not consider hearing loss to be a serious disability.⁶⁰ It is the general tendency of people to overlook their hearing problems so the health professionals must ensure that people are made aware of the gravity of this issue.
- *Promoting Use of Hearing Devices:* Hearing aids are considered as stigma by a large section of society. But the health professionals must encourage persons with hearing impairment to use hearing devices and aids if it can be beneficial. They should also be part of as many screening camps as possible.

Civil Society

- *Disability is not Inability but a Form of Human Diversity:* Support those in the community who use the sign language and hearing devices. Accept the diversity of the persons with hearing impairment rather than their defectiveness. Disseminate awareness and behavioural change campaigns with the help of disability rights experts as well as media. Recognizing each other's needs and collectively helping one another, we can indeed make our world more inclusive and equitable.

Conclusion

Most of the problems regarding the suitable system for imparting education to persons with disabilities and especially the persons with hearing impairment stems from the fact that they are not fairly represented in the policy making. The supported model of decision making is the only model which will result in true development of the persons with disabilities. Both the process and outcome must comply. Educational needs should be assessed from the perspective of what is best for the individual and the available financial and human resources within the specific country. Thus, there can be no universal model of best education for the children with disabilities in general and hearing disability in

60 Charles A. Laszlo, "Acceptance and Adaptation - a Personal Journey", J. Suzuki et al. (eds.), HEARING IMPAIRMENT AN INVISIBLE DISABILITY HOW YOU CAN LIVE WITH A HEARING IMPAIRMENT, 1st ed. 2004, p. 79.

particular. Inclusive education seems the most appropriate method of education only if it is properly defined according to the specific needs of the specific impairments.

Parameters like specific curriculum, teaching methods, accessing tools as well as extra-curricular activities must be developed for the persons with hearing impairment. Only then education would be able to make our world more inclusive and equitable. After all, persons with hearing impairment also have a right to be heard.

ISSUES AND CHALLENGES RELATING TO GIRL-CHILD: INTERNATIONAL DELIBERATIONS AND DISCOURSE

Nitu Kumari*

Abstract

Children were believed to be the private property of the parents and hardly treated as someone possessing rights. Girl-child, on the basis of sexism and tender age, faces more difficulties and have many peculiar challenges. There is no official and international definition or description of girl-child, and no international binding convention specifies the status of girl-child. In addition, there is no separate definition of girl-child in the legal context and girl-child counts as sub-set of children category under the age of 18 years. With these peculiar problems, she needs a more and immediate attention of world community. This article analyses the girl-child issue and how it came at international floor. What are the international norms and standards formulated by different states, organizations, and international deliberations? It concludes with the remarks on paper and practice differences between redressal and rehabilitation approach to girl-child issues.

Keywords: Girl-Child, International Community, Challenges to Girl Child, Standard and Guidelines, Health, Education, Protection and Redressal.

Introduction

All the laws, policies and programs for children have generally been made by the adult members with the explanation that children were incapable of deciding their own fate because of innocence and immaturity.¹ However, the international community through various discussions and declarations i.e. Geneva Declaration 1924, Universal Declaration of Human Rights (1948), UN Declaration of Rights of Child 1959, recognized the need to promote child care. They also emphasized the need for protection of children but did not talk about the rights of children. Gradually various studies and reports raised the importance of rights of children to be involved in the decision and policy making which affect them. Thus, this belief led to the recognition of child as right holder and formulation of the United Nations Convention on the Rights of Child (UNCRC) 1989, which postulates certain rights to the children including the right to participate in the decision making process affecting them. According to Article 12(1) of the UNCRC 1989, “States Parties shall assure to the child

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1 Glenda Mac Naughton et al., “Early Childhood Professionals and Children’s Rights: Tensions and Possibilities Around the United Nations General Comment No. 7 on Children’s Rights”, INTERNATIONAL JOURNAL OF EARLY YEARS EDUCATION, Vol. 15, No. 2, 2007, pp. 161-170.

who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”²

With the initial support of 192 states, the UNCRC 1989 became a landmark achievement for children rights. Few states such as Somalia and the U.S., are not signatories to this convention. The impact of this child rights orientation was highly significant. In 1990 based on the initiative by UNICEF, World Summit for Children was held in New York and a European Convention on the Exercise of Children’s Rights held in 1996. These summits were held to emphasise the importance of child rights.³ United Nations and various countries across the world along with numerous NGOs have raised the issues of child rights and tried to counter the challenges faced by children globally.

There were a number of controversies regarding the definition of child; some suggested that the individual below the age of 14 years to be considered as the child, while others regarded it up to the age of 18 years. In natural terms, childhood is the period of life from birth to adolescence or teenage period. Technically, the term “Child” was defined for the first time in the process of the formulation of the Child Labour Prohibition Act by International Labour Organization (ILO). ILO identifies child as a person appropriate till the age of completion of their compulsory education, and adulthood as the period when s/he enters the world of work.⁴ Although it does not clearly mention the age of compulsory education but ILO’s International Program on the Elimination of Child Labour (IPEC) states that under the age of 14 years.⁵ According to The Child Labour (Prohibition and Regulation) Act, 1986, employment is prohibited for children below the age of 14 years. The ILO Report of 2010 also states that child labour means that a child under the age of 15 engaged in work that poses threat to its health, safety or moral development and is a subject of forced labour.⁶

According to United Nations Office on Drugs and Crime (UNODC), “Child victims or witness means every person under the age of 18 years should be

2 “Convention on the Rights of the Child, 1989: Adopted and Opened for Signature, Ratification and Accession by UN General Assembly Resolution 44/25”, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, (visited on December 29, 2018).

3 Philip Alston and John Tobin, LAYING THE FOUNDATIONS FOR CHILDREN’S RIGHTS: AN INDEPENDENT STUDY OF SOME KEY LEGAL AND INSTITUTIONAL ASPECTS OF THE IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD, 2005.

4 Tatek Abebe and Sharon Bessell, “Dominant Discourses, Debates and Silences on Child Labour in Africa and Asia”, THIRD WORLD QUARTERLY, Vol. 32, No. 4, 2011, pp. 765-786.

5 Eric V. Edmonds, “Defining Child Labour: A Review of the Definitions of Child Labour in Policy Research”, INTERNATIONAL PROGRAMME ON THE ELIMINATION OF CHILD LABOUR, 2009.

6 Michael Wyness, “Global Standards and Deficit Childhoods: The Contested Meaning of Children’s Participation”, CHILDREN’S GEOGRAPHIES, Vol. 11, No. 3, 2013, pp. 340-353.

treated as a child, irrespective of his or her role.”⁷ According to Article 1 of the UNCRC, a human being under the age of 18 years is considered a child unless under the law applicable to the child, majority is attained earlier. It is to be noted that one of the most frequently used definitions for the age of child by the world community is provided by the Coalition to Stop the Use of Child Soldiers. It has defined child as below the age of 18 years. According to this definition, child below 18 years is prohibited from recruitment into armed forces.⁸ According to the United Nations Protocol to Prevent, Suppress and Punishment Trafficking in Persons, Especially Women and Children (also known as Palermo Protocol, 2000), stated that “child shall mean any person under eighteen years of age.”

This article is an attempt to discuss various issues and challenges faced by children in general as well as girl-child in particular. It goes on to analyse how child has become an international issue and the norms and standards that have been formulated internationally for the welfare of girl-child. Further, the author examines different kinds of mechanism that are in place to monitor the compliance to these norms and standards for the treatment of girl-child.

Challenges Faced by Children Globally

Children are vulnerable and easily victimised because they are unable to protect themselves. During wars, natural disasters, economic crisis, other man-made or natural tragedies adversely affect all human beings, but their impact on children is considerably more. As children are vulnerable and easy targets.⁹ Children, who experience these difficulties also deprive from other basic facilities i.e., education, home, adequate sheltering in refugee camps etc. During 1990s, a series of national and international armed conflicts, ethnic cleansing and terrorism continued to plague in many parts of the world. Child labour, child trafficking, and other forms of exploitation are some of the hazards which affect their education, health and wellbeing. Exploitation and violence are generally faced by children in different forms i.e., mental exploitation (abuses, trauma, pressure etc.) or physical exploitation (forced sexual activities, violence etc.), from which they are unable to defend themselves.

As all individuals must have faced different challenges in their childhood because they were unable to defend themselves and easily victimised by others. These challenges escalate further for the girl-child being more vulnerable and subject to greater exploitation because of gender. Due to these challenges on the basis of tender age and sexism, girl-child has been subject of deliberation and discourse of world community.

7 “*Handbook on Effective Prosecution Responses to Violence Against Women and Girls*”, CRIMINAL JUSTICE HANDBOOK SERIES, UNODC, 2010.

8 J. Marshall Beier, “*Children, Childhoods, and Security Studies: An Introduction*”, CRITICAL STUDIES ON SECURITY, Vol. 3, No. 1, 2015, pp.1-13.

9 Onora O'Neill, “*Children's Rights and Children's Lives*”, ETHICS: AN INTERNATIONAL JOURNAL OF SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY, Vol. 98, No. 3, 1988, pp. 445-463.

International Issue Relating Girl-child

After the long battle, both at the regional and international level, girl-child got an independent identification and it became an international issue, separate from that of children in general. There were various situations occurring all over the world which drew the attention on girl-child issue. There was increased violation of human rights against women and girl-child in particular, in times of armed conflict women and girl-child faced many atrocities i.e., systematic rape, forced pregnancy and forced abortion, in particular under the policies of ethnic cleansing.¹⁰

There were many regional and international attempts to internationalize the girl-child related issues. Governments and non-government organisations conducted a range of projects and programs to identify the issues and challenges of girl-child and highlighted various atrocities and hidden violence against them. The international recognition of violence against girl-child and women is also considered as infringement of human rights. This is the result of years of devoted campaigning by women-rights activists and survivors of violence.¹¹

'The Convention on the Elimination of All Forms of Discrimination Against Women' (CEDAW) was adopted in 1979 by UN General Assembly for protection of women rights. These rights provided limited references regarding the girl-child and mainly addressed women's issues. However, it helped in building a platform for deliberations on girl-child rights related issues. After fifteen years of CEDAW, in mid 1990s UNICEF and UNIFEM did attempt to extend CEDAW's mandate by separating women and girls' rights by emphasizing that the rights of today's girl is the rights of tomorrow's women.¹² Both organizations stress that without empowering girl-child, the empowerment of women is inadequate.

The Convention on the Rights of the Child, 1989 (CRC) did not recognize girl-child separately. It states the equality among children without differentiating among them on grounds of sex, social background and ethnicity. This convention promotes the equal opportunity for all without any discrimination and supports the needs of the girl by encouraging equality. Consequently, the tendency to see female child equal with male-child has gained some strength.

UNICEF Board recommended in the 1990s that its programs and strategy for a decade should clearly address the status and needs of the girl-child and suggested that further work should continue in the following years. UNICEF highlighted that gender-related discrimination against girls exists in most

10 United Nations, "Report of the Fourth World Conference on Women", 1996, <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>.

11 Anna von Roenne, "Generation Dialogue about FGM and HIV/AIDS: Method, Experiences in the Field and Impact Assessment", 2005.

12 Elisabeth J. Croll, "From the Girl Child to Girls' Rights", THIRD WORLD QUARTERLY, Vol. 27, No. 7, 2006, pp. 1285-1297.

societies in the form of their customs. South Asian Association for Regional Co-operation (SAARC) also draws attention to girl-child and designated the 1990s as 'Decade for the Girl-child.' It dedicated its research initiatives to identify problems of the Girl-child.¹³ It highlights those problems which are generally faced by girl-child. UNICEF and SAARC's efforts have contributed positively in raising the girl-child subject in Beijing Conference in 1995. India is among the first group of countries along with others from Africa to recognize the 'girl-child' as the centre of attention for improving the socio-economic status of women.¹⁴

These attempts make girl-child issue as the international issue, but it is not sufficient. Girl-child is yet to get the adequate attention of international community; it requires more attention for international recognition. The recognition conferred to girl-child in Beijing Conference held in 1995 enumerated that the "girl-child of today is the woman of tomorrow." Committed effort with skills and innovative ideas are necessary to solve the problem of girl-child towards attainment of the goal of equality, development and peace of any country. In the Fourth UN conference for Women held in Beijing in 1995, the girl-child occupied her own space on an international agenda. This conference highlights the human rights of women and girl-child and takes effective actions against the violations of these rights. The Conference reaffirmed that "the world conference on human rights recognized women and girl-child as an inalienable, integral and invisible part of universal human rights."¹⁵

The Millennium Development Goals (MDG's) adopted in September 2000 wherein 189 member states of United Nations adopted this Declaration. It includes commitments and targets to work together for poverty eradication, gender equality, development and the protection of the environment.¹⁶ These goals are pushing the issues of gender equality at international level while helping in promoting girl-child rights. It provides a platform where the issue of women and girls seeks international attention. The gender equality has become achievable with such international cooperation. The third goal of MDG is to Promote Gender Equality and Empowerment of Women addressing Gender Disparity and promoting the rights of girl-child. These goals are interlinked with Universal Education, Gender Equality, Maternal health and all are correlated to women and girl-child empowerment.¹⁷

Many Non-Governmental Organizations (NGO's) actively participate in resolving girl-child issues and also play a vital role in taking this issue at international level. They worked for achieving the standards and norms to achieve gender equality. Many NGOs represented in Annual Sessions of

13 *Ibid.*

14 Sarala Gopalan and Vijay Bhaskar, "Response of the Government to the Problems of the Girl Child", WOMEN'S LINK, Vol. 4, No. 3, 1998, pp. 2-4.

15 *Supra* n. 10.

16 Bonnie Kettle, "Challenging the Margin: Gender Equality and the UN Reform Process", THIRD WORLD QUARTERLY, Vol. 8, No. 5, 2007, pp. 871-886.

17 United Nations, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2013.

Commission on Status of Women (CSW) and submit their report to Commission on Status of Women (CSW) about gender equality and the problem of girl-child.¹⁸ In 2006, the Non- Governmental Organizations (NGOs) held a meeting on women status reformation in the association of 50th Session on UN Commission on the Status of Women (CWS). They deliberated on the issues of women and girl-child and opined that maximum part of the world is not safe and addressed a letter to the then Secretary-General of the UN. That letter was signed by 240 women representatives, who belonged to 50 different countries.¹⁹ Therefore, the issue of girl and women has risen from different parts of the world. All these summits and resolutions and deliberations built a thought where women were seen as global citizens. As women's and girls' problems are not come apart, similarly this is not a matter of any individual states or region. So the United Nations took initiatives for women empowerment and gender equality that also provided a forum to member states where they think, deliberate and make the program for the benefit of people of the world.

The 2007 UNICEF and UNESCO Joint Report emphasises on eliminating laws, that permit girl to marry before the compulsory school leaving age and allow disparity in school-leaving ages and compulsory education for girls and boys.²⁰ Both organizations took collective initiative on girl-child vulnerability in various parts of the world; it drew attention of international community on peculiar problem of girl-child.

In 2011, United Nations took initiative and passed a resolution and declared 11th October to be observed as the International Day of Girl-child (IDGC). This day was selected for encouraging the rights of girls and addressing the peculiar challenges which faced by girl-child. In initial days of 2012, the main focus was on the issue of eradicating the child marriage. In 2013, the theme was 'Innovating for Girls' Education' (UNICEF 2011). The United Nations and other international organizations as well as regional actors keep encouraging activities, which focus on issues of girl-child. Various norms and standards were formulated by national and international community for the wellbeing of girl-child.

Standards and Guidelines Relating to Girl-child

The effort made by international and regional organizations i.e., United Nations, World Bank, SAARC and other Non- Governmental Organisations (NGO) were relevant to formulate numerous norms and standards in addressing the issue of girl-child. International policies, declarations and conventions for children have been adopted by many countries and further encouraging other

18 Heyzer Noeleen, "Making the Links: Women's Rights and Empowerment Are Key to Achieving the Millennium Development Goals", GENDER AND DEVELOPMENT, Vol. 13, No. 1, 2005, pp. 9-12.

19 *Supra* n. 16.

20 Angela Melchiorre, "At What Age Are School-Children Employed, Married and Taken to Court", THE RIGHT TO EDUCATION PROJECT, UNESCO, 2nd ed. 2004.

countries to adopt them. Some of the major norms, standards and guidelines relating to girl-child is discussed below.

The Declaration of the World Summit for Children (1990), the Beijing Platform for Action and Declaration (1995) and the Millennium Declaration leading to the Millennium Development Goals (MDGs) (2000). All these documents on children are not binding for States Parties.²¹ The Convention of Rights of the Child adopted in 1989 is a binding document. International efforts are being made to set common norms and standards for both, boy or girl child. All states are expected to adhere to these norms and standards.

Protection of Girl-child and International Approach

A number of general and specific treaties protect Girl-child under the international law. Article 19 of CRC states that the girl child is entitled to protection from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation, including sexual abuse, while in the care of parents, guardian or any other person. Further, the girl-child needs protection even before birth, the practice of female foeticide is common particularly in Asian countries. Therefore, various UN standards and guidelines have been set to protect the life of girl-children.

On a general platform, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (CESCR) established a 'bill of rights' that applies universally.²² The UN Charter, 1945 reassured basic human rights including equality and dignity for men and women. CEDAW and UNCRC norms for girl-child to provide atmosphere for their progress with respect, protection and full enjoyment of all human rights guaranteed by the UN Human Rights Commission.²³ These initiatives provide a protective environment to every girl-child for safety and survival. Protection of girl-child from sexual and mental violence is one of the important aspects therein. There are some standards set up to eliminate violence against women and girl-child i.e., the General Assembly Declaration on the Elimination of Violence against Women, 1993, Vienna Declaration, 1993, and Program of Action Plan and Beijing Declaration, 1995. Though these international efforts (except Beijing Declaration) are not specifically meant to prevent violence against and exploitation of girl-child, it ultimately protects females under all age groups.

The Declaration on the Elimination of Violence against Women, 1993 and Statute of the International Criminal Court, 1998, both initiatives are relevant to prevent sexual violence against girl-child. They addressed child rape, forced

21 Savitri Goonesekere, "The Elimination of All Forms of Discrimination and Violence Against the Girl Child", 2006, United Nations Division for the Advancement of Women (DAW) in collaboration with UNICEF, EGM/DVGC/2006/BP.1, 25-28 September.

22 Nura Taefi (2009) "The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child 1", INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS, Vol. 17, 2009, pp. 345-376.

23 *Supra* n. 21.

prostitution, forced pregnancy, sexual slavery, and sexual violence. All of these crimes against women are considered as war crimes.²⁴ The punishment for these crimes should be very rigorous. To protect girl-child from such kinds of sexual and mental violence and exploitation, every state must ensure effective measure to prevent them and provide an environment where girl-child enjoys all human rights and fundamental freedom like a boy-child. A state must counter any act against these rights of girls and women immediately and effectively. Beijing Conference set norms that the all perpetrators who involve in the crime against women and girl-child trafficking, forced marriage, child prostitution, and other type of sexual violence activities shall be treated under criminal as well as civil laws.²⁵

These norms and standards play a vital role in the protection of girl-children in various circumstances. All norms are not equally adopted by all state parties so it could not equally benefit girl-child across the world. For example, the compulsory registration of marriage is one of the norms of both Marriage Convention 1962 and CEDAW, but India declares that due to the large population of country as well as various different customs and religions, India cannot follow them.²⁶

Health of Girl-Child

All human beings have the right to enjoy their health without any discrimination and states shall ensure that this right should not be violated under any circumstances. Article 19 of CRC states that child has the right to protection from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation, including sexual abuse, while in the care of parents, guardian or any other person. Furthermore, Article 24 states that the right to health and access to health services is the right of every human being; it also emphasises that States Parties shall ensure that no child is deprived of adequate health facilities and shall protect the child from harmful traditional practices. These norms can protect the girl-child from various inhuman practices that affect their physical and mental health, i.e., female genital mutilation, child marriage etc.

The Beijing Conference in 1995 discussed issues surrounding the health of the girl-child and laid emphasis on effective action to curb discrimination against girl-child. It recognised that the full implementation of the rights of women and of the girl-child was an absolute, integral and indivisible part of all human rights and fundamental freedoms. It stressed on the protection of basic health facilities, parental care etc. of the girl-child and effective action against the violation of her rights.

United Nations Girls Education Initiative (UNGEI), with the help of United Nations Population Fund (UNFPA), has worked in various areas which play a

24 Clara Chapdelaine-Feliciati, "Restorative Justice for the Girl Child in Post Conflict Rwanda", JOURNAL OF INTERNATIONAL WOMEN'S STUDIES, Vol. 7, No. 4, 2006, pp.14-35.

25 *Supra* n. 10.

26 UNICEF, CHILD MARRIAGE AND THE LAW: LEGISLATIVE REFORM INITIATIVE PAPER SERIES, 2008.

positive role in formulating norms and standards for challenges faced by the girl-child. It promotes maternal health, gender equality and dignity of the girl-child.²⁷ These initiatives help to combat the problems of inadequate health and maternal care, inadequate nourishment and other problems faced by the girl-child due to the indifference of the patriarchal society and family.

The World Health Organization (WHO) has published a systematic review of, and proposal for, norms preventing child marriage, early pregnancy and poor reproductive outcome among adolescents in developing countries. It has recommended the support of political leaders, planners and community leaders in prohibiting marriage before the age of 18 years, both through laws and policy making. UNICEF, World Bank (WB), and UNFPA have attempted to view these problems through the lens of human capital; their solution to high fertility rates and child marriage is the education of girls.²⁸

Protection of Girl-Child

The issue of trafficking of girl-child has also been given great importance by the international community, with the encouragement of the UN. Article 11 of the UNCRC 1989 declares that all States Parties shall take effective and immediate action against this organized crime. The Beijing Conference recommended that governments, with the help of NGOs, mass media and UN treaty bodies, should work actively to curb and punish the horrific and inhuman crime, in addition to providing legal protection and medical assistance to victims including the girl-child.²⁹

Education of Girl-child

Education is an important tool which enhances the development of human beings. As discussed earlier, the girl-child's educational status is generally poorer than that of a boy child in most parts of the world, especially in patriarchal societies. The world community has therefore taken initiative and set up norms to grant all persons the right to education. For example, Article 26 of the 1948 Universal Declaration of Human Rights (UDHR) states that everyone has this right without discrimination on the grounds of sex, colour and class, and also encourages states to ensure equality of everyone, including the girl-child.

The Beijing Conference also focussed on the education of girl-child, recommending equal access to education for her. It called upon various actors i.e. the international community, national governments, regional and international agencies, civil society, and NGOs to formulate strategic action

27 United Nations Girls' Education Initiative (UNGEI), "*Global Advisory Committee and Partners*", http://www.ungei.org/whatisungei/index_729.html, (visited on April 15, 2014).

28 Mary Cobbett, "*Beyond 'Victims' and 'Heroines': Constructing 'Girlhood' in International Development*", *PROGRESS IN DEVELOPMENT STUDIES*, Vol. 14, No. 4, 2014, pp. 309-320.

29 *Supra* n. 10.

against inequalities and inadequacies in this sector in order to improve educational opportunities for the girl-child.³⁰

UNESCO's norms concentrated on countering barriers which are responsible for high dropout rates of the girl-child. It set standards for every school to compulsorily have separate toilets for female students. It also directed governments to establish and provide hostel facilities for girls in all schools.³¹

Child Marriage

Norms for child marriage are provided in various conventions and treaties. Article 16 of CEDAW states that men and women have the same right to enter into marriage with free and full consent; it also clarifies that consent is considered free only if the groom or bride is not a child. It directs states to take all necessary action, including legislation, to specify and enforce a minimum age for marriage.³² Through this initiative, CEDAW promotes the effective legal action against the harmful tradition of forced marriage of the girl-child and stresses on the importance of state action on the issue. All states important role on the prevention of girl-child from this harmful tradition.

UNCRC, while not directly mentioning child marriage, encourages the inclusion of the views of the child in decisions relating to her life; it also focusses on the abolition of traditions and practices that have a negative impact on the child, including the girl-child. Additionally, it prohibits States Parties from granting permission or legal validity to marriages between persons who have not attained the age of majority, fixed to be 18 years in the Convention. The UDHR also mentions the right of all human beings to marry with their "free will and consent". Combined with the general norm that consent cannot be free when given by a minor, this provision protects the girl-child from the tradition of early marriage. Not just that, Article 16 prohibits discrimination due to sex and grants both men and women to "found a family of their choice" as well as equal rights in the marriage and at the time of its dissolution.³³

The UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962 also sets standards for the prohibition of this tradition. It makes consent compulsory for all marriages, for both intended spouses. Article 1 of the Convention again emphasises the invalidity of marriages entered into without the full and free consent of parties. Article 2 instructs States Parties to specify a minimum age of marriage and declare marriages not complying with this rule to be invalid and illegal.³⁴ States Parties should enact laws requiring the registration of all marriages, ensuring further protection to the girl-child from child marriage.

30 *Supra* n. 10.

31 *Supra* n. 10.

32 United Nations (1979), "Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979): Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180." 18 December.

33 United Nations Declaration of Human Rights (UNDHR), <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx> (visited on May 17, 2015).

34 *Ibid.*

UNICEF is also committed to the elimination of child marriage, especially in those cases where the girl-child has not completed her compulsory education. It is working to discourage and change social norms and beliefs that play a vital role in continuing this harmful traditional practice in various societies.³⁵ Governments are also taking strategic action, in cooperation with NGOs, mass media, private sector and relevant international organizations, including United Nations agencies, in an attempt to put an end to this practice.³⁶

In addition to the creation of these norms and standards, the international community has introduced certain mechanisms. These mechanisms evaluate the outcome of the policies and programmes aimed at the wellbeing of the girl-child as well as create a roadmap for the future.

Mechanisms Relating to Girl-child Protection and Redressal

A mechanism is a vital tool for any programme, policy or treaty, as it conducts a proper assessment of achievements and challenges and monitors the implementation process at the state level. There are different types of mechanisms for these purposes, the most popular being “treaty-based monitoring”. Some of the more important treaty-based monitoring bodies are given below.

Committee on the Rights of the Child

Articles 42-54 of UNCRC discuss the entry into force and proper implementation of all the rights given therein. These Articles have established a Committee on the Rights of the Child to monitor the implementation of the Convention. All States Parties are required to submit a regular report to the Committee. The first report by every state was submitted within the two years of the Convention’s adoption; every subsequent report has to be submitted every five years. Based on these reports, the Committee makes certain recommendations to the States Parties, known as “concluding observations”.³⁷

The Committee consists of 18 experts, who are independent, of good and honourable character and well versed in the human rights field.³⁸ The Committee also monitors States Parties’ implementation of the two Optional Protocols to the Convention. These protocols relate the child’s right to be protected from involvement in armed conflict, slavery, prostitution, pornography etc. Thus, the Committee ensures States Parties are complying with the provisions of the UNCRC and its two Protocols. It also keeps track of the status of the girl-child internationally.

35 *Supra* n. 21.

36 *Supra* n. 10.

37 UNICEF, CHILD PROTECTION INFORMATION SHEET: CHILD LABOUR, UNITE FOR CHILDREN 1946-2006, 2006.

38 UN Document, Declaration of the Rights of the Child, 1959, <http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf>, (visited on July 17, 2015).

Commission on Status of Women

Although the Commission on the Status of Women (CSW) was established as a functional commission of ECOSOC to deal with the issue of discrimination against women, it addresses the issues concerning the girl-child as well. Along with UNICEF and expert groups, CSW organised an online discussion, based on which it explored the condition of the girl-child in various parts of the world and the action taken by governments to improve it.³⁹

CSW also receives recommendations from the UN and it is expected that the Commission will pay attention to them. For instance, a report on 'The elimination of all forms of discrimination and violence against the girl-child' suggested some guidelines.⁴⁰

Before the establishment of the CSW, women's rights issues were dealt with by ECOSOC and its members, as well as NGOs, who organised an annual meeting at the UN headquarters. Through this initiative, the actors present reported on the condition of women and girls in different parts of the world; they also made suggestions and recommendations regarding the improvement of their condition. UN WOMEN organised several meetings with experts, known as Expert Group Meetings (EGMs). These experts hail from various governments, academia, civil society, United Nations as well as other regional and international agencies. The work of the EGMs is to discuss and analyse issues relating to the girl-child. With some recommendations, they set up the annual theme of Commission of Status of Women. Their other work includes the preparation of flagship reports and issue recommendations in consultation with UNICEF.⁴¹ The diverse background of the experts is helpful in analysing different aspects of policies' merits and demerits. The EGM has successfully highlighted the main obstacles to the welfare of the girl-child, i.e. HIV/AIDS, armed conflict etc.⁴²

UNFPA and UNICEF

Since 2010, UNFPA and UNICEF along with the Harvard School of Public Health's Program on International Health and Human Rights, have engaged in developing a monitoring and evaluating (M&E) tool for Female Genital Mutilation/ Cutting (FGM). Every country office of UNFPA produces an annual global report on child marriage and FGM. Individual countries' reporting and monitoring system has emerged as a valuable mechanism for evaluating the

39 UN Women, <http://www.un.org/womenwatch/daw/Review/english/49sess.htm>, (visited on December 8, 2018).

40 Division for the Advancement of Women Department of Economic and Social Affairs, UN Document, "ONLINE DISCUSSION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AND VIOLENCE AGAINST THE GIRL CHILD", 2006.

41 *Supra* n. 39.

42 *Supra* n. 21.

shortfalls and challenges of policies relating to the girl-child as well as difficulties in implementation.⁴³

Mandatory Reporting

The system of mandatory reporting has been crucial to the battle to eliminate child sexual abuse, both physical and sexual.⁴⁴ The girl-child is especially vulnerable; according to the Australian Institute of Health, Welfare (AIHW) 2006, girls were two to three times more likely to be sexually abused than boys, with sexual abuse being confirmed in about 10% of all cases. Through the mandatory reporting system, it is compulsory to report on these cases, according to the Western Pacific Regional Office of WHO. In some countries, domestic legislations have established mandatory reporting by health care providers who treat child victims of sexual abuse.⁴⁵ With these efforts, the governments will be better able to create rules against the domestic and sexual violence against the girl-child.

Universal Periodic Review (UPR)

The Universal Periodic Review (UPR) is a process of the Human Rights Council, involving a review of human rights progress by all UN Member States in their respective territories. The idea of UPR was given by the United Nations Secretary-General, Kofi Annan. This mechanism has provided a forum to members for open dialogue and discussion on the implementation of basic human rights and freedoms. Moreover, even NGOs are present at the UN Peer Review Meeting (UNPR). States give recommendations to their peer States on certain issues. Peer States are not obliged to accept all recommendations and may reject some. For example, in a review meeting in April 2008, UK rejected certain recommendations of Indonesia on issues relating to CRC.⁴⁶ Nevertheless, the UNPR system has provided a platform for an organised discussion on issues relating to the girl-child. Peer States ensure that human rights are ensured for all people without discrimination on the basis of gender and sex. The UK, for example, pointed out cross-government strategies to address issues relating to women and girl-children in different regions.⁴⁷

43 UNFPA and UNICEF, JOINT PROGRAM ON FEMALE GENITAL MUTILATION/CUTTING: ACCELERATING CHANGE, SUMMARY REPORT OF PHASE 1: 2008-2013, 2014.

44 D.G. Juliette et al., "How University Student-Teachers for Primary School Learn about Department of Education Policy on Child Sexual Abuse, and Mandatory Reporting: The Sources of Their Professional Information", HIGHER EDUCATION, Vol. 58, No. 2, 2009, pp. 221-239.

45 World Health Organization, ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO, 2008.

46 Emma Hickey, "The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground? A Critical Evaluation of the First Cycle and Recommendations for Reform", INTERNATIONAL CONSTITUTIONAL (ICL) JOURNAL: VERLAG ÖSTERREICH, 2012.

47 *Ibid.*

NGOs also play an important role in formulating any policy or operational activity related to the girl-child. They hold international and national leaders, governments and organisations accountable for their commitments. The NGO AAWAAJ (meaning, “voice”) campaigned for the development of a standard format for the collection of data relating to girl-child and reached consensus through dialogue.⁴⁸ States Parties report on the proper implementation of the UNCRC in their countries; additionally, the Committee also receives shadow reports by NGOs of those countries.⁴⁹ In this way, NGOs can help address specific issues and challenges relating to the girl-child.⁵⁰

Data Collection

UNICEF, UNIFEM, WHO and other organizations collect and publish data relating to girl-child. This is an effective means of assessing the actual progress of implementation of policies by states. UNFPA, along with state governments, collects data related to the girl-child population, including data relating to child marriage and enrolment of girl-child in school. UNFPA is not supported by the regular budget of the UN; however, governments’ voluntary contributions helps it.⁵¹ It also works in partnership with the civil society. The data collected alerts countries to the poor position of the girl-child and the need for a global effort to combat this problem.⁵²

The UN Development Program publishes a Gender Development Index (GDI) which displays the situation of the girl-child all over the world. Member countries’ individual reports are also included. It has also developed a Gender Inequality Index (GII) which discusses the status of specific rights of the girl-child, such as life expectancy, standard of health, literacy, enrolment in school etc. This data is essential in the formulation of adequate policies aimed at ameliorating the status of the girl-child.⁵³ This data is still adequate, however. For example, in the case of educational statistics, there is information on the number of girls enrolled in schools but very little information on other vital dimensions of the learning process.⁵⁴ Without the availability of adequate data, it is difficult to explore the actual problems relating to the girl-child in specific areas and set programmes and policies which can counter them. For example, in 2000, most African countries ranked in GDI was below than

48 *Supra* n. 40.

49 Laura Theytaz-Bergman, “A Guide for Non-Governmental Organizations Reporting to the Committee on the Rights of the Child” THE NGO GROUP FOR THE CONVENTION ON THE RIGHTS OF THE CHILD, 2006.

50 *Supra* n. 21.

51 United Nations Population Fund, MARRYING TOO YOUNG END CHILD MARRIAGE, 2012.

52 Nancy F. Woods, F. Nancy, “A Global Imperative: Development, Safety, and Health from Girl Child to Woman”, HEALTH CARE FOR WOMEN INTERNATIONAL, Vol. 30, No. 3, 2009, pp.195-214.

53 Economic Commission for Africa, THE AFRICAN GENDER AND DEVELOPMENT INDEX, 2004.

54 Ashwani Saith and Rekha Wazir, “Towards Conceptualizing Child Wellbeing in India: The Need for a Paradigm Shift”, INTERNATIONAL SOCIETY FOR CHILD INDICATORS, Vol. 3, 2010, pp. 385–408.

100; only Egypt was included in the Gender Empowerment Measure (GEM). The cause of other countries' exclusion and low ranks was cited to be lack of sufficient data.⁵⁵

Conclusion

Children are known to be more vulnerable to, and easy targets of, evildoers. They suffer the most in any crisis, be it war, natural disasters or crimes. Specific vulnerabilities include child labour, organ trafficking, child trafficking, violence and exploitation etc. Due to her tender age and gender, the girl-child is even more susceptible to exploitation and oppression. Problems peculiar to her extend to her family life and status in the patriarchal society. The specific challenges plaguing the girl-child include female foeticide, infanticide, FGM, systematic rape, prostitution, pornography, forced marriage, dowry, adolescent pregnancy etc. In many cultures and societies, the girl-child is deprived of adequate care, nutrition and healthcare, affecting her overall wellbeing.

Despite these challenges, there was little international concern relating to the rights of the child. After the First World War, the League of Nations took initiative by adopting the Geneva Declaration in 1924, the first remarkable document recognising child rights issues at an international level. The matter of child rights was pursued urgently after the establishment of the United Nations, reflecting in Article 25(2) of the UDHR, 1948, the Preamble to the UN Declaration on the Rights of the Child, 1959 and the landmark UNCRC, 1989.

While there is no official definition for a girl-child in any UN or regional organisation, the girl-child has received significant attention in the international arena recently. Even before the Beijing Conference which created a separate agenda for the girl-child, regional efforts were present and engaged in the task of the protection and development of the girl-child. UNICEF's Board Recommendation in the 1990s stated that UNICEF's programs and strategies for the decade would address the needs of the girl-child. The South Asian Association for Regional Co-operation (SAARC) also drew attention to the girl-child by designating the 1990s as the "Decade for the Girl-child" and has worked on the issue through research and the help of the media. Before the Beijing Conference, initiatives were taken by United Nations through ECOSOC, CEDAW, CWS etc. which tried to highlight the issues relating to women, including the girl-child.

Various norms and standards have been formulated related to the wellbeing of the girl-child. The problems specific to girl-child have been addressed through a number of general and specific treaties. The right to birth, equality and equity, education etc. have all been extended to the girl child by regional organisations and individual governments. Education for All (EFA), Gender equality and women empowerment, which is the third goal of MDGs, also emphasized that the disparities related to girl-child should be eradicated. The definition of the age of marriage and free consent, by the UN Convention on

55 *Supra* n. 53.

Consent to Marriage, UDHR 1948 etc., have been important steps in fighting forced marriage of the girl child. As discussed earlier, the health of the girl child has also been taken seriously and deliberated upon in order to formulate standards and norms.

Mechanisms play a vital role in the implementation and monitoring of any program or policy. Various mechanisms have been set up at the international, regional and national level, i.e. UPR, mandatory reporting, annual survey of countries, GDI, GII etc. These mechanisms have engaged the world community actively in the process of countering challenges to the girl child.

International, Regional as well as national governments, along with civil and non-civil actors, have played an extremely crucial role in bringing the world community's attention to this hot and burning issue. Nevertheless, the issues and challenges faced by the girl-child needs greater attention and participation by the world community. There is still need of a holistic approach and collective action to eradicate these issues from the root level in order to provide a safe, sociable and pleasant environment for all children.

FAIR DEALING IN THE INFORMATION AGE: PASSÉ OR IMPASSE

Divita Pagey*

Abstract

The traditional notions of the law of copyright face serious challenge in wake of the technological changes of the information age. Copyright in India is governed by the Indian Copyright Act 1957, which functions under the umbrella of the global intellectual property regime. Since copyright law serves the twin purposes of incentivising creativity and encouraging propagation of knowledge, it attempts to strike a balance between the two often-conflicting, but equally important, purposes by devising exceptions. The International norms regarding these limitations and exceptions are found enshrined in the Berne Convention for the Protection of Literary and Artistic Works 1886, which provides for the 'three-step test'. This article focuses on examining the numerous challenges faced by the fair dealing model in India in the information age, highlighting its inadequacies, and ascertaining whether fair dealing is passé and needs modification, or has reached an impasse, and calls for stricter implementation to withstand the demands of the information age.

Keywords: Copyright, Limitations and Exceptions, Fair Use, Fair Dealing, Information Age, Three-Step Test.

Introduction

This is the age of information. The world is globalised, the economy is knowledge-based, and information is the ultimate currency. The value of information in the current times can be aptly gauged from the international headline-grabbing scandal of March 2018, alleging *Cambridge Analytica*, an international data analytics firm, for harvesting personal information from around 50 million users of the social-media giant, *Facebook*, without proper authorisation, and utilising it to craft the election campaign that helped Donald Trump win the United States of America Presidential election in 2017.¹ Chris Fussel has opined that “*The information age has ushered in a networked and interdependent world, one in which challenges and opportunities appear and disappear faster than traditional organisational models can manage.*”² When the law- which is ever-dynamic, seeks to regulate the dissemination of

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1 David Ingram and Peter Henderson, “*Trump Consultants Harvested Data from 50 Million Facebook Users*”, REUTERS, March 17, 2018, <https://in.reuters.com/article/facebook-cambridge-analytica/trump-consultants-harvested-data-from-50-million-facebook-users-reports-idINKCN1GT04S>, (visited on April 4, 2018).

2 Chris Fussel, TEAM OF TEAMS: NEW RULES OF ENGAGEMENT FOR A COMPLEX WORLD, 1st ed. 2015.

information- which is the new gold, in this information age- the concoction is too volatile to be effectively regulated by straitjacket legal provisions that allow little or no room for expansive interpretation. The law of Copyright is one such area of law.

Works in digital format involve some level of copying in each and every use. Thus, a strict interpretation of Copyright law can easily make every single act of reading, viewing or listening to Copyrighted materials endless stream of Copyright infringements.³ Since the Copyright law serves the twin purposes of incentivising creativity and encouraging propagation of knowledge, it attempts to strike a balance between the two often-conflicting, but equally important purposes, by devising exceptions to the exclusive bundle of rights comprising Copyright. The systems of limitations and exceptions in different jurisdictions around the world, though diverse, are being equally challenged by the vicissitudes of the information age.

Copyright in India is governed by the Indian Copyright Act 1957, which functions under the umbrella of the global intellectual property regime. The Indian Act has adopted the system of fair dealing as its statutorily prescribed system of limitations and exceptions. The article focuses on examining the inadequacies of the concept of fair dealing in India in the information age, and ascertaining whether fair dealing is passé and needs modification, or has reached an impasse, and calls for stricter implementation to withstand the demands of the information age.

Three-Step Test: International Norm on Limitations and Exceptions to Copyright

Meaning

The international norm regarding the limitations and exceptions to Copyright is found enshrined in the Berne Convention for the Protection of Literary and Artistic Works 1886 (hereinafter referred to as Berne Convention). Article 9(2) of the Berne Convention provides for a three-step test to be followed by Member States while carving out limitations and exceptions in their respective national Copyright legislations.⁴ According to the test, limitations and exceptions to Copyright are permitted when they satisfy three conditions (steps), first, they should be restricted to certain special cases; second, they

3 Amira Dotan et al., “Fair Use Best Practices for Higher Education Institutions: The Israeli Experience”, JOURNAL OF COPYRIGHT SOCIETY U.S.A., Vol. 57, 2010, p. 447.

4 Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works 1886 provides that “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

should not conflict with the normal exploitation of the work; and lastly, they should not unreasonably prejudice the legitimate interests of the author.

International Norms on Limitations and Exceptions to Copyright

The said three-step test has been adopted in the Trade-Related Aspects of Intellectual Property Rights (TRIPS), and subsequently in the World Intellectual Property Organization (WIPO) Internet Treaties- WIPO Copyright Treaty, 1996 (WCT) and the WIPO Performances and Phonograms Treaty, 1996 (WPPT). Thus, the three-step test is the prevailing international norm concerning limitations and exceptions to Copyright, to be followed by nations in their domestic Copyright legislations. India, having ratified the TRIPS Agreement, is under an international obligation to conform to the three-step test in implementation of limitations and exceptions at the domestic level.

Flexibility of Three-step Test

The most significant feature of the three-step test is the flexibility of its framework, giving wide scope for the adaptation of a tailored set of limitations and exceptions at the national level, according to the social, cultural, and economic needs of a particular nation. The test is to be read with Article 7 of TRIPS which expressly provides that the Agreement aims to balance rights against obligations, as well as to foster not only economic development, but also social welfare. Specifically, with respect to the digital arena, Article 10 of WCT permits Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new limitations and exceptions that are appropriate in the digital network environment.⁵

Therefore, modifications made to the existing Indian model of limitations and exceptions to Copyright, with a view to better equip it with the challenges of the information age, would be perfectly in consonance with India's international obligations.

Limitations and Exceptions to Copyright: Different Approaches

Victor Hugo wrote that "*literature was the government of humankind by the human spirit*". Hugo, one of the greatest exponents of the Romantic Movement, had led the campaign for authors' rights through his *Association Littéraire et Artistique Internationale* which culminated into the adoption of the Berne Convention. Hugo also wrote that if a conflict should arise between the rights of

5 Christophe Geiger, et al., "*The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*", AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, Vol. 29, 2014, p. 581.

the author and those of “*the human spirit*”, the latter should prevail. This means that Copyright protection should cease to apply but for the goal of maximizing welfare by ensuring that new works are created.⁶ A strong undercurrent of public interest is evident in the evolution of Copyright law, which is also understood as its utilitarian or public benefit rationale.

At common law, Copyright protection was denied to works whose existence was considered contrary to the public interest, i.e., when the work was of an illegal, immoral, or irreligious nature. But the principles upon which courts denied protection were not certain. In *Beloff v. Pressdram Ltd.*,⁷ the scope of the defence of public interest was discussed. The court explained that the scope of this defence was to permit disclosure of misdeeds of a serious nature, such as breaches of national security or of the law, fraud or matters destructive to the country or its people, including matters medically dangerous to the public. Therefore, the common law defence of public interest can be used to refuse enforcement of Copyright, even though there is no reference to such a defence in the Copyright legislation.⁸

All modern Copyright systems around the globe provide for a system of statutory limitations and exceptions, whereby the legislature has enumerated or indicated instances where some form of public interest overrides the private interest of the Copyright owner. The different approaches or models of limitations and exceptions are as discussed below.

Fair Use

This approach provides a non-exhaustive list of generally worded exceptions. Under this approach, any use which a court deems to be ‘fair’ will be treated as non-infringing. This is known as fair use.⁹ The United States of America (USA) has adopted the fair use doctrine. The doctrine assumes a privilege in persons other than the Copyright owner to use the protected work in a reasonable manner, even though such use is unauthorised. The doctrine is applied on a case-to-case basis, taking into account, among other factors that may be relevant, the statutorily enumerated factors.¹⁰ For instance, in the USA, Section 107 of the Copyright Act provides for the four factors to be considered by the trier of a case while applying the doctrine of fair use- the purpose and

6 Daniel J. Gervais, “*Making Copyright Whole: A Principled Approach to Copyright Limitations and Exceptions*”, UNIVERSITY OF OTTAWA LAW & TECHNOLOGY JOURNAL, Vol. 5, 2008, p. 1.

7 (1973) 1 All ER 241; [1973] RPC 765.

8 V.K. Ahuja, LAW OF COPYRIGHT AND NEIGHBOURING RIGHTS-NATIONAL AND INTERNATIONAL PERSPECTIVES, 2nd ed. 2015, p. 207.

9 Mathews P. George and Chithra George, “*A Critique of the Delhi High Court Judgment in DU Photocopy Case*”, <http://www.livelaw.in/critique-delhi-high-court-judgment-du-photocopy-case/>, (visited on April 6, 2018).

10 Michael A. Epstein, EPSTEIN ON INTELLECTUAL PROPERTY, 5th ed. 2008, pp. 4-35.

character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; the nature of the Copyrighted work; the amount and substantiality of the portion used in relation to the Copyrighted work as a whole; and, the effect of the use upon the potential market for or value of the Copyrighted work.

In *Harper and Row v. Nation Enterprises*¹¹ it was held that fair use is a mixed question of law and fact, and the factors enumerated in the section are not meant to be exclusive. The USA Supreme Court has also indicated that courts should be mindful of the inter-related nature of the four statutory factors. In *Campbell v. Acuff-Rose Music, Inc.*¹², the Court observed that “*the task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognises, calls for case-by-case analysis.*”

Fair Dealing

This system follows a pigeon-hole approach by providing a large number of specific exceptions, comprising of well-defined activities.¹³ Fair dealing was statutorily introduced for the first time in the 1911 Act of United Kingdom.¹⁴ If the unauthorised use of a Copyrighted work falls within the defined exceptions, and is fair, then it would amount to fair dealing of such work and not Copyright infringement. India follows the fair dealing approach with Section 52 of the Indian Copyright Act 1957 providing for a list of exceptions. The Copyright laws of Australia, Canada, New Zealand, and South Africa also use fair dealing.

Unlike the doctrine of fair use, fair dealing cannot apply to any act which does not fall within at least one of the categories listed in the statute.¹⁵ In *Blackwood and Sons Ltd. v. A.N. Parasuraman*,¹⁶ the court stated that if the purpose of the reproduction is not one of those enumerated in the statute, the question of fair dealing would not arise. Further, the court stated that two points have been urged in connection with the meaning of the expression ‘fair’ in fair dealing, firstly, that in order to constitute unfairness there must be an intention to compete and to derive profit from such competition, and secondly, that unless the motive of the infringer were improper or oblique, the dealing would be fair.¹⁷

However, the terms fair use or fair dealing have nowhere been defined. The courts find it difficult to lay down precise standards.¹⁸ It has been

11 471 U.S. 539 (1985).

12 510 U.S. 569 (1994).

13 *Supra* n. 9.

14 Rishabh Saxena and Pracheta Kar, “*Is Fair Dealing Really Fair in India?*”, RGNUL STUDENT LAW REVIEW, Vol. 1, 2014, p. 42.

15 *Supra* n. 9.

16 AIR 1959 Mad 410:1958 SCC OnLine Mad 62.

17 *Supra* n. 8, p. 210.

18 *Ibid.*

acknowledged as a question of degree in the famed case of *Hubbard v. Vosper*¹⁹ which was the first major judicial attempt to define ‘fairness’²⁰. The Delhi High Court, in *Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd.*,²¹ held that it is not possible to delineate the exact contours of fair dealing, and its determination is a question of fact, degree and overall impression.²²

Enumerated Exceptions

This approach provides for unequivocal exceptions by listing certain ‘enumerated exceptions’ without any qualification such as ‘fairness’. Unauthorised uses of Copyrighted work are permitted if and only if they fit squarely within the ambit of the exceptions enumerated in the statute.²³

Hybrid Approach

This approach involves using a hybrid system of limitations and exceptions combining more than one of the said approaches. Singapore uses a hybrid model combining fair dealing and fair use approaches.²⁴

Fair Dealing in India

Section 52 of the Indian Copyright Act 1957 lays down the provisions for fair dealing which can be categorised as follows on the basis of their purpose or justification:

Private Use

Section 52(1)(a)(i) permits reproduction of Copyrighted work for private use, including research. The object of the exception is to enable students to make copies of Copyrighted work for research or other form of personal use. But they cannot use such copies for profit or commercial purposes.²⁵ In *Syndicate Press of University of Cambridge v. Kasturi Lal and Sons*, the Delhi High Court observed that “*Copyright is a form of protection and not a barrier against research and scholarship. Lifting portions of the original work and presenting it as one’s own creation can in no way be described as any form of bona fide enterprise or activity. Research and scholarship are easily distinguishable from imitation and plagiarism.*”²⁶

19 [1972] 2 Q.B. 84; [1972] 2 WLR 389; [1971] 1 All ER 1023 CA.

20 *Supra* n. 14, p. 59.

21 2011(45) PTC 70 (Del); [2010] ILR 6 Delhi 230.

22 *Supra* n. 17, p. 209.

23 *Supra* n. 9.

24 *Ibid.*

25 H.K. Saharay (ed.), IYENGAR’S COMMENTARY ON THE COPYRIGHT ACT, 9th ed. 2016, p. 413.

26 2006(32) PTC 487 (Del); 2005 SCC OnLine Del 1448.

Section 52(1)(aa) permits the copying or adaptation of a computer programme for the purpose of the use for which it is supplied, or for making back-up copies as a protection against loss.

Section 52(1)(p) permits reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access.

Criticism or Review

Section 52(1)(a)(ii) permits quotations to be made from a Copyrighted work for the purposes of criticism or review, but the quotation must not be so much as to make the review a substituted work.²⁷ This defence is available for criticism or review only when the act is accompanied by an acknowledgement as required under the provision of Section 52 (1).²⁸ In *Syndicate of Press of University of Cambridge v. Kasturi Lal and Sons*,²⁹ the Delhi High Court observed that “A review, criticism or guide acknowledges the original authors of the work that they deal with. Verbatim lifting of the text to the extent of copying the complete set of exercise and the key to such exercise can in no manner be termed as a review, criticism or a guide to the original work.”

Reporting Current Events

Section 52(1)(a)(iii) permits fair dealing material for the purpose of reporting current events in print or broadcast media because a person has the right to know which is part and parcel of the freedom of speech and expression.³⁰ In *Ashdown v. Telegraph Group*,³¹ the exception of fair dealing was not granted when a newspaper published extracts of a confidential diary which had minutes of a political meeting. The court held that their production was made for the defendants' commercial interests and was therefore, not fair dealing.

Section 52(1)(m) permits the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction.

Official or Legal Purpose

Section 52(1) (d) permits the reproduction of a literary, dramatic, musical or artistic work for the purpose of a judicial proceeding or for the purpose of a

27 *Supra* n. 25, p. 414.

28 *Supra* n.14, p. 42.

29 *Supra* n. 26.

30 *Supra* n.14, p. 42.

31 [2001] 4 All ER 666; [2002] RPC 5; [2001] 3 WLR 1368.

report of a judicial proceeding. What is 'judicial proceeding' is not defined in the Indian Act. But in Section 48 of the English Act, it is defined to mean 'a proceeding before any court, tribunal, or person, having by law power to hear, receive and examine evidence on oath'. This exemption is necessary for the functioning of the judiciary.³²

On similar grounds, Section 52(1)(e) permits the reproduction or publication of a literary, dramatic, musical or artistic work in any work prepared by the Secretariat of a Legislature, exclusively for the use of the members of that Legislature.

Section 52(1)(f) permits reproduction of any literary, dramatic or musical work in a certified copy made or supplied in accordance with any law for the time being in force.

Section 52(1)(q) permits the reproduction or publication of any matter published in the Official Gazette, except an Act of Legislature; an Act of Legislature along with its commentary; the report of any committee/council etc. appointed by the Government if such report has been laid on the Table of the Legislature; the judgment or order of any court or other judicial authority. Section 52(1)(r) permits the production or publication of translation of an Act of Legislature or rules in any Indian language.

Section 52(1)(za) permits the performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any *bona fide* religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority.

Educational or Instructional Purpose

Section 52(1)(g) permits the reading or recitation in public of any reasonable extract from a published literary or dramatic work. What is done merely for instruction or information cannot be deemed to affect the interests of the author.³³ Section 52(1)(h) permits the *bona fide* publication of collection of passages from literary and dramatic works for instructional use, 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.

Section 52(1)(i) permits the reproduction of any work by teacher or pupil in the course of instruction, or as part of questions and answers in an examination. Section 52(1)(j) permits the performance of a work by staff or students in course of the activities of an educational institution, provided the audience is limited to such staff and students, and their parents and guardians.

³² *Supra* n. 25, p. 416.

³³ *Supra* n. 25, p. 416.

Functional Purpose

Section 52(1)(v) permits the use by the author of an artistic work, where the author of such work is not the owner of the Copyright therein, of any mould, cast, sketch, plan, model or study made by him for the purpose of the work: Provided that he does not thereby repeat or imitate the main design of the work. Section 52(1)(w) permits the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device. Section 52(1)(x) permits the reconstruction of a building or structure in accordance with the architectural drawings or plans by reference to which the building or structure was originally constructed, provided that the original construction was made with the consent or licence of the owner of the Copyright in such drawings and plans.

Recitation or Performance before a Private Audience

Section 52(1)(k) permits the causing of hearing of a recording in an enclosed residential hall or a club or organisation that doesn't operate for profit. Section 52(1)(l) permits the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution.

Storage or Reproduction for Non-Commercial Purpose

Section 52(1)(n) permits the storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work. Section 52(1)(o) permits the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a non-commercial public library for the use of the library if such book is not available for sale in India. Section 52(1)(z) permits the making of an ephemeral recording, by a broadcasting organisation using its own facilities for its own broadcast by a broadcasting organisation of a work which it has the right to broadcast; and the retention of such recording for archival purposes on the ground of its exceptional documentary character.

Use of Work that is Accessible to Public

Section 52(1)(s) permits the making or publishing of a painting, drawing, engraving or photograph of a work of architecture or the display of a work of architecture. Section 52(1)(t) permits the making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work, if such work is permanently situated in a public place or any premises to which the public has access. Section 52(1)(u) permits the inclusion in a cinematograph film of- (i) any artistic work permanently situated in a public place or any premises to which the public has access; or (ii) any other artistic work, if such

inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film.

Facilitating Access for Persons with Disability

Section 52(1)(zb) permits the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format by any person to facilitate persons with disability to access to works, provided that the copies of the works in such accessible format are made available to the persons with disabilities on a non-profit basis but to recover only the cost of production.

Expiration of Term of Copyright

Section 52(1)(y) permits in relation to a literary, dramatic, artistic or musical work recorded or reproduced in any cinematograph film, the exhibition of such film after the expiration of the term of Copyright therein.

Principle Underlying Section 52 of Indian Copyright Act

An analysis of Section 52 evidences a common thread running through the various types of exceptions listed therein. All the enumerated activities are non-commercial and don't have the potential to affect the economic interests of the Copyright owner adversely. The non-commercial nature of the activities is maintained by the limitations imposed by the provisions regarding how the work or any part thereof is to be 'communicated to public' for the dealing to be 'fair'. Depending on the nature of the fair dealing exception, communication to public is either not permissible at all, as in the case of private use, or permissible to a very restricted extent, as in the case of performances before private audiences. Though publication of official documents and reporting of current events involve communicating the works to the public at large, in none of these cases can communication of the work to public significantly hamper the economic interests of the Copyright owner. Moreover, proviso to Section 52(1) mandates the accompaniment of an acknowledgment of the title and author of the work used.

Therefore, as long as the activities of the user fall within the categories enumerated in Section 52, the scope and extent of his dealing is kept strictly within the ambit of 'fairness', not allowing him to gain disproportionately out of such dealing. However, what happens when the site of the dealing in concern shifts from the real to the virtual world? All conventional understanding of 'communication to public' goes for a toss! Suddenly, the list of activities in Section 52 appears too small and insufficient to contain the vast expanse of activities on the digital platform.

Challenges to Fair Dealing in the Information Age

Emergence of a Networked Economy

Jeremy Rifkin has argued that in the new 'age of access', there is a fundamental shift in our understanding of the logic of production, distribution and consumption, with a shift from conventional notions of the market to the idea of networks. The Internet has created a networked economy which is fundamentally shaping the way people think about production, distribution and collaboration and rendering conventional forms of regulation and structuring of economic transactions incompatible with the new framework. As he puts it: *"The young people of the new 'protean' generation are far more comfortable conducting business and engaging in social activity in the worlds of electronic commerce and cyberspace. For them, access is already a way of life, and while property is important, being connected is even more important... For them, personal freedom has less to do with the right of possession and the ability to exclude others and more to do with the right to be included in webs of mutual relationships."*³⁴ Therefore, the conventional notion that 'communication to the public' of a Copyrighted work by a user disadvantages the economic interest of the original author doesn't hold true in the information age.

Change in the Concept of Communication to Public

The information age has radically altered people's way of life. People lead contemporaneous lives in the real as well as the virtual worlds. For the technology-savvy, everything that they say or do in the real world is shared on a virtual medium and is accessible to the world at large. Whether a person is having a conversation, reciting a poem, narrating a story, performing an act, or making a drawing, it is all transferred onto the digital platform on a click of the button and the word 'private' seems to be becoming a relic! On the virtual platform, teachers upload the videos of their lectures, and students exchange academic resources freely. Every recitation or performance which happens in front of a restricted private audience in the real world is 'communicated to the public' the moment it is shared on virtual media.

Recalibration of the Economic Balance in Copyright

Experience has shown that while such communication benefits the user, it also advances the interests of the Copyright owner. Earlier it was understood that without structures in place to protect the initial investment, why would anyone produce intellectual goods? But with digitization, the costs to make and distribute Copyrighted goods dropped. A flood of infringement followed. But a flood of new works followed as well. Digital distribution meant that refined and widespread creation was no longer limited. The claim that new work would stop

34 Jeremy Rifkin, *THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM, WHERE ALL OF LIFE IS A PAID-FOR EXPERIENCE*, 1st ed. 2001, p. 12.

being produced was proven false. Business models had to be revamped. High cost intermediaries and distribution networks changed. A world of four or five major labels controlling close to eighty per cent of the market shifted, and a host of smaller labels cropped up.³⁵ Thus, in the information age, the existing idea of ‘copying’ seems to be economically profitable to both the owner and user of the work.

Grey Area

There is a burgeoning amount of open-content sharing of Copyrighted works online through creative common licences. Once a work is in the virtual medium, it is virtually impossible to restrict its reach or use in any manner. Thus, a plethora of online activities dealing with Copyrighted works don’t find mention in the list provided by Section 52, nor do they fall within the ambit of any of the enumerated exceptions. This creates an unregulated space for the user of Copyrighted works. The use in question may either amount to infringement but goes unchecked because of the legal grey area that it falls in, or, despite being ‘fair’ in essence, may attract liability of infringement because fair dealing can only exist in the statutorily enumerated activities.

Increasing Private Governance through Licences

With the law on fair dealing not being equipped to deal with the wide-range of online activities, these arrangements are largely governed through licences under Copyright. Letting a significant portion of Copyright, which involves crucial public policy matters, be governed by private parties among themselves, can be problematic. It is observed that when private parties are actively encouraged to find their own private solutions to problems, government is in the position of giving the Copyright industries a green light to steer right past, or right through issues such as fair use, freedom of speech and due process. This is not a beneficial, and certainly not a beneficent, solution.³⁶ Concern has also been expressed that the more we bestow proprietary rights on private entities in relation to software, which in the information society is integral to the construction of knowledge and more generally communication; we bestow the power on the private entity to construct discursive frameworks. In essence we are giving a private entity ownership of digital language.³⁷ The arrangement of unregulated legal spaces being controlled by agreements among private players poses a threat to the balance inherent in the concept of Copyright. The balance would tend to tilt in favour of the player with deeper pockets and more

35 Deven R. Desai, “*The New Steam: On Digitization, Decentralization, and Disruption*”, HASTINGS LAW JOURNAL, Vol. 65, No. 6, 2014, p. 1469.

36 Diane Leenheer Zimmerman, “*Copyright and Social Media: A Tale of Legislative Abdication*”, PACE LAW REVIEW, Vol 35, 2014, p. 260.

37 Brian Fitzgerald and Anne Fitzgerald, “*Intellectual Property Rights in Digital Architecture (Including Software): The Question of Digital Diversity in Cyberspace*”, INTERNATIONAL INTELLECTUAL PROPERTY LAW & POLICY, Vol. 6, 2001 Ch. 97, p. 1.

bargaining power while deciding the so-called ‘mutually agreed terms’ in a licence agreement. Moreover, users can no longer stick to the list provided under Section 52³⁸ to make ‘fair’ uses of Copyrighted works.

Balancing Owner Rights against User Exceptions

The traditional understanding treated what owners can do as rights and what everyone else can do as indulgences. However, how can rights be balanced against exceptions? The scales already start weighted on one side.³⁹ Users in the information age have already occupied more space than what the law of fair dealing is willing to acknowledge. Unfortunately, the legislative approach to fair dealing seems to be reduced to a [rights + x = optimal © policy] equation, where x is a statutory list of exceptions which is supposed to somehow ‘work itself out’ in practice, and/or that x must be as circumscribed as possible because more rights produce better outcomes.⁴⁰ It is not warranted for the State to conveniently overlook the large number of unanswered questions and unregulated arenas created by Copyright in the information age. Whether the law is *passé* and needs change, or has reached an *impasse* and requires better implementation, needs to be deliberated upon.

Conclusion

The information age has impacted the Copyright law drastically. The alteration of the concepts of production, distribution and consumption in a networked economy has changed the scope of what amounts to commercial activity. The information age is a complex mesh of communication networks, with an ever-increasing access to communications purported to be either private or restricted to a small audience. Thus, all communication is liable to become communication to public, which is traditionally one of the exclusive economic rights granted to a Copyright owner. The existing law of fair dealing is too narrow to incorporate the activities and tackle the challenges concerning Copyright users in the information age. Therefore, an imminent need is felt to amend the fair dealing provisions in the Indian Copyright Act. Since the Copyright law is international in character, any amendment made at the domestic level must adhere to the relevant International law or norms. India is a signatory to the TRIPS Agreement, which has incorporated the Three-step test laid down by the Berne Convention to be followed by States while crafting limitations and exceptions to Copyright at the domestic level. The purposive flexibility of the three-step test allows India to devise and amend limitations and

38 Indian Copyright Act 1957.

39 David Vaver, “*Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties*”, CASE WESTERN LAW REVIEW, Vol. 57, No. 4, 2007, p. 731.

40 Daniel Gervais, “*Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Limitations and Exceptions to Copyright*”, JOURNAL OF COPYRIGHT SOCIETY U.S.A., Vol. 57, 2010, p. 499.

exceptions to Copyright commensurate with its socio-economic complexities and technological changes.

Fair dealing in India is facing umpteen actual as well as potential challenges due to its restricted scope and under developed jurisprudence. In the author's opinion, the fair dealing model enshrined in Section 52 of the Indian Copyright Act, is passé and should be modified to a model which firstly, is wider in scope so as to encompass the user activities in the information age, and secondly, provides room for flexible interpretation. It is also suggested that a hybrid model of fair dealing and fair use, like the one adopted by Singapore⁴¹, would satisfy the two requirements. The present list of enumerated exceptions in Section 52 is exhaustive. The list should be retained but made illustrative, and criteria for determining whether a certain use which is not a part of the list is 'fair' should be inserted in the Section. This hybrid approach combining fair use and fair dealing models, coupled with the existing Technological Protection Measures (TPMs) or anti-circumvention provisions under Section 65A and 65B of the Indian Copyright Act, should prove comprehensive to regulate use of Copyrighted works in the information age.

41 Copyright Act 1987 (Singapore), <https://sso.agc.gov.sg/Act/CA1987>, (visited on May 6, 2018).

BREASTFEEDING IN PUBLIC: A POLICY REVIEW

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Abstract

Natural practice of breastfeeding in the current Indian society is driven by western culture and various other factors. The government has badly failed to implement the policies and schemes and educate the people about the benefits of breastfeeding. The societal denial of breastfeeding in public places in India is a grave situation which needs to be looked upon immediately. The author has broadly discussed about the schemes and policies of government to promote the breastfeeding and the causes of its failures. This paper will also review the major factors that prevent the practice of breastfeeding through an empirical research. It also deals with problem of breastfeeding in public and provides a revolutionary solution that can be implemented with an immediate effect in India. The paper also discusses the dilapidated condition of ASHAs and Anganwadi centres and how to fit them into the map in a better way to promote breastfeeding.

Keywords: Infant Breastfeeding, Breastfeeding in public, ASHAs and Anganwadis, Baby Care Rooms, Exclusive Breastfeeding.

Introduction

*O, thou beautiful damsel, may the four oceans
Of the earth contribute the secretion of milk
In the breasts for the purpose of improving
The bodily strength of the child
O, thou with the beautiful face, may the child
Reared on your milk, attain a long life, like
The Gods made immortal with drinks of nectar.*

- Sushruta, translated.

Since the evolution of mankind, breastfeeding has been considered to be the best form of nutrition for an infant. The category Mammalian is identified principally by the presence of breasts (mammas), which excrete and release a fluid that for a time is the sole nourishment of the infant.¹ But with changing times, life styles and fashions, the practise of breastfeeding has witnessed severe decline. Introduction of milk bottles and other breast milk substitutes mislead the mothers to opt for such commercial products. It is reckoned by UNICEF that

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1 Jan Riordan, BREASTFEEDING AND HUMAN LACTATION, 3rd ed. 2006, p. 5.

1.5 million infant lives each year can be saved if the infants are exclusively breastfed from birth.²

On November 22, 2016, breastfeeding was declared as a human right for both, the new-borns and the mothers by the United Nations Human Rights Commission, Geneva, Switzerland.³ In India, today the practice of breastfeeding is driven by many social, traditional, commercial and various other hindrances. About 15 million babies out of 26 million born every year in India are unable to get the benefit of mother's milk within one hour of their birth despite 80 per cent of them being born in health facilities. India ranks 78 out of 97 nations when it comes to breastfeeding support services, says the report titled "Arrested Development" compiled by a consortium of public health groups and agencies including government departments,⁴ All India Institute of Medical Sciences and UNICEF under the aegis of World Breastfeeding Trends Initiative and the Breastfeeding Promotion Network of India (BPNI).⁵ The study will highlight the importance and benefits of breastmilk for a child.

The expeditious growth and development of a child can be witnessed since the time of his birth to the age of 6 to 8 years. Breastmilk provides nutrition to babies and help in nurturing their mind and health in every possible manner. These are the following advantages of breastfeeding as :⁶

- Promote adequate growth and development, thus preventing stunting.
- Contain antibodies that provide protection against diseases, especially against diarrhea and respiratory infections.
- Save child from asthma and various types of cancers.
- Decrease the risk for Vitamin-E and iron deficiency which causes anemia.
- Reduce risk of heart diseases, diabetes & obesity.
- Boost Immune System.
- Improve the IQ level of the baby.

Breastfeeding plays an essential role of providing every child with the healthiest start to life. It is a baby's first and the best source of nutrition which bolsters brain development. A child should be provided with exclusive breastfeeding for the first six months. Thereafter, supplementary food should be given along with the mother's milk till the child attains the age of two years. Colostrum (mother's first milk) to the baby is extremely important for the initial

2 World Health Organisation, "Breastfeeding Key to Saving Children's Lives", https://www.who.int/mediacentre/news/notes/2010/breastfeeding_20100730/en/, (visited on November 4, 2018)

3 "Breastfeeding a Matter of Human Rights, Say UN Experts, Urging Action on Formula Milk", <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20904&LangID=E.>, (visited on November 4, 2018),

4 "India falters on Breastfeeding", <https://www.thehindubusinessline.com/news/science/india-falters-on-breastfeeding/article24624494.ece>, (visited on November 4, 2018).

5 *Ibid.*

6 "Benefits of Breastfeeding", <https://www.nhs.uk/conditions/pregnancy-and-baby/benefits-breastfeeding/>, (visited on November 4, 2018).

growth of the child. Ideally, an infant should be breastfed within an hour of birth.⁷ The newborns are very active and agile for approximately half an hour after the birth. A child, if kept with the mother immediately after its birth can be taught to suck a mother's milk.⁸

In India 1.2 million children under the age of five die every year and half of these deaths occur in first 28 days after birth, a time mentioned as neonatal period. Global evidences show that if a child is exclusively breastfed then he is 14 times more likely to survive for the first six months of life than non-breastfed children.⁹ Almost 2.5 million children upto the age of 6 years die in India each year and 65% of these deaths are related to inappropriate infant feeding with the country contributing to the highest number of deaths of newborns.¹⁰

All people are entitled to healthy and nutritious food as articulated in Article 25 of Universal Declaration of Human Rights and Article 47 of the Constitution of India also directs the State to raise the level of nutrition and standard of living and improved public health for every citizen.¹¹ But what does the right to food and nutrition mean for an Infant whose only food is his/her mother's milk? Recently, a mother who visited a shopping mall in Kolkata had asked the officials of the mall to provide a private and clean space to her to breastfeed her child. She was callously told to breastfeed the child in the toilet as there was no designated spot.¹² The incidences of such kind reflect the incompetency of the government to provide apt places for mothers to breastfeed her child. Right to food is not a mere right guaranteed under various international statutes but also a right that needs to be practiced with dignity.

India has a population of more than 1.25 billion with a decadal growth of approximately 17.6%.¹³ The Infant Mortality Ratio (IMR) varies across the states in India with the large Northern Indian states contributing a disproportionately large number of infant deaths. Madhya Pradesh and Rajasthan, for example, have high rate of child mortality while Goa and Sikkim have rates comparable with middle income countries.¹⁴ Geographical vastness, sociocultural diversity and orthodox beliefs of society across India contribute to

7 The practise of breastfeeding is beneficial to mothers as well, almost negating the risk of oval and endometrial cancer. Also, it lowers the chances of heart diseases, diabetes, arthritis etc. if the mothers exclusively nurse their infants.

8 World Health Organisation, "Breastfeeding", https://www.who.int/nutrition/topics/exclusive_breastfeeding/en/, (visited on November 6, 2018).

9 "Early and Exclusive Breastfeeding", <http://unicef.in/AddNewPage/PreView/21>, (visited on November 6, 2018).

10 M.K.C. Nair "Legislation in the Protection of Breastfeeding in India, Solution Exchange for MCH Community Newsletter", BREASTFEEDING MONTH SPECIAL, August 2008.

11 Article 47 of the Constitution of India.

12 Sandeep Chaudhary, "Forced to Breastfeed in Mall's Washroom," THE TRIBUNE, November 30, 2018, p. 3.

13 "Size, Growth rate and Distribution of Population-Census of India," http://censusindia.gov.in/2011-prov-results/data_files/india/Final_PPT_2011_chapter3.pdf, (visited on November 7, 2018).

14 "Infant Mortality Rate (IMR) (per 1000 live births)," <http://niti.gov.in/content/infant-mortality-rate-imr-1000-live-births>, (visited on November 7, 2018).

this vastness. Problems like malnutrition, infection and unregulated fertility are major health problems with mothers in India which is the genesis of high death rates in mothers and infants. Even though India has made a substantial progress in bringing down maternal mortality rate in recent years, but it has completely failed to address a very appealing issue of infant mortality and breastfeeding which is very much related with each other.

Initiatives Taken by the Indian Government for Better Health of Infants and Mothers

The Government of India from time to time has taken various initiatives to promote breastfeeding through policies and awareness programmes. But the mismanagement, corruption and inadequate funding and facilities have made this task harder for the Government. *MAA*, *POSHAN Abhiyaan* and various other schemes could have been a great success if the government had properly ensured the functioning of these schemes. In this section, the author will discuss the loopholes and mismanagement on the part of the government.

MAA- National Breastfeeding Programme

This is the only major intensified scheme of Government of India which thoroughly focuses on the promotion and awareness of Breastfeeding in India. *MAA* (Mother's Absolute Affection) aims to build on enabling environment for breastfeeding through awareness activities, targeting pregnant and lactating women, family members and society in order to promote optimal practices. In August 2016, at the launch of this scheme, the government decided to earmark Rs. 4,30,000 to create awareness through mass media and interpersonal communication.¹⁵ The programme ambitiously plans to train and incentivise Accredited Social Health Activists (ASHAs) to promote breastfeeding.¹⁶ The goal of *MAA* programme is to enhance optimal breastfeeding within one hour of birth, exclusive breastfeeding for the first six months and continued breastfeeding for at least two years, along with feeding of safe and nutritious food on completion of six months.¹⁷

The government deserves praise for its work, though the policy needs to be partially redesigned. It is well known that health workers in villages, that is, ASHAs and ANMs, as well as doctors in hospitals fail to provide adequate services to people.¹⁸ Moreover, the programme's budget may be too small to

15 *MAA- Nation Breastfeeding Programme*, <http://unicef.in/AddNewPage/PreView/19> (visited on November 7, 2018).

16 Nikhil Srivastav, "The Challenge of Breastfeeding Sensitisation," *ECONOMIC AND POLITICAL WEEKLY*, Vol. 53, No. 9, <https://www.epw.in/engage/article/challenge-breastfeeding-sensitisation>. (visited on November 17, 2018).

17 *Supra* n.15.

18 The author is firmly of the opinion that there is a gross mistake on the part of the ASHAs and *Anganwadis* in India and even the government should also be blamed for it. Many of these ASHAs and *Anganwadis* work at various government hospitals and other centres but they have badly failed in their job. Almost 80% deliveries take place in health facilities in India but less than 45% of the newborns are breastfed within one hour of birth. (See: <http://unicef.in/AddNewPage/PreView/19>). According to a research conducted by the Ministry

achieve any meaningful improvements in breastfeeding rates. According to a research conducted by the researcher in Pratapgarh, Uttar Pradesh, 2 out of every 10 women were aware of the 'MAA Scheme'. And if the people aren't aware of such programmes then how can the objectives of the schemes be achieved?

Pradhan Mantri Matritva Vandana Yojana (PMMVY)

Formerly known as Indira Gandhi Matritva Sahyog Yojna, it is a government run maternity benefit programme introduced in 2010 to help stem India's high rates of infant and maternal mortality. The scheme is implemented in all districts of the country in accordance with the provision of the National Food Security Act, 2013. Under PMMVY, a cash incentive of Rs 5000/- would be provided directly in the account of Pregnant Women and Lactating Mothers for first living child of the family subject to their fulfilling specific conditions relating to Maternal and Child Health. The scheme is implemented using the platform of *Anganwadi* Services scheme of Umbrella ICDS under Ministry of Women and Child Development in States/ UTs implementing scheme through Women and Child Development Department/ Social Welfare Department and through Health system in respect of States/ UTs where scheme will be implemented by Health & Family Welfare Department.¹⁹

The mother's health is one of the major reasons that accounts for the high Infant Mortality Rate in the country. The programme aims to provide partial compensation for the wage loss in terms of cash incentives so that the woman can take adequate rest before and after delivery of the first living child. The cash incentive provided would lead to improved health seeking behaviour amongst the Pregnant Women and Lactating Mothers. All Pregnant Women and Lactating Mothers, excluding Pregnant Women & Lactating Mothers who are in regular employment with the Central Government or the State Governments or PSUs can benefit from this scheme. A beneficiary is eligible to receive benefits under the scheme only once.²⁰ A beneficiary is eligible to receive benefits under the scheme only once. That is, in case of infant mortality, she will not be

of Woman of Child Development, only 31% of the pregnant women were visited by an ASHA and only 51% were visited by an Anganwadi or Asha after the delivery. It has been recently reported that the *Anganwadis* have been forced to engage in different tasks such as undertaking household surveys and ensuring Aadhaar linkage for direct benefit transfer schemes of the governments (See: <https://indianexpress.com/article/india/root-of-indias-malnutrition-problem-the-underpaid-anganwadi-worker-5353392/>). The *Anganwadis* are also deployed as Polling Booth officers in various elections happening all over the country. An important institution such as Anganwadi whose primary function is to combat child hunger and malnutrition has been engaged in a totally unaccommodating job leaving the future of the country in a trouble. The *Anganwadis* are also underpaid and there is a big fault on the part of the government in providing the suitable infrastructure to many of the Anganwadi Centres all over the country. I have discussed this sanitation issue further in detail in my research and have provided the statistical data for the same.

19 *Pradhan Mantri Matru Vandana Yojana- Ministry of Women and Child Development*, <http://www.wcd.nic.in/schemes/pradhan-mantri-matru-vandana-yojana> (visited on November 17, 2018).

20 *Ibid.*

eligible for claiming benefits under the scheme, if she has already received all the installments of the maternity benefit under PMMVY earlier. There are certain other conditions that beneficiaries need to fulfill before getting any benefit from the programme.

Recently, the government made a change in this programme that this policy will apply only to first-borns which is a major setback for the objectives of the policy. This would discourage a large number of women from keeping in touch with the doctors and hospitals during pregnancy. Evaluations of the programme had already been critical, finding that only 63% of the money promised between 2013 and 2016 had actually been spent. Onerous paperwork required to prove that women were complying with conditions was also slowing payments, according to a review last year. Poor health infrastructure in many rural parts of the country – where mothers' health is generally most at risk – was also preventing women from complying with the conditions necessary to receive the payments.²¹ According to the latest news reports, less than two percent of the intended beneficiaries of this ambitious maternity benefit scheme have received cash incentive benefits since it was announced by Prime Minister over a year ago²². The PMMVY was announced by Prime Minister Narendra Modi on December 31, 2016. Unfortunately, it violates the National Food Security Act in several ways. First, the benefits have been reduced from Rs. 6,000 to Rs. 5,000 per child. Second, they are now restricted to the first living child. Third, they are further restricted to woman above the age of 18 years.²³

Like other government schemes, this scheme also seems to be heading towards a slow death because of the unreasonable changes by the government and the failure of the scheme to reach the backward rural areas. The scheme largely defeats the purpose it is supposed to serve: according to a recent analysis, it excludes more than half of all pregnancies because first-order births account for only 43% of all births in India. Among those who were eligible, a little over half had applied for maternity benefits.²⁴

POSHAN Abhiyaan

The newly launched programme is India's flagship programme to improve nutritional outcomes for children adolescents, pregnant women and lactating mothers. The programme was launched recently on the occasions of the women's day (March 08, 2018). It aims to bring down the high instances stunting growth, malnutrition and anaemia. The intention is to do this through convergence, mass movements and leveraging technology. *Anganwadi* workers

21 "Risking Lives of Mothers and Children : India Condemned for Cuts to Benefits," <https://www.theguardian.com/global-development/2017/may/30/india-risking-lives-of-mothers-and-children-cuts-to-maternal-benefits>, (visited on November 21, 2018).

22 "Less than 2% Beneficiaries Get Under Maternity Scheme," <https://www.hindustantimes.com/india-news/less-than-2-beneficiaries-get-aid-under-maternity-scheme/story-vZqt5A43x8hO9vUI48oppO.html>, (visited on November 21, 2018).

23 "Without Maternity Benefits," <https://www.thehindu.com/opinion/op-ed/without-maternity-benefits/article25616970.ece>, (visited on November 21, 2018).

24 *Ibid.*

(AWWs) are required to feed in details of the beneficiaries and monitor their growth in real time during pregnancy, as well as height and weight of the child once born, in the mobile phones given to them and follow up with SMS alerts to those who are at risk.²⁵ Different ministries have converged to make the mission successful and bring down the Infant and Maternal Mortality Rates. *Anganwadis* are the central point of deliveries of health facilities and nutrition services to pregnant women, lactating mothers and children. ASHAs are also fit into this operation to reach the rural and tribal areas.²⁶

The target of this programme is as to:²⁷

- Prevent and bring down stunting in children below six years.
- Prevent and bring down the number of undernourished children below six years.
- Bring down the prevalence of anaemia among young Children from 6-59 months.
- Bring down the prevalence of anaemia among Women and Adolescent Girls in the age group of 15-49 years.
- Bring down Low Birth Weight.

Anganwadi Centres being a fulcrum of this scheme and many other similar schemes run by the central and state government, demand a lot of investment and attention by the state. There are over 13.49 lakh *Anganwadi* Centres in India²⁸ and 60% of these are located in rental accommodations.²⁹ AWCs need adequate space to function properly and accommodate the enrolled children conveniently and in hygienic area. Further, as per the report by NITI Aayog, only 48.2% AWCs maintain good hygienic conditions and almost 14% of AWCs do have safe drinking water facilities.³⁰ Many *Anganwadi* workers complain of being underpaid and overburdened with tasks such as Booth Level Officers (BLO) duties and surveys etc.³¹ Even though POSHAN Abhiyaan is a progressive initiative by the government for the promotion of breastfeeding but a lot need to be fixed for the better implementation and high success rate of this project. Institutions like *Anganwadi* are working under the dark clouds of corruption and mismanagement on the part of the government. The government needs to invest its money in the right place and should strive for better and quick results because India cannot afford to have a generation of stunted citizens.

25 “POSHAN Abhiyaan,” <https://icds-wcd.nic.in/nnm/home.htm#>, (visited on November 10, 2018).

26 *Ibid.*

27 *Supra* n. 25.

28 “Operational Anganwadi Centres (AWCs)” as on 31.12.2015, <https://community.data.gov.in/operational-anganwadi-centres-awcs-as-on-31-12-2015/>, (visited on November 17, 2018).

29 “A Quick Evaluation Study of Anganwadis- NITI Aayog”, http://niti.gov.in/writereaddata/files/document_publication/report-awc.pdf, (visited on November 10, 2018).

30 *Ibid.*

31 “Taken for Granted and Ignored, Anganwadi Workers Demand Better Pay, Conditions”, <https://thewire.in/labour/anganwadi-icds-child-development-ministry>, (visited on November 17, 2018).

National Guidelines on Infant and Young Child Feeding, 2004

This policy guideline was jointly introduced by Ministry of Human Resource Development and Department of Women & Child Development in 2004. Objectives of Guidelines on Infant and Young Child Feeding as to³² - advocate the cause of infant and young child nutrition and its improvement through optimal feeding practices nationwide; help to raise awareness and promotion of breastfeeding; achieve the national goals for Infant and Young Child feeding practices set by the Planning Commission for the Tenth Five Year Plan.

The Planning Commission included goals for Breastfeeding and Complimentary Feeding in the “National Nutrition Goals” for the “Tenth Five Year Plan”. The Tenth Five Year Plan had set major specific goals to be achieved by 2007. The major goals of this plan were to - bring down the prevalence of underweight children under three years from the level of 47% to 40%; enhance early initiation of breastfeeding (colostrum feeding) from the level of 15.8% to 50%; enhance the complimentary feeding rate at 6 months from the level of 35.5% to 75%.

However, the latest statistics show the actual progress. A study by a renowned journal in 2016 revealed that 97 million children were underweight in India.³³ In 2017, India was reported to have the largest number of malnourished children in the world.³⁴ According to UNICEF in 2016, 6 Lakh infants in India died in their first month.³⁵ Only 41.6% of babies are breastfed within an hour of birth in India in 2017, according to NHFS-4 data.³⁶ According to UNICEF, complementary feeding rate of children from 6 months to 18 months in 2018 was approximately 55%.³⁷

The plan of this programme was to disseminate the awareness across the lengths and breadths of this country. The policy guidelines failed to achieve its goals and its failure shows the irresponsibility and ignorance on the part of the executors. The goals discussed in the guidelines were promised to be achieved by 2007 but even in 2016-17, India is far behind those figures.

32 *Ibid.*

33 “India had 97 Million Underweight Children in 2016, Says Lancet”, <https://www.financialexpress.com/health-3/india-had-97-million-underweight-children-in-2016-says-lancet/890300/>, (visited on November 14, 2018).

34 “Nutrition”, <http://unicef.in/Story/1124/Nutrition>, (visited on November 14, 2018).

35 “Infant Mortality: 6 Lakh Indian Children Died in their First Month in 2016, Says UNICEF”, <https://www.thehindu.com/sci-tech/health/infant-mortality-6-lakh-indian-children-died-in-their-first-month-in-2016-says-unicef/article22807866.ece>, (visited on November 14, 2018).

36 Santosh Jain et al., “Why do We Need to Promote Breastfeeding”, Press Information Bureau, GOVERNMENT OF INDIA.

37 “Infant & Young Child Feeding,” <http://unicef.in/Whatwedo/7/Infant-and-Young-Child-Feeding>, (visited on November 14, 2018).

Major Factors Influencing Breastfeeding Practices in India

Maternal Health & Nutrition: A mother needs to be healthy to give birth to a healthy child, but pregnant women are facing a grave curse of malnutrition in India. Poor maternal health and nutrition are important causes of child malnutrition, which leads to poor adult health, poor cognition and poor economic production. Poor maternal health is also a leading cause of low birth weight and high infant mortality rate. A third of women of reproductive age in India are under nourished, with a body mass index (BMI) of less than 18.5 kg/m². It is well known that an undernourished mother inevitably gives birth to an undernourished baby, perpetuating an intergenerational cycle of under nutrition. While it is globally acknowledged that focusing on the first 1000 days of a child's life- from conception to two years of age- is a critical window of opportunity to address stunting. However, the focus of nutrition programmes for India has largely been post-birth, with child and feeding centres interventions.³⁸ The government has to revive its ineffective policies and should take into account the importance of the health of a mother in nourishing an infant.

Orthodox Beliefs: According to an empirical research conducted by the author among 120 women in a Government Hospital in Pratapgarh District, Uttar Pradesh, 64 women breastfed their children only for 3-5 minutes as they thought that breastfeeding for longer duration causes sore nipples. Almost 35% of these women did not breastfeed their children at night as they said that feeding at night causes colic to the baby. Only 47.5% of these women initiated breastfeeding within 24 hours of birth and only 26.3% initiated breastfeeding within an hour of birth due to several traditional reasons. Many of these mothers gave herbal powder substances to keep the evil spirits away from the baby. Most of the women also discarded colostrum and gave honey to the babies as pre-lacteal feeds.

Even though the above research was conducted with limited resources, many such traditional practices are followed in major portions of the country according to the data provided by an International Journal.³⁹ Cultural restrictions imposed on pregnant and lactating women especially in rural areas is a major problem that can only be solved by spreading awareness among people.

Commercial Hindrances: The first thing that a newborn does is latch on to mother's breast for milk. It's a mammalian nature as the breast milk is the best source of nutrition for the baby. But the decline of breastfeeding practices in India accelerated due to the introduction of Breast-milk Substitutes. The development of artificial baby milk has been a marketing success story, not least in the skill with which the competing product has been destroyed. Artificial milk is an entirely different substance from human milk, containing no

38 "Women Nutrition," <http://unicef.in/Whatwedo/6/Women-Nutrition>, (visited on December 3, 2018).

39 "International Journal on Collaborative Research on Internal Medicine & Public Health," <http://internalmedicine.imedpub.com/infant-feeding-and-rearing-practices-adapted-by-mothers-incoastal-south-india.php?aid=6408>, (visited on December 3, 2018).

living cells and not adapting to each baby's individual and changing needs.⁴⁰ The powder milk lacks the nutrition that a baby requires for its growth and can also cause allergy, diarrhoea, jaundice and various other infectious diseases.⁴¹

The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 as Amended in 2003 (IMS Act) has banned any kind of promotion for baby foods and feeding bottles for children aged up to 2 years, including advertisements inducement of sales, pecuniary benefits to doctors or their associations including sponsorship.⁴² After the implementation of IMS Act, India has successfully put a restriction on the increasing sales of milk formula in India but there is still some scope for improvement as the baby food manufacturers still violate the IMS Act. According to a news article, Euromonitor reported that 10,847 tonnes of standard infant formula (0-6 month's age group) was sold in India in 2012, which is 10,847,000 kg of milk powder. It means India sells about 27 Million containers of 400 grams each year, almost equal to its babies born. Going by the estimated growth of Infant Food industry in 2022, this figure will be 32.7 million.⁴³ Even though it is contended by the authorities that the advertisements of artificial milk products is completely banned in the country as established by the IMS Act, several of them continue to appear in newspapers, magazines, televisions etc.

Lack of Awareness: Social marketing initiatives such as awareness programmes, seminars, advertisements etc. can be handy tools for promoting awareness to change the mother's knowledge, beliefs and attitudes about breastfeeding. Government hospitals can collaborate with *Anganwadis* to reach the mothers in sub-urban and rural areas. Organisations like Breastfeeding Promotion Network of India (BPNI) can play a huge role by campaigning in the states with high infant mortality rate. Even though the government has initiated certain policies and has taken some promising steps to improve the condition of breastfeeding practices in the country, there is a long way to go to achieve some materialistic results.

Western Culture: Breastfeeding has been considered to be one of the oldest practices recommended in Vedas and Hindu Scriptures. The Atharva Veda says that breast is a pitcher full of nectar. Sushruta has dedicated a whole chapter on the importance of Breastfeeding in his book Sushruta Samhita. The Charak Samhita depicts the importance of breastfeeding and the Kashyap Samhita describes the quality of breastmilk. Hindu society overall believed that the breastmilk is the best form of food for the newborn.

40 Gabrielle Palmer, THE POLITICS OF BREASTFEEDING: WHEN BREASTS ARE BAD FOR BUSINESS, 2nd ed. 2009, p. 204.

41 *Supra* n. 1, p. 82.

42 The Infant Milk Substitutes, Feeding Bottles and Infants Food (Regulation of Production, Supply and Distribution) Act 1992 as amended in 2003, No. 38, Acts of Parliament, 2003.

43 "Baby Food Industry Violated Laws on Breast Milk Substitute", <https://retail.economicstimes.indiatimes.com/news/toys-kids-and-baby/babycare/baby-food-industry-violated-laws-on-breast-milk-substitute/55765434>, (visited on December 3, 2018).

In the 20th Century, the Western Culture was widely spreading its wings all around the world, and the customs in India were won over by the western culture soon. Today just like the western culture, we believe that the primary role of the breasts is related to sexual behaviour and pleasure. The practices that we were following since the Early Vedic era are considered to be irrelevant in today's times (mainly in urban society) as the Indian society is very much in the influence of the Western Culture. Women in urban areas in the country do not generally breastfeed their children because they are under a myth that it can harm their physical figure and they will gain weight. The sexualisation of breasts continues to sabotage the practice of breastfeeding and the mothers are now facing difficulty in breastfeed their children in both public and at home.

Breastfeeding in Public: A Crucial Debate

I would rather have cow's milk from a breast than breast milk from a bottle.

Carole Livingstone

No law in India prohibits a mother to breastfeed in public yet nursing in public has become enough of a taboo in Indian society that mothers mostly feel unsafe and often have to face embarrassment while feeding in public. People consider breastfeeding in public as an obscene activity which affects the society's moral fabric. It is a universally accepted fundamental right of a woman to breastfeed her child irrespective of the place and situation. In spite of the legal acceptance of breastfeeding, women who dare to breastfeed in public are judged by their character and have to face embarrassment and voyeurism.⁴⁴

We are now becoming a society that blames its victims and suppresses the rights of women. A recent case of *Felix M.A. v. P.V. Gangadharan*⁴⁵ in the Kerala High Court has fortunately started the debate about obscenity in public breastfeeding from the legal perspective. In this case, a Kerala magazine featured a woman breastfeeding a baby on the cover page and the caption read as "Don't Stare: We Need to Breastfeed". This was considered to be an act of obscenity which affects the moral fabric of the society. The two judges bench in this case observed:

"We do not see, despite our best efforts, obscenity in the picture, nor do we find anything objectionable in the caption, for men. We looked at the picture with the same eyes we look at the paintings of artists like Ravi Raja Varma. As the beauty lies in the eyes of beholder, so does the obscenity, perhaps. Even the sections relied on by the petitioner fail to convince us that the respondent publishers have committed any offence, much less a cardinal one,

44 As such the women in India find it difficult to breastfeed outside their homes, that's why they have to depend upon milk bottles and infant milk formulas whenever they go out. This is the main reason why the rate of exclusive breastfeeding is low in India.

45 WP (C). No. 7778 of 2018.

affecting the Society's moral fabric, and offending its sensibilities."⁴⁶

In the case of *Aveek Sarkar v. State of West Bengal*⁴⁷ the Supreme Court explicitly explained the definition of Obscenity. The Supreme Court stated,

"A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind [sic] and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of exciting lustful thoughts can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."⁴⁸

The United States in *Roth v. United States*⁴⁹ observed that sex and obscenity are not to be seen as synonyms. It was held that only those sex-related materials which had the tendency of exciting lustful thoughts were found to be obscene and the same has to be judged from the point of view of a common person by applying contemporary community standards.⁵⁰

Breast is a mammary organ and its primary function is to feed an infant but it has been sexualized to an extent that the society has imposed heavy restrictions on women to practise breastfeeding in public. It can very easily be inferred from the above case laws that breastfeeding in public is not a crime in the country however societal factors seemed to have overpowered the legal acceptance of breastfeeding in public. The problem with Indian society is, people even today, judge a particular situation from a male's perspective and completely exclude the women. I still call this modern India society 'A Male Dominating One' because we still see men urinating in public, and this act of men has never been questioned by any news report to be obscene even though it is illegal⁵¹. On the other hand, the so called 'modern Indian society' seems to have a problem with women breastfeeding in public, which is completely legal in the country.

46 *Ibid.*

47 (2014) 4 SCC 257.

48 The term contemporary community standards is a standard used to test descriptions or depictions of sexual matters, which was first adopted by the United States Supreme Court in 1957 in *Roth v. United States*, 354 U.S. 476. In the Roth case, the Court put forth its test for determining whether a work is obscene as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as whole appeals to prurient interest." The courts in India used to apply the archaic 1868 Hicklin Test for determining obscenity but in the case of *Aveek Sarkar v. State of W.B.*, (2014) 4 SCC 257, the contemporary community standards test was applied the first time in India.

49 354 U.S. 476 (1957).

50 *Ibid.*

51 Section 34 of the Police Act 1861 criminalises urinating in public.

In the recent times there has been a growing demand of a law which allows women to breastfeed in public. The fact that we need a law to provide all sought of support for breastfeeding to infants in public places, which should address the severity of the problem. The female breast, whose true biological function is to feed babies, has been primarily objectified as an erotic body part by contemporary western culture. Much of the discomfort and shaming surrounding public breastfeeding originates from the understanding of breasts as an erotic body part.

Female body parts i.e., hairs, legs, etc., which has no inherent sexual functions, are instructed to be covered by different cultures in the world. During the Victorian Britain, women were told to wear long skirts or dresses that would cover their legs properly. Many Muslim women and girls wear hijab (scarves) to cover their hairs. In Jewish communities, women wore hats and scarves to cover their hairs outside home. Such taboos illustrate that the women bodies that are considered sexually arousing are changeable in different times and places and concealing them only adds to forbidden allure.⁵² I think that the societal denial of public breastfeeding is the major reason why many women start bottle feeding their babies and start giving breastmilk substitutes.

Suggestions to Strengthen Policy

Although, it is going to take some time for the societal acceptance of public breastfeeding then we need to look for other solutions so that mothers can breastfeed their children when they step out in public. Recently, the concept of Baby Care Rooms (BCR) has been trending in many countries which can be said to be a successful solution to the societal obstruction of breastfeeding in public. Baby Care Room is space which provides facilities to carers to attend to the personal needs of infant or toddlers such as breastfeeding, feeding fluids and solids, changing nappies.⁵³ Countries like Australia, Malaysia & USA have a brilliant setup of such Baby Care Rooms. India can also consider installing such BCRs in various public places like shopping malls, hospitals, railways stations, airports, workplaces, restaurants, etc. Besides giving freedom to the mothers to breastfeed outside their homes, the researcher thinks BCRs can be a useful tool for the promotion of the correct way of breastfeeding. An *Anganwadi* or Asha member can be posted in most of these Baby Care centres to explain the correct process and profits of breastfeeding to every person visiting these baby care rooms. The proper set up of BCRs requires a proper policy and has to be under the watch of a statutory body. This policy must explicitly legalise breastfeeding in public because a law has the potential to strike down all the confusions and debates regarding public breastfeeding. The introduction of such policies can revolutionize the practise of breastfeeding and can also gradually mould our society back to the ancient era when the breasts were considered to be a pitcher

52 Jane Nicholas, *THE MODERN GIRL: FEMINIE MODERNITIES, THE BODY AND COMMODITIES IN THE 1920'S*, 1st ed. 2015, pp. 141-142.

53 Nik Farhanah et al., "*Baby Care Rooms in Shopping Malls: Accessibility to Malaysian Public*", *PROCEDIA- SOCIAL AND BEHAVIORAL SCIENCES*, Vol. 35, 2011, pp. 531-533.

of nectar. The researcher suggests following points that should be considered while framing such a policy for breastfeeding and set up of BCRs:

- All the airports, railway stations and the bus stations of major cities in the country must be equipped with such breastfeeding rooms.
- All the shopping malls in the country must be equipped with such breastfeeding rooms.
- Any restaurant with the capacity to hold more than 60 people must be equipped with such BCRs.
- In rural areas in India, 3 to 4 villages have one common market place, we can have BCRs in such market places as well.
- All hospitals whether private or government must be equipped with such BCRs.
- In cities which have the population of more than 30 lakh, such BCRs can be set up in an area of every 1km².⁵⁴
- The *Anganwadis* and ASHAs posted in such BCRs will have a job to counsel the visiting mothers.
- Pamphlets that talk about the importance of breastfeeding and the criticism misconception and myths that the people have about this particular practice, can be distributed to such mothers who visit the BCRs.
- Various awareness camps in different areas (mostly in rural areas) can be organised by ASHAs and Government Doctors to educate the people about the benefits of breastfeeding.

Shopping Malls, restaurants and other private entities can be directed to set up BCRs at their own expenses and also engage an employee to counsel the visiting mothers while barring the use of these facilities to promote commercialisation. Diapers and food supplements (for the infants after 6 months of births) can be provided to mothers from these BCRs at subsidised price. This will attract more people to visit the BCRs and the government will have a good opportunity to educate the people. Till now the government was reaching the mothers through ASHAs and *Anganwadis* to talk about things related to pregnancy, and child birth and breastfeeding, however, the set up of BCRs will start the both way channel in the country, which means that now the people will also reach the government.

Conclusion

Proper implementation of schemes i.e., *MAA*, *POSHAN Abhiyaan* etc. is the need of the hour. From the discussion held above, it can be clearly observed that major solution is to create awareness among people by the above suggested modes. The concept of BCRs, if wisely implemented, can be a handy tool to promote breastfeeding practices in the Indian society. The right to food of millions of children is being violated everyday in the country and it is high time

54 The responsibility of maintaining the cleanliness and sanitation of such BCRs can be given to the municipality of such cities.

that the attention got shifted from theory to action. The government needs to invest the money for the success of the above discussed policies and schemes and fix the loopholes so that the proper functioning of these schemes can actually make actually be driven towards a tremendous success. Awareness programmes must be conducted all over the country on a regular basis to educate the people about the practise of breastfeeding and how the western culture is driving the Indian society away from its own customs.

The societal denial of public breastfeeding is a major issue which compels a mother to opt for Infant milk substitutes and milk bottles. As this problem cannot be changed in a day or two, the Baby Care Rooms seems to be the best possible solution. Such baby care rooms will not only tackle the problems of public breastfeeding but with the presence of ASHAs or *Anganwadis* in BCRs will also help in creating awareness about breastfeeding practices. Other than this, the government needs to focus on providing proper infrastructures to *Anganwadi* centres and proper maternity wards in the Government Hospitals in all over the country with an immediate effect. Additionally, the government must also consider about teaming up different companies under CSR so that the investment in this particular sector can be divided between the Government and these companies.

Exclusive breastfeeding can not only save the lives of millions of infants but it can also save the future generation from the epidemic of malnutrition and stunting. The government of India has a lot to do to improve the condition of breastfeeding in the country and these millions of infants are waiting for one positive step from the government to save their lives.

FORM –IV

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