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EDITORIAL

The recent spurt regarding the judicial intervention in executive functions has once again revived the debate on the scope and extent of judicial review under the Indian Constitution. The Supreme Court's taking over of the monitoring of some of the high profile cases on corruption, such as, the *2G Spectrum Scam, the Common Wealth Games Scam*, the setting up of the Special Investigation Team (SIT) for the black money trail, etc., are few instances of the same. The tension between the executive and the judiciary has been rising and has posed various questions on the limits of judicial review, judicial activism and judicial over-reach. Conflicting views have been expressed on all these issues.

The judiciary has taken the responsibility of monitoring the investigations in situations where the government has shown inability to contain corruption of high magnitude, involving, ministers, politicians and top bureaucrats, due to 'coalition compulsions'. This does not amount to judicial over-reach. In such cases, the judiciary is only performing the judicial functions as envisaged under the Constitution. The government has often failed to make legislation dealing with issues pertaining the fundamental rights of the people, such as, sexual harassment, foreign adoption, illegal detention, etc., and judiciary has intervened in those circumstances, in public interest, to fill-in the void.

The above instances indicate that unless the executive and the legislature perform their functions and discharge their responsibilities for the benefit of the citizens, the judiciary will continue to exercise its judicial review power to fill up the vacuum created by executive indifference and legislative apathy. One would agree with Mr. Fali Nariman that judicial over-reach is the consequence of administrative under-reach. Judges are not running the government but they are remedying the acts of non-governance or mis-governance. When gross violations of human rights are brought to its notice, the judiciary cannot procrastinate it, but must respond. It is expected that all the three wings of the government would perform the functions assigned to them for the welfare of the people as envisaged by Montesquieu in his Doctrine of Separation of Powers, until then, the recourse of the common man is the judiciary which has brought significant changes in their lives.

Prof. M. K. Balachandran

CONTENTIOUS JUDGEMENTS AND THEIR IMPACT ON CONSUMERS AND CONSUMER COURTS

Prof. M. K. Balachandran*

Abstract

It is undisputed that the Supreme Court as well as the consumer courts established under the Consumer Protection Act, 1986, has rendered justice to a large number of consumers over the years. However, a few conflicting and controversial judgments delivered by the National Commission as well as the Supreme Court have been adversely impacting the smooth functioning of the consumer courts in the country. They are conflicting because in some cases the same court has been giving different judgments on similar facts situations; they are controversial because some of them are delivered in contravention of the spirit of the Act and a few others are rendered *per incuriam*. Some of these judgments have restricted the jurisdiction of the consumer courts by excluding certain services (postal services and educational services) from the purview of the Act, while others have created procedural hurdles (medical negligence cases) in their functioning.

The paper seeks to critically analyse these judgments with a view to highlight the deficiency in these judgments and to suggest remedial measures. The definition of the term 'service' and the ambit of section 3 the Act which are subjected to controversial interpretations are discussed in detail in the light of relevant judicial pronouncements and established legal principles. The paper suggests suitable amendments to these provisions which will enable achievement of the avowed objective of this beneficial legislation, *viz.*, the better protection of the interests of the consumers.

Introduction

The Supreme Court by upholding the constitutional validity of the Consumer Protection Act, 1986[1], has bestowed recognition and credibility to the adjudicatory process of the consumer courts in settling consumer disputes. The Court has also set at rest the controversy surrounding the applicability

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1 *Indian Medical Association* v. *V.P. Shanta*, AIR 1996 SC 550.

of the Act to the medical profession by categorically declaring that "the service rendered to a patient by a medical practitioner by way of consultation, diagnosis and treatment would fall within the ambit of service as defined in section 2 (1) (o) of the Act"[2].

Earlier, in a land mark judgement[3], the Court had declared that "the Consumer Protection Act is a social benefit oriented legislation" and as such "the provisions of the Act have to be construed in favour of the consumer to achieve the purpose of the enactment"[4]. The court had also declared that "a government or a semi government body or a local authority is as much amenable to the Act as any other private body rendering similar services"[5]. The principle of personal liability has also been made applicable to cases of deficiency in service under the Act by holding that the damages awarded by the consumer courts by way of compensation should be recovered from the salary of the employees who are found to be negligent[6].

The Supreme Court, thus, has been extending a helping hand to the consumer courts in the proper performance of their statutory functions of deciding consumer disputes. The consumer courts – the National Commission, the State Commissions and the District Forums on their part have also delivered a number of judgements in favour of the consumers redressing their genuine grievances, thereby, instilling a sense of confidence and relief among the consumers that their grievanees will be heard and decided justly and fairly by the competent authorities established under the Act.

However, a few conflicting and controversial judgements delivered by the National Commission as well as the Supreme Court have been creating road blocks in the otherwise smooth running of the consumer courts. They are controversial because some of them are delivered in contravention to the spirit of the Act and a few others are rendered *per incuriam* by ignoring the decisions of the larger bench, rendered earlier.

2 *Ibid.*
3 *Lucknow Development Authority* v. *M.K. Gupta*, AIR 1994 SC 787.
4 *Ibid.*
5 *Ibid.*
6 *Ibid.*

One feels disturbed that some of these judgements have restricted the area of operation of the consumer courts under the Act by excluding certain services (postal services and university services) from the purview of the Act, while others have created procedural burdles (medical negligence cases) in their functioning. It is a matter of concern for the consumers as well as the consumer activists that these judgements are rendered on the face of the Consumer Protection Act which "applies to all goods and services"[7] and which was enacted for "the better protection of the interests of the consumers"[8].

The paper seeks to highlight some of these judgements and their impact on the consumer courts through a critical analysis of the judgements which have adversely affected the functioning of the consumer courts. At the outset, a brief account of the provisions of the Act which are relevant for the discussion is provided.

The Scope of the Act

The Consumer Protection Act is one of the most important citizen-friendly legislation that has been enacted by the parliament since independence[9]. The Act is citizen-friendly in the sense that their implementation is dependent on the citizens' initiative and assertive actions.

The Act was enacted in 1986 "for the better protection of the interests of the consumers"[10]. It envisages a better legal framework within which an ordinary citizen can fight for his rights and get his grievances redressed. It provides for speedy and inexpensive settlement of disputes within a limited timeframe as against civil courts which are generally costly and time consuming. The establishment of the consumer courts in the country has been a great relief to the consumers who had earlier stayed away from the ordinary courts and suffered in silence. The consumers have been filing a large number of cases

7 The Consumer Protection Act, 1986, s. 1(4).

8 The preamble to the Consumer Protection Act, 1986.

9 The Right to Information Act, 2005, the Right to Services Act, 2010 (Bihar) and the Delhi (Right of Citizens to Time Bound Delivery of Services) Act, 2011, are some of the other citizen friendly enactments.

10 The Preamble to the Consumer Protection Act reads: "An Act to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith".

before the consumer courts and majority of them have been disposed off in favour of the consumers. The issues in those cases cover defective goods to deficient services; many of them affect the common man in the country.

National Commission's Stand on Postal Services

The first victim of the controversial judgement of the National Commission was the postal service. In the *Presidency Post Master* v. *Dr. U. Shanker Rao's*[11], the Commission was called upon to decide two revision petitions based on two sets of facts relating to deficiency in postal services. In the first case Dr. Shanker Rao alleged that he had posted about 600 invitation cards for a function he had organised and most of them did not reach the invitees, thereby, caused heavy loss and disruption to the party he had organised. He alleged gross deficiency in service and negligence on the part of the postal department and accordingly claimed damages. The department refuted the charges and argued that the delay, if any, was not wilful or intentional and in any case section 6 of the Indian Post Office Act, 1898[12], gave them complete immunity.

The District Forum rejected the argument and awarded damages. The State Commission dismissed the appeal of the postal department holding that section 6 constituted no defence when an action for compensation for deficiency in service or negligence was instituted under the Consumer Protection Act.

In the second revision petition, the complainant alleged that he had sent a consignment of handloom towels by lorry to Calcutta and the original lorry receipt of the same was sent by registered post acknowledgment due to a Bank in Calcutta to be received by the consignee to take delivery of the consignment. The complainant came to know that the registered letter had not reached the Bank and more shockingly that some other person had taken delivery of the consignment by using the said lorry receipt. He argued that the registered letter had fallen into the hands of some unscrupulous person due to the carelessness,

11 II (1993) CPJ 141.

12 The Indian Post Office Act, 1898, s. 6 reads: "The Government shall not incur any liability by reasons by the loss, misdelivery or delay or damage to, and postal article in course of transmission by post, except in so far as such liability may in express terms be undertaken by the Central Government as hereinafter provided, and no officer of the Post Offices shall incur any liability by reason of any such loss, misdelivery, delay or damage, unless he has caused the same fraudulently or by his wilful act or default".

negligence and misconduct of the postal authorities, resulting in damage to the petitioner. The postal department admitted the booking of the registered letter and averred that on inquiry it was found that the registered letter had reached the Calcutta RMS "but its further disposal was not known" and claimed immunity by relying on section 6 of the Indian Post Office Act.

The District Forum awarded damages. The State Commission on appeal held that the defence under section 6 of the Post Office Act was no longer available to the department after the passing of the Consumer Protection Act which provided the consumers a cheap, speedy and inexpensive and expeditious remedy against deficiency in service, whether caused by government agencies or a private body. The State Commission also remarked that the fact that the registered letter had reached the Calcutta RMS and from there it was lost indicated the extreme apathy and indifference, want of due diligence and care amounting to gross negligence on the part of the postal department.

The National Commission rejected the above reasoning by placing reliance on section 3 of the Consumer Protection Act[13] which the Commission interpreted as clearly laying down that "if the remedy is barred under any other Act, then the various Forums constituted under the Act cannot grant the remedy prayed for". The Court accepted the revision petitions by holding that the remedy was barred under section 6 of the Indian Post Office Act and as such there was no remedy available under the Consumer Protection Act.

The decision was followed by the National Commission in some of the subsequent cases, the latest being *Union of India* v. *M. L. Bora*[14]. The facts are more or less the same. The complaint related to the non-delivery of 532 registered letters containing new share certificates sent to the respective shareholders in exchange of the old certificates. On enquiry, the postal department informed the petitioner that "the shares had been lost in transit". The District Forum awarded damages and the State Commission confirmed the decision of the District Forum.

13 Section 3 reads: "The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force".

14 II (2011) CPJ 9 (NC).

In the revision petition filed before the National Commission, the department argued that "the complaints filed were baseless, vexatious and frivolous in nature" and that "the respondent was not entitled to any relief in view of Section 6 of the Post Office Act, which granted complete immunity to the government for the loss, misdelivery, delay and damage to the postal article, unless it is proved that the loss was caused due to the fraudulent and / or wilful act of any officer of the post office"[15]. The department also relied on section 3 of the Consumer Protection Act which was interpreted to mean that "if the remedy is barred under any other law no relief can be granted under the Act".

In both the cases, the National Commission further observed that in the absence of any allegation against any of the officers of the postal department that the loss or misdelivery or delay was caused due to the fraudulent or willful act or default of such an officer, no relief can be granted against any of the officers of the department.

The facts of the above two cases are discussed in greater detail as they raise many unanswered questions.

Unanswered Questions

Notwithstanding the immunity granted to the postal department under section 6 of the Post Office Act and notwithstanding the interpretation or misinterpretation of section 3 of the Consumer Protection Act as excluding the jurisdiction of the consumer court 'when the remedy is barred under any other Law' (in this case the Post Office Act), the following questions remain unanswered:

Is it not the responsibility of the postal department to ensure the safe delivery of a registered article to the addressee? Does it not have a duty to take care of the articles entrusted with it till they reach the addressees? If the article cannot be delivered for any reason other than *vis-majoure* or *force-majeur*, is it not the responsibility of the department to conduct a proper investigation and find out the reason for the loss or misdelivery of the article and inform the consumer accordingly?

15 *Id.*, p. 10.

The consumers in both the cases adduced evidence to show that they had sent the letters by registered post and the same had not reached the addressees. It is impossible for them to further prove that the loss or misdelivery of the article was due to the fraudulent or willful act or default on the part of a particular officer/ officers of the postal department, as they have no means to know that. In *Shanker Rao's* case, the explanation given by the postal department was that 'the registered letter reached the Calcutta RMS office, but its further disposal was not known'. Similarly, in *M. L. Bora's* case, the department casually mentioned that 'the registered letters were lost in transit', indicating a casual approach to the whole issue.

It squarely falls on the department to investigate and identify the officer who has been entrusted with the safe delivery of the registered letters and prove that none of the officer/ officers in the department has caused the loss or misdelivery of the article fraudulently or by wilful act or default, as it is within the knowledge of the department and not of the consumer as to who is in-charge of the article till it is delivered to the addressee.

The issue is more serious in *Shanker Rao's* case where not only the registered letter did not reach the addressee but the same was also fraudulently used by someone to take delivery of the consignment.

How did the original lorry receipt sent by registered post fall in the hands of some other person who managed to take delivery of the consignment? Can it happen without the connivance or negligence of an officer/ employee of the postal department? Regrettably, the National Commission did not find it necessary to go into the averments of the facts "in view of the legal position discussed". Obviously, such acts are not protected by section 6 of the Post Office Act.

The Contrary View

It is gratifying to note that the National Commission had taken a contrary approach atleast in a few cases. In *Superintendent of Post and Telegraph Department Circle at Solan* v. *M. L. Gupta*[16], where the postal article was not delivered to the correct addressee causing pecuniary loss to the complainant,

16 I (2009) CPJ 132 (NC).

the Commission held the deficiency to be a default and gross negligence on the part of the postal authorities and as such could not take shelter under Section 6 of the Post Office Act. The Court observed: "Protection if any under Section 6 and for that matter under all other laws would be attracted to reasonable, fair, bonafide and genuine acts of the litigant (postal department) and its subordinate staff. But it cannot be allowed to be invoked in cases of gross high handedness as is the situation in this case"[17]. Similarly, in a subsequent case[18] where the Commission found on the facts that the non-delivery of a registered article to the addressee was a willful act, it was held to be a deliberate and intentional negligent act on the part of the officer and as such was not protected by section 6 of the Act. Unfortunately, in both these cases the Commission did not refer to section 3 of the Consumer Protection Act. It is surprising that even after such reasoned decisions the National Commission reverted back to its original position in *M. L. Bora's case.*

Interestingly, some of the judgements delivered by the State Commissions on postal services before and after *Shanker Rao's* decision appear to be more logical and rational in their reasoning. The Orissa State Commission[19], after an elaborate discussion on sections 6 and 49 of the Post Office Act, had held that "whenever a person receives an article to do something in respect of that article it is within his knowledge what happened to the article and in the absence of an explanation, it is to be presumed that he defaulted to take due care in respect thereof. For this default, he is not protected under section 6 of the Post Office Act"[20]. In this case, the grievance of the complainant was related to the non-delivery of an article sent by speed post through the post office. The court held that section 3 of the Consumer Protection Act would not protect the postal authorities who were negligent in rendering postal service to the complainant.

The Gujarat State Commission was also speaking on the same line when they held that "the provisions of Section 6 would not be applicable in case of deficiency in service which is a separate cause of action and a new right created under the Consumer Protection Act"[21]. Similarly, the Uttarakhand

17 *Id*., p. 133.

18 *Branch Post Master, Village and Post Jaitpur* v. *Chandra Shekhar Pandey*, II (2009) CPJ 40 (NC).

19 *Nirmal Panda* v. *Post Master General*, II (1993) CPJ 988.

20 *Id*., p. 992.

21 *Department of Posts, Rajkot* v. *M/s J.K. Diagnostics*, III (1993) CPJ 1677.

State Commission also observed in *Post Master, Ramnagar* v. *Narpal Singh*[22] that "if the speed post article could not be delivered to the addressee then it is the duty of the appellant (postal department) to trace it out and inform the complainant about the status of delivery. Since the appellant failed to provide any information it was logical for the District Forum to infer that some official of the postal department had done so wilfully"[23], and held the postal department liable. The court went further: "It is true that Section 6 of the Post Office Act, 1898 provides exemption from any liability if the postal article is lost, misdelivered, delayed or damaged, but the officials are not supposed to be negligent and careless in dealing with the postal articles handed over to them for transmission"[24]. Again when a registered letter never reached the destination, the Rajasthan State Commission[25] held the postal department liable for deficiency in service as they did not explain how the registered letter was lost and who was responsible for that. The court pointed out that: "It is difficult for the consumer to prove that there has been a fraudulent act or willful act or default on the part of an officer... The appellant should have fixed up responsibility of that officer who was responsible for the loss of the postal article"[26].

It is submitted that the facts of *Shanker Rao* and *M. L. Bora* clearly show that it was fraudulent or willful act of the postal authorities and as such were clearly liable. The Commission had held otherwise.

Statutory and Governmental Functions

The National Commission had observed that the services rendered by the post office were merely statutory and there was no contractual liability. "Establishing the post offices and running the postal services, the central government performs a government function and the government does not engage in commercial transactions"[27], the Commission pointed out.

22 II (2011) CPJ 444.

23 *Id.*, p. 445.

24 *Ibid.*

25 *Department of Post through Superintendent of Post Offices, Jaipur* v. *Babulal*, III (2011) CPJ 183.

26 *Id.*, p. 184.

27 *Supra* n. 11.

All these observations and reasoning are inconsistent with the provision of the Consumer Protection Act which applies to all goods and services except those that are specifically excluded by the Central Government by notification. No such notification has been issued by the Central Government till now. The Act also defines service "service of any description which is made available to potential users"[28] which means any type of services whether statutory or governmental. The inclusive part of the definition of service includes the provision of facilities in connection with banking, insurance, supply of electrical or other energy, many of these facilities are provided by statutory authorities. The Supreme Court has also made it very clear in *M. K. Gupta's*[29] case that the legislative intention was to protect a consumer against the services rendered even by statutory bodies and declared: "No distinction can be drawn between private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made mainly by the statutory authorities is included in it". A government or semi government body or a local authority is as much amenable to the Act as any other private body rendering similar service. The court also cautioned: "Any attempt to exclude services offered by statutory or official bodies to the common man would be against the provisions of the Act and the spirit behind it... The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even a facility"[30].

Different Interpretations of Section 3

The Commission has interpreted section 3 of the Consumer Protection Act as excluding the jurisdiction of the consumer courts to grant any remedy under the Act if the remedy is barred under any other Act. This interpretation is not in tune with the interpretation given to it by the National Commission earlier as well as by the Supreme Court, subsequently, in a catena of cases. As early

28 Section 2(o) reads: ""service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;".

29 *Lucknow Development Authority* v. *M.K. Gupta*, AIR 1994 SC 787.

30 *Ibid.*

as 1989, Hon'ble Mr. Justice Bala Krishna Eradi, the first President of National Commission had opined that there was no substance in the contention that the existence of a provision for arbitration in section 7B of the Indian Telegraph Act, 1885, would be a bar for the consumer to invoke the provisions of the Consumer Protection Act for relief. The court held: "Having regard to the scope, object and purpose of the Act which is a special statute, subsequently enacted by the Parliament especially for the creation of a machinery for granting cheap and speedy redressal to the aggrieved consumers, we are *prima facie* of the view that there is no substance at all in this contention, especially the redressal forums constituted under the Act are not civil courts"[31].

Subsequently, in *District Manager, Telephones, Patna* v. *Dr. Tarun Bharthuar*[32], the Commission was called upon to decide whether the consumer court had jurisdiction to decide disputes in respect of telephone bills when the Indian Telegraph Act, 1885, specifically provided that such disputes "shall be determined by arbitration". In other words, when a remedy is provided under section 7B of the Telegraph Act, is the remedy under the Consumer Protection Act barred by implication? Answering the question in the negative, the Commission held:

> "Section 3 of the Consumer Protection Act lays down that the provisions of the said Act are in addition to and not in derogation of the provisions of any other law for the time being in force. In other words, the Consumer Protection Act gives the consumer an additional remedy besides those which may be available under other existing laws. The fact that disputes involving meter reading or excess billing can be settled under Section 7B of the Indian Telegraph Act does not therefore oust the consumers from seeking relief under the Consumer Protection Act. Evidently, Parliament has considered it expedient to do so for the better protection of the interests of the consumers and for expeditious settlement of consumer disputes involving meter reading or excess billing even when such disputes might be covered under Section 7B of the Indian Telegraph Act"[33].

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31 *Union of India* v. *Nilesh Agarwal*, I (1991) CPJ 203, 206.

32 I (1992) CPJ 47.

33 *Id.*, p. 49.

It is interesting to note that Mr. Justice B. S. Yadav who had written the judgement in *U. Shanker Rao's* case has cited the above judgement with approval in *Union of India* v. *Dr. B. S. Sidhu*[34] wherein the judge observed:

> "It was argued that the complainant ought to have applied for arbitration for settlement of the dispute. This objection has been taken by the Telecom Department in various cases coming before us at the appellate and revisional stages and it has been repeatedly held by this Commission that the consumer of telecommunication services are entitled to seek relief from the Consumer Forums constituted under the Consumer Protection Act, 1986, inspite of the provisions contained in Section 7B of the Indian Telegraph Act"[35].

One fails to understand the rationale for providing divergent interpretations for section 3 in similar factual situations.

Again in *M/s Fair Air Engineers (P) Ltd.* v. *N. K. Modi*[36], the Supreme Court had held that "by virtue of section 3, the consumer forums can proceed with matters in accordance with the provisions of the Act rather than relegating the parties to arbitration proceedings pursuant to contract between parties". The Kerala High Court has also taken a similar view that "jurisdiction of the forum is not ousted by section 7B of the Telegraph Act, 1885 as the remedy provided under the Consumer Protection Act is in addition to those available under other statutes or under general provisions of law... the remedy under the Consumer Protection Act will prevail over section 7B of the Telegraph Act"[37].

The existence of the remedy by way of arbitration does not preclude an aggrieved consumer from seeking redressal from the forums constituted under the Consumer Protection Act which is a special statute enacted by the parliament for the specific purpose of providing a speedy, cheap and efficacious remedy to consumers before the special forums created for that purpose[38]. Arbitration clause should not come in the way of the aggrieved party

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34 I (1992) CPJ 208 (NC).

35 *Id.*, p. 211.

36 AIR 1997 SC 533.

37 *Ibid.*

38 *Commercial officers, Office of the Telecom District* v. *Bihar State Ware Housing Corporation*, I (1991) CPJ 42.

from seeking legitimate relief under the Consumer Protection Act[39]. In a later judgement, the Supreme Court held that the consumer court has jurisdiction to entertain a complaint "despite the fact that other forums / courts also would have jurisdiction to adjudicate upon the *lis*"[40]. The Court observed:

> "If a legislature in its wisdom has granted additional rights and remedies to the class of consumer constituted by the Act, it is not for the court by way of interpretation to cut and abridge the scope thereof. These rights and remedies are not to be blocked or hamstrung either by the statutory arbitration provision of an earlier law or by any contractual arbitration agreement by parties"[41].

However, in one of the latest cases[42], an *ex parte* judgement delivered without hearing the complainant, the Supreme Court took a contrary view that "When there is a special remedy provided in Section 7B of the Indian Telegraph Act regarding disputes in respect of telephone bills then the remedy under the Consumer Protection Act is by implication barred".

It cannot be considered to be correct interpretation of section 3 of the Consumer Protection Act, as it is inconsistent with the earlier judgements on the interpretation of the section. It is unfortunate that the learned judge did not make any reference to the decision in *Fair Engineer's case* or *Vishwabharthi's case* and did not even provide any reasoning for overruling the full bench judgement of the Kerala High Court.

Immunity under Section 6 and the Probable Consequences

In *M. L. Bora's case*[43], the Commission had gone a step further to justify the reason for enacting section 6 to give protection to the government against any claim for damages on account of loss of postal article. It cited with approval the judgement in *Post Master, Imphal* v. *Dr. Jamini Devi Sagolband*[44] where the commission had calculated the hypothetical loss which the post office

39 *Udaipur Cement Works* v. *Punjab Water Supply & Sewerage Board*, I (1999) CPJ 67 NC.

40 *State of Karnataka* v. *Vishwabharthi House Building Co-operative Society*, I (2003) CPJ 1(SC).

41 *Ibid.*

42 *General Manager Telecom* v. *M. Krishnan*, III (2009) CPJ 71 (SC).

43 *Union of India* v. *M.L. Bora*, II (2011) CPJ 9 (NC).

44 I (2000) CPJ 28 (NC).

would have incurred, even if there was delay or deficiency in one percent of the cases handled by them. The Commission pointed out that "the government will have to pay compensation of Rs. 21 crores a day which will come to 730 crores a year" and declared that "no government can bear the brunt of the sort of liability in rendering a valuable public service. Either the postal service will have to be closed down or the charges enhanced drastically to bring home merely another Rs. 800 crores of revenue"[45].

Very strange indeed! The argument is that the postal department will have to pay a huge amount by way of compensation for their own negligence if they are not given protection under section 6, and so they can be negligent. The consumer should suffer in silence for the negligence of the postal department!

An equally strange and quite unconvincing argument was put forward by the Commission to justify the existence of section 6 of the Post Office Act, *viz.*, "the government gives much more in service than it gets in revenue". It is conveniently forgotten that the postal authorities are paid their salaries out of the taxes collected from the public to perform their statutory functions to serve the public. It is a statutory function which should be performed responsibly and carefully. Here, a registered article is lost. Is the postal department not duty bound to explain how the article was lost in transit? Should the consumer be made to suffer for the negligence of the postal authorities? In rendering a valuable public service, the public authorities should not be negligent. As Mr. Justice Mohapatra observed in *Nirmal Panda's*[46] case, "If they (the postal authorities) feel that they cannot discharge such responsibility, they should vacate their office. They ought not to be permitted to enjoy the benefits of employment at the suffering of consumers"[47].

Further, the Commission has pointed out that there are some provisions in the Post Office Act for payment of compensation for the loss of insured articles. Does this mean that if the article is insured, the postal authorities will be more careful, but not if it is only registered? In other words, in the case of registered articles, they do not have to be accountable to the consumers. Fortunately, the

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45 II (2011) CPJ 9 (NC), p. 12.

46 *Nirmal Panda* v. *Post Master General*, II (1993) CPJ 988.

47 *Id.*, p. 993.

Commission has not made any hypothetical calculation of the pecuniary loss the post office will incur, if one percent of the insured articles are lost!

The archaic nature of section 6 of the Post Office Act and the absurdity of the extent of immunity granted to the postal authority under the Act is evident from the decision of the Madhya Pradesh State Commission in *Post Master* v. *Vijay Singh Chauhan*[48]. In this case, a money order sent by the petitioner was not delivered to the addressee. The Commission relied on section 48 of the Post Office Act[49] which provided protection to the department against claims for loss of money order and held, "It is amply clear from clause (c) of Section 48 that even in case where the amount (of the money order) has not been paid, no claim lies against the post office in respect thereof"[50].

It is unimaginable that the postal authorities will not be liable even when a money order – not a registered letter – is not delivered to the addressee. The consumer should suffer even when his hard earned money is lost due to the negligence of the postal authorities. Is such a law valid? In *Maneka Gandhi's case*[51], the Supreme Court has categorically declared that a law to be valid should be just, fair and reasonable. Can a law which gives complete immunity to the postal authorities for their acts of negligence resulting in the loss or injury to the citizens be considered to be a valid law? Obviously, the answer should be in the negative.

Relying on an archaic, unjust, unfair and unreasonable law to deprive a consumer the benefits of a social benefit legislation, like, the Consumer Protection Act is, to say the least, thoroughly unfair and manifestly unjust.

It is therefore, high time to repeal the obsolete Indian Post Office Act, 1898, as it suffers from invalidity on the ground that it is unjust, unfair and unreasonable.

It may be mentioned here that if section 3 of the Consumer Protection Act is interpreted in the way it is interpreted by the National Commission in

48 II (2009) CPJ 421.

49 Section 48 (c) reads; "the payment of any money order being refused or delayed by, or on account of, any accidental neglect, omission or mistake, by, or on the part of, an officer of the Post Office, or for any other cause whatsoever, other than the fraud or willful act or default of such officer; or".

50 *Id.*, p. 422.

51 AIR 1978 SC 578.

Shanker Rao, M.L. Bora and other cases, it will result in providing complete immunity to the postal authorities for their negligent acts and omissions except for frandulent, willful neglect or default, with disastrous consequences. They will become casual and indifferent in discharging their statutory duties causing great hardship and suffering to the common man.

Most importantly, people will lose faith in the postal services if there is no guarantee that their registered letters will reach the destination, their money orders will not get lost in transit or their speed post article will reach the addressee on time. The consumers will shift to other service providers like courier service for meeting their requirements. This has already started happening. Judgements like *Shanker Rao* and *M. L. Bora* while protecting the inaction, indifference and negligence of the postal authorities by relying on an archaic, unjust, unfair and unreasonable law will end up in the closure of the postal services in the country.

Education as Service

The consumers are confronted with conflicting decisions in matters relating to education, both by the National Commission and the Supreme Court, expressing divergent views on whether education is service, whether a student is a consumer and whether a dispute relating to imparting of education would come within the purview of the Consumer Protection Act or not. In some cases, it has been held that educational institutions are not covered under the Consumer Protection Act as they are not rendering any service as defined under the Act. In *Joint Secretary, Gujarat Secondary Education Board* v. *Bharat Narottam Thakkar*[52], the National Commission held that the Board in conducting examinations, evaluating answer sheets, announcing results was not performing a service as defined under the Act. A similar view was taken by the Commission in a number of other cases[53]. In some other cases, they are held liable on the ground that they have been performing administrative functions in conducting examinations, evaluating answer books and declaring results and as such are amenable to the jurisdiction of the consumer courts. In

52 I (1994) CPJ 187 (NC).

53 *Chairman, Board of Examination, Madras* v. *M. K. Khader*, (1996) I CPR 114 (NC); *Registrar, University of Bombay* v. *Mumbai Grahak Panchayat*, I (1994) CPJ 146 (NC); *Deputy Registrar, Colleges* v. *Ruchika Jain*, (2006) III CPR 18 (NC); *Kota Open University* v. *Raj Kumari Yadav*, I (2010) CPJ 152 (NC).

Sreedharan Nair v. *Registrar, University of Kerala*[54], the Commission held that the services of the University hired for consideration for imparting education would be a service as defined under the Act. The court relied on its earlier judgement in *Bhupesh Khurana* v. *Vishwa Budha Parishad*[55] that:

> "Imparting education by an educational institution for consideration falls within the ambit of service as defined in the Consumer Protection Act. Fees are paid for services to be rendered by way of imparting education by the educational institutions. If there is no rendering of service, (the) question of payment of fee would not arise. The complainants had hired the service of the respondent for consideration so they are consumers as defined in the Consumer Protection Act"[56].

The court held that the action of the University in not issuing the Degree / Certificate was a clear case of deficiency of service and awarded compensation.

In a subsequent judgement in *Board of Secondary Education* v. *Sasmita Moharana*[57], after an elaborate discussion of the various issues involved and with convincing arguments citing relevant precedents from the Supreme Court, the Commission held the Board of Secondary Education liable for negligence in rendering service. The complainant alleged that the Board was negligent in making a wrong entry of the marks which resulted in delay in declaring the final result and consequently, she lost one academic year as the date of admission had already expired by the time the result was announced. The respondent argued that the consumer court had no jurisdiction to entertain the complaint as the holding of examination was a statutory duty and that on account of the huge number of answer sheets (54 lakhs) there was possibility of some human error which could not be treated as negligence or deficiency in service on the part of the Board.

The Commission cited with approval the observation made by the Supreme Court[58] in a similar case of wrong entry of marks of a student holding the Board

54 I (2004) CPJ 27 (NC).
55 II (2001) CPJ 74 (NC).
56 *Id.*, p. 30.
57 II (2007) CPJ 154 (NC).
58 *The President Board of Secondary Education, Orrisa* v. *D. Suvankar*, IV (2006) CPJ 21 (SC).

of Secondary Education liable for negligence and awarded compensation. The Supreme Court had observed:

> "Award of marks by an examiner is to be fair and considering the fact that re-evaluation is not permissible under the statute, the examiner has to be careful, cautious and has a duty to ensure that the answers are properly evaluated. An examination is a stepping stone on career advancement of a student. Absence of a provision for re-evaluation cannot be a shield for the examiner to arbitrarily evalnate the answer scripts. That would be against the very concept for which re-evaluation is impermissible"[59].

Regarding the dispute of jurisdiction of the consumer courts in educational matters, the Commission made a very valid point which is worth quoting: "No donbt, the earlier view was that educational institutions were not rendering services and they were performing their statutory dnty while holding examinations". The court pointed out that the Supreme Court through *M. K. Gupta's judgement* had changed rhe course to a great extent so far as statutory authorities were concerned by holding that the Commission had jurisdiction to entertain a complaint not only against business or trading activity but even against services rendered by statutory public authorities in view of the wide reach of the Act. The court also explained the concept of accountability of public authorities for their arbitrary and *ultra vires* actions and the liability of the State to compensate for the loss or injnry suffered by a citizen due to such aetions by its employees.

The Commission made a pointed reference to the observations made by the Supreme Court on the responsibility of statutory authorities: "The authority empowered to function under a statute while exercising power, discharges public duty. It has to act to sub serve general welfare and common good"[60], and added: "In a modern society, no authority can arrogate to itself the power to act in a manner which is arbitrary". In the light of the Supreme Court judgements in *LDA* v. *M.K. Gupta*[61] and *GDA* v. *Balbir Singh*[62], the Commission declared that the consumer fora would have jurisdiction in such like matters and held:

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59 *Id.*, p. 25.
60 *Id.*, p. 159.
61 AIR 1994 SC 787.
62 II (2004) CPJ 12 (SC).

> "Holding examinations may be a statutory duty but administrative failure in issuing correct mark sheet and certificate in time is part of service and to this extent under the garb of non-sovereign statutory duty, the Board can neither take shelter nor avoid liability for negligence of the Examiner or Chief Examiner for failure to issue correct mark sheet in time. In view of the above said reasons, the Consumer fora have jurisdiction to entertain complaint in this regard"[63].

The reasoning underlying this judgement is quite logical and convincing. Apart from the fact that there is a little bit of confusion in the judgement regarding the duty of the Board in holding the examination being a statutory duty and issuing mark sheets and certificates to be an administrative function, the reasoning is quite convincing.

However, the distinction between administrative and statutory functions has no relevance in fixing the liability of the State in tortious acts of its servants in view of the abolition of the distinction between sovereign and non-sovereign functions of the State. The relevant observation of the Supreme Court in the *M.K. Gupta's* case is worth mentioning:

> "The theoretical concept that the King can do no wrong has been abandoned in England itself and the State is now held responsible for the tortious acts of its servants. The First Law Commission constituted after coming into force of the Constitution on the liability of the State in tort, observed that the old distinction between sovereign and non-sovereign functions should no longer be invoked to determine the liability of the State"[64].

The judgement of the National Commission which is mainly based on the judgements of the Supreme Court delivered earlier did not find favour with the Supreme Court in a later judgement in *Bihar School Examination Board* v. *Suresh Prasad Sinha*[65], which chronologically is the latest in the series and as such is important also.

In this case, the complainant contended that since the Board had allotted the same roll number to another student and himself by mistake. His result was

63 *Id.*, p. 160.

64 *Id.*, p. 159.

65 IV (2009) CPJ 34 (SC), delivered by Markandey Katju, J.

not announced and as a result he had to re-appear in the Board Examination. Consequently, he suffered a loss of one year for which he claimed compensation under the Consumer Protection Act. The District Forum awarded compensation and the appeal of the Board was dismissed by the National Commission.

The Supreme Court held that the Board in the discharge of its statutory functions did not offer its services to any candidate. A student who participates in the examination does not hire or avail of any service from the Board for a consideration and that the fee paid by the student is not a consideration, but only the charges paid for the privilege of participation in the Examination. The court held:

> "The Board is a statutory authority established under the Bihar School Examination Board Act, 1952. The function of the Board is to conduct school examinations. This statutory function involves holding periodical examinations, evaluating the answer scripts, declaring the results and issuing certificates. The process of holding examinations, evaluating answer scripts, declaring results and issuing certificates are different stages of a single statutory non-commercial function. It is not possible to divide this function as partly statutory and partly administrative. When the Examination Board conducts an examination in discharge of its statutory function, it does not offer its *"services"* to any candidate. Nor does a student who participates in the examination conducted by the Board, hires or avails of any service from the Board for a consideration. On the other hand, a candidate who participates in the examination conducted by the Board, is a person who has undergone a course of study and who requests the Board to test him as to whether he has imbibed sufficient knowledge to be fit to be declared as having successfully completed the said course of education; and if so, determine his position or rank or competence vis-à-vis other examinees. The process is not therefore availment of a service by a student, but participation in a general examination conducted by the Board to ascertain whether he is eligible and fit to be considered as having successfully completed the secondary education course. The examination fee paid by the student is not the consideration for availment of any service, but the charges paid for the privilege of participation in the examination"[66].

66 *Id.*, p. 36.

The Court further observed that: "The act does not intend to cover the discharge of a statutory function of examining whether a candidate is fit to be declared as having successfully completed a course by passing the examination"[67]. The Court maintained that the judgement in the *M. K. Gupta's case* had no relevance as "The Board is not carrying on any commercial, professional or service oriented activity. No benefit is conferred nor any facility provided by the Board for any consideration. Therefore, the said decision is inapplicable"[68].

The judgement has its adverse impact on the National Commission in its later judgements. In *Kota Open University* v. *Raj Kumari Yadav's case*[69], the Commission after citing a number of its earlier judgements held that since the services of the University or Board were not hired for consideration, candidates appearing for examination were not consumers and concluded: "Now, in the matter of imparting education by the University or Board or Educational Institution, the issues are no longer debatable and res *integra* in view of the decision of the Hon'ble Apex Court in *Bihar School Examination Board* v. *Suresh Prasad Sinha*, holding that the Bihar School Examination Board is not rendering services as defined under the Consumer Protection Act, 1986"[70]. The decision is followed by the Supreme Court in *M. D. University* v. *Surjeet Kaur*[71], by holding that the Board in the discharge of its statutory function does not offer its services to any candidate and as such is not liable under the Consumer Protection Act.

A Critical Analysis of *Sinha's* Case

It is unfortunate that while the Supreme Court in *Suresh Prasad Sinha's* case has cited as many as eight judgements to explain what constitutes a precedent and why the courts should guard against the danger of mechanical application of an observation without ascertaining the context in which it was made, but has not cited even a single judgement to substantiate why imparting education is not a service, why the student is not a consumer and why the fees paid by him cannot be considered to be a consideration? In *Bangalore Water Supply*

67 *Ibid.*
68 *Ibid.*
69 I (2010) CPJ 152 (NC).
70 *Id.*, p. 15.
71 JT (2010) 7 (SC) 179.

and Sewerage Board v. *R. Rajappa and others*[72], Hon'ble Mr. Justice Krishna Iyer had held that "education is a service". This observation can also be brushed aside by saying that the definition should be read in the context of the meaning of word industry. Can education be a service in the context of industry under the Industrial Disputes Act and a non service in the context of the Consumer Protection Act? Regrettably, the court did not refer to its earlier judgements in *D. Suvankar's case* or *Balbir Singh's case*. In *Suvankar's* case, the Supreme Court has held that the award of marks by the examiner is to be fair and the examiner has to be careful, cautious and has a duty to ensure that the answers are properly evaluated and for any lapse the Board would be liable. It emphasised that "An examination is a stepping stone for the career advancement of a student". In *Balbir Singh's* case, the Supreme Court had held "The authority empowered to function under a statute while exercising power, discharges public duty. It has to act to sub serve general welfare and common good". *In Khurana's* case, the Supreme Court while confirming the judgement of the National Commission that imparting of education by an educational institution for a consideration falls within the ambit of service as defined in the Consumer Protection Act and held that "the Commission rightly held that there was deficiency in the service on the part of the institute and the claimant respondents are entitled to claim the relief as prayed in the plaint"[73].

If education is not a service, not even a facility, but only a privilege, as it is made out by the Supreme Court, students will not have any remedy against wrongful and arbitrary action of the officials of educational institutions, such as, incorrect evaluation, non-issue of degrees, unreasonable delay in declaration of results causing injury and hardships to them, etc. Conducting examination, evalnation of answer books, announcing results and award of degrees or certificates are statutory functions of the Universities and other educational institutes and should be performed responsibly and carefully as any lapse on the part of the Institution will adversely affect the career advancement of the students. As has been observed by Mr. Justice S. S. Sandhawalia in *M. D. University, Rohtak* v. *Shakuntala Chaudhary*[74],

72 AIR 1978 SC 548.

73 *Id.*, p. 31.

74 I (1992) CPJ 33.

"Even a non deliberate error in the publication of the result may sometimes mar the educational career of a student. It is common place that the declaration of the result is the end product of the labour of the examinees over the academic session and often is the culmination of the educational career of a student. It deserves emphasis that in the highly competitive climate of seeking admission in the more prestigious professional or academic institution (some time within a very narrow time frame), a student may well miss forever the chance of joining the same and thus be put to an irretrievable loss by a mis-declaration of his result. Therefore, whenever the University defaults from its primal duty of care in this context, the examinees would clearly be entitled to compensation under the Act for the deficiency in the services rendered"[75].

If the University is not rendering a service and the students are only availing a privilege and the University is not liable for any negligent act, students become helpless in earning a livelihood which in many cases depends on his getting a degree from the University. If it is a privilege, the students who are adversely affected by the arbitrary actions of the University authorities will not have any remedy, not only under the Consumer Protection Act but also under any other law because "A privilege is the opposite of a duty and the correlative of a no right"[76].

In this context it is worth remembering that in *Mohini Jain* v. *State of Karnataka*[77], the Supreme Court has held that the right to education is a fundamental right under Article 21 of the Constitution and the was affirmed by the majority in *Unikrishnan* v. *State of Andhra Pradesh*[78]. As education is a fundamental right, it can be enforced in a court of law but if it is only a privilege, it does not confer any legal right.

The candidate does not make any request to the Board to test him. It is a statutory requirement that a person who has undergone a course or study should appear for a test conducted by the University/ Board to be declared as

75 *Ibid.*

76 Hohfeld, *Fundamental Legal Conceptions*, 1923, pp. 38-39 as cited in K. J. Aiyar, *Judicial Dictionary*, 14th Edn., LexisNexis Butterworths, 2007, p. 853.

having successfully completed the said course of education. It is the statutory duty of a Board to conduct the examination/ test for all students who have satisfactorily completed the course and who have paid the fees for the same and declare the result on the basis of their performance. Failure to do so will amount to a deficiency in service. The examination fee paid by the students is a consideration for availing these services of the Board and as such, he is a consnmer who hires or avails of a service for a consideration. Once a student joins a particular course in an educational institution, the necessary concomitant is to go through the examination/ test and get the result on the basis of his performance. Any lapse in this regard will be a deficiency in service under the Consumer Protection Act.

Procedural Hurdles in Medical Negligence Cases

As discussed above, the controversial and conflicting judgements on postal services and educational services have resulted in the denial of justice to a large section of the consumers. Many of the consumers have started losing faith in the system. Another judgement of the Supreme Court has created procedural hurdles for the consumers in filing complaints in medical negligence cases and for the consumer courts in entertaining such complaints.

In *Marpin F. D'souza* v. *Mohd. Ishfaq*[79], the Supreme Court, speaking through Mr. Justice Markandey Katju, issued general directions to the consumer courts that:

> "Whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issning notice to the doctor or hospital against whom the complaint was made, the Consumer Forum or criminal court should first refer the matter to a competent doctor or a committee of doctors specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a *prima-facie* case of medical negligence, should notice be issued to the concerned doctor or hospital".

79 I (2009) CPJ 32 (SC).

The Court justified its order by stating that this was necessary to avoid harassment to doctors who may not be ultimately found to be negligent. "Indiscriminate proceedings and decisions against doctors are counter productive and serve society no good[80]" the Court observed.

One can understand and appreciate the concern of the Supreme Court towards doctors who are innocent. It is true that doctors feel harassed when patients file frivolous complaints against them whenever something goes wrong in the hospital. The patients and their relatives in their anxiety do not realise that doctors cannot guarantee cure but can only guarantee care. It is absolutely necessary that doctors should take care of their patients as they have a duty to take care of them. They should exercise a reasonable degree of skill and knowledge and a reasonable degree of care in deciding whether to undertake the case, in deciding what treatment to give and in the administration of that treatment.

However, mere filing of a complaint against a doctor or a hospital in the consumer court itself gains wide publicity, especially, in the case of well known doctors and reputed hospitals, and that itself adversely affects the reputation, even if they are proved not negligent ultimately. Absolute care should therefore be taken by the consumer courts in processing and entertaining complaints in such cases.

Having said that, it may also be mentioned that to follow the directions issued by the Supreme Court to refer all complaints to a competent doctor or a committee of doctors before issuing a notice to the doctor or hospital concerned will be equally counter productive as the number of cases that would be filed on medical negligence might come to naught as it would be difficult, if not impossible, to get "a certificate of *prima facie* case" from a doctor or a committee of doctors, especially, in semi-urban and rural areas. The Supreme Court was also aware of these facts as is evident from its observation that "like in all professions and services, doctors sometimes have a tendency to support their own colleagues who are charged with medical negligence". Besides this, it is sometimes difficult to get doctors to adduce evidence in

80 *Ibid.*

medical negligence cases due to peer pressure. Unfortunately, this aspect has been overlooked by the court.

D'souza is not a Binding Precedent

However, a subsequent Bench of the Supreme Court through an illuminating judgement[81], came to the rescue of the consumers by holding that "the general directions issued in D'souza case are, with great respect, inconsistent with the directions given in *Mathew*[82] which is a larger Bench decision, and also inconsistent with the principles laid down in another three judge Bench of the this court rendered in *Indian Medical Association case*"[83] and as such is *per incuriam*.

Mr. Justice Ganguly, speaking for the court, in *Kishan Rao's case* gave an exhaustive analysis of *D'souza case* and related judgements and categorically declared that "this court is constrained to take the view that the general direction given in the *D'souza's case* cannot be treated as a binding precedent and these directions must be confined to the particular fact of that case"[84].

The judgement has given a great relief to the consumers and consumer activists dealing with medical negligence cases.

It is interesting to go into the details of both cases and the critical analysis of *D'souza's* judgement in *Kishan Rao's* case. It was a case of wrong treatment given to a patient who was suffering from intermittent fever and chill. She was not treated for malaria, but was treated for typhoid as a result of which the patient died. The District Forum awarded compensation on the ground that the patient was subjected to wrong treatment by the hospital.

The State Commission, however, overturned the decision of the District Forum holding that the complainant had failed to establish any negligence on the part of the hospital authorities and that there was no expert opinion to suggest that the line of treatment adopted by the hospital was wrong or was negligent. The National Commission upheld the finding of the State Commission.

81 *V. Kishan Rao* v. *Nikhil Super Speciality Hospital*, III (2010) CPJ 1 (SC).

82 *Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1.

83 *Indian Medical Association* v. *V. P. Shantha*, (1995) 6 SCC 651.

84 *Id.*, p. 12.

The Supreme Court overruled the judgement of the National Commission and held that on the facts and circumstances of the case, expert evidence was not required and upheld the decision of the District Fora which had not asked the appellant to adduce expert evidence.

The Court pointed out that in *D'souza* case, the complaint was not a criminal complaint, but the judgement equated a criminal complaint against a doctor or hospital with a complaint before the consumer court and issued the above general directions that irrespective of the nature of the complaint (whether civil or criminal) expert opinion should be taken before entertaining the complaint.

In *Mathew's* case, the direction for consulting another doctor or committee of doctors was confined only to criminal complaints and not in respect of complaints before the Consumer Fora as there is jurisprudential and conceptual difference between cases of negligence in civil and criminal matter. The court also cited in support the judgement in *Indian Medical Association* which had opined that in complicated cases which required recording of expert evidence, the complainant could be asked to approach the civil court for appropriate relief as provided under section 3 of the Consumer Protection Act which provides that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

Referring to the judgement in *Indian Medical Association*, the court observed that simple cases or medical negligence where expert evidence is not required should be decided by the fora on the basis of the procedure prescribed under the Consumer Protection Act and in complicated cases when expert evidence is required the parties have a right to go to the civil court as provided under section 3 of the Act.

Similarly, the larger Bench in *Dr. J. J. Merchant* case[85] had held that only in appropriate cases examination of expert may be made and the matter is left to the discretion of the Commission and therefore, the general direction given in *D'souza's* case to have expert evidence in all cases of medical negligence was not consistent with the principle laid down in *J. J. Merchant* case.

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[85] *Dr J J. Merchant* v. *Shrinath Chaturvedi*, (2002) 6 SCC 635.

The Court also made it clear that those directions are contrary to the "avowed purposes of the Consumer Protection Act" which seeks to provide for greater protection of the interests of the consumers by providing a fora for quick and speedy disposal of the grievances of the consumers. "Such avowed legislative purpose cannot be either defeated or diluted by superimposing a requirement of having expert evidence in all cases of medical negligence regardless of factual requirement of the case. If that is done the efficacy of remedy under the Act will be substantially curtailed and in many cases the remedy will become illusory to the common man"[86].

This is the crux of the judgement – the efficacy of remedy under the Act will be substantially curtailed and in many cases the remedy will become illusory to the common man, if expert evidence is insisted upon in all cases of medical negligence.

The Court concluded:

> "With great respect to the Bench which decided *D'souza*, this court is of the opinion that the directions in *D'souza* are contrary to the law laid down in para 37 of *Indian Medical Association* (b) para 19 in *Dr. J.J. Merchant* and *Dr. J.J. Merchant*, (c) those directions in para 106 in *D'souza* equate medical negligence in criminal trials and negligence fastening civil liability whereas the earlier larger Bench in *Mathew* elaborately differentiated between the two concepts, (d) those directions in the *D'souza* are contrary to the said Act which is the governing statute, (e) those directions are also contrary to the avowed purpose of the Act which is to provide a speedy and efficacious remedy to the consumer, (f) those directions run contrary to the principle of '*res ipsa loquitur*' which has matured into a rule of law in some cases of medical negligence where negligence is evident and obvious"[87].

The judgement in *V. Kishan Rao's* case has saved the consumers and consumer courts from the cumbersome procedure of securing expert evidence of a doctor or a committee of doctors in all cases of medical negligence. The judgement has provided procedural clarity for the consumer courts while entertaining medical negligence cases.

86 *Supra* n. 79, p. 42.

87 *Id.*, p. 13.

Unfortunately, the damage has already been done by the *D'souza's* judgement. The consumer courts, especially, the District Forums in semi-urban and rural areas have become reluctant to entertain medical negligence cases in view of the difficulty in getting expert evidence from doctors because of peer pressure. It will take some time for *Kishan Rao* to trickle down to consumer courts and the consumers for them to apply in medical negligence cases. It may be mentioned here that while wide publicity was given to *D'souza's* judgement through the media, no such publicity appears to have been given about *Kishan Rao's* judgement. There is a need for creating awareness among the public about such favourable decisions in the midst of a number of conflicting and controversial judgements.

Conclusion

The conflicting and controversial judgements on postal services and educational services by the National Commission and the Supreme Court as well as the procedural hurdles created by the Supreme Court in medical negligence cases have resulted in confusion and concern among the consumers about the effectiveness of the consumer courts in redressing consumer grievances. The law has become uncertain and the consumers are gradually losing faith and confidence in the system, atleast in the case of deficiency in certain services. This is happening despite the avowed object and purpose of the Act. Section 3 of the Act has been interpreted differently by different courts because there is scope for such interpretation. Similarly, even though service is given an exhaustive definition, the inclusive part of the definition has created difficulties. It took more than six years for an affirmative decision from the Supreme Court that medical services are covered under the Consumer Protection Act. Regarding the services of lawyers, even though the National Commission has declared that the service of a lawyer comes within the purview of the Consumer Protection Act, the issue, it is understood, is pending before the Supreme Court for final disposal. Under such circumstances, it is necessary to amend the relevant provisions of the Act to give more clarity to some of the provisions of the Act. It is therefore, suggested that:

- The inclusive part of the definition of the expression service may be expanded to include professionals like doctors, lawyers, builders and architects and also services like postal services and educational

services to bring them within the purview of the Act.

- A proviso may be added to Section 3 of the Act that: "The provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law" as is found in some enactments.

It is a matter of regret that the avowed object and spirit of the Act is ignored in some judgements while some other judgements are rendered *per incuriam*. It is hoped that the courts dealing with consumer disputes would keep in mind that the Act is a beneficial legislation and as such the provisions of the Act have to be construed as far as possible in favour of the consumers to achieve the purpose of the enactment, i.e., the better protection of the interests of the consumers.

PROSTITUTION — THE UNNOTICED DIMENSIONS IN THE INDIAN LEGAL SCENARIO

P. S. Seema*

Abstract

It is usually said that ethics change from time to time and from place to place. This cannot be truer in any other case than in the case of prostitution. Prostitution was condemned and is still condemned not only morally but also legally in India. But, the interesting fact is that its content has changed considerably. When its content changed, even the position of the old culprit changed to that of victim. This happened mainly due to the influence of international laws on suppression of prostitution. As per the old definition in the Immoral Traffic (Prevention) Act, prostitution meant 'the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind'. This is also the popular notion of the word prostitution and correspondingly, of a prostitute. But, as per the new definition, prostitution means the 'sexual exploitation or abuse of persons for commercial purposes'. This change is due to the influence of International laws, like, the Convention Against all forms of Discrimination against Women (CEDAW) and Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others. In fact, these documents do not consider hiring the body of any person as an offence, but, only the exploitation of it.

Thus, if a woman hires her body for promiscuous sexual relationship, and another person exploits her, she is not a prostitute and her action is not prostitution. The person who exploits her is engaged in prostitution, and that person is the prostitute. This means, that there is a substantial difference between the old and new definition of prostitution and prostitute. But, the misfortune is that, along with the changed definition, the Act has not made changes in other provisions that deal with the prostitution and prostitute. So, the Act which had its provisions for dealing with prostitute with one definition still continues, even with the changed definition, which is substantially different from the earlier one. This anomaly has created a lot of problems in the very working of the Act. Judicial interpretations have also not taken into account this contradiction, and they also have added to the confusion. In fact, there is no provision in the Act for punishing a 'prostitute', as all the offences relate to the old prostitute and prostitution.

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This paper examines these anomalies caused due to the inadvertence in not amending the corresponding provisions of the Act, along with the changed definition of the words prostitution and prostitute. A brief outline of the international laws in this matter is also discussed. Suggestions are also made to rectify this situation.

Introduction

The word prostitution is very much condemned by people at large. Prostitution means the act by which a person offers his/her body for sex in return for money. Thus, a prostitute not only 'sells' her body, she also engages in sexual relationship with many people, with whom she has no affinity or even acquaintance. This makes a prostitute a condemned person in the eyes of people at large. They are disliked and even feared by many women because of their fear that their husbands might also go to such prostitutes, and bring insult and misery (and most often diseases) to the wives. Thus, prostitutes can also cause disruption in many families. So, in a sense, it could be said that a prostitute is a threat to the peaceful life of a society in many ways. Hence, naturally, describing prostitution as an offence and punishing the offenders will be the normal solution.

However, there are arguments in favour of prostitution as well. They argue that prostitution is also a profession, and prostitutes should be considered as sex workers, and they must also get the protections given to the other workers. This in other words is an argument for decriminalisation of prostitution. This is a very complex situation, because on the one hand, something which was considered as an offence is to be legalised, and on the other hand, those 'offenders' are to be given protection also. Heated debates over this issue often take place in the name of morality, ethics, social ethos, etc.

The issue of prostitution can raise a lot of ethical, moral, social, legal and health issues. Should a person be permitted to sell his or her body as a part of sexual autonomy? Or, should he or she be prevented from doing so, as it is against the morality and ethics of the mainstream? Those who argue for decriminalisation of prostitution argue that if they can earn money through this without being tortured at the hands of other employers, why should they be prevented from doing so? According to the International Sex and Red light Guide, these girls can make much more money at $30, a customer, than $4 per day in the factories[1]. If one chooses to use her body in this manner, in lieu

of social slavery at the hands of poverty employers, and men are willing to pay them more than slave labour wages, so be it. They also argue that until someone can correct the whole world's economic condition, as well as the overpopulation problem, someone has to pay the bills[2].

Those who argue against prostitution raise a lot of social, ethical, moral, and health problems. First of all, it is against the morality of the society. Secondly, it is against the dignity of a woman. Thirdly, it may disrupt many families. Fourthly, it can cause a lot of health problems if the prostitute is affected with contagious diseases, which can affect the health of even the future generation. Fifthly, while, asking the question of probibiting prostitution, or allowing it, the person who is to be taken as the unit should be an average woman, who would always refuse to sell her body. So, as against the argument of allowing prostitution as a part of liberty of a person, it is argued that a natural person would never think of selling her body for money by having sexual relationship with anyone who can buy her. That means, being a prostitute is not very natural, or it is unnatural, in which case the law will always be against it. Above all, they argue that a person's autonomy over her body is not so absolute that she can be left with her freedom to use it in a manner not aeeeptable or prejudicial to others.

This presents a picture of a prostitute being a villain, and the rest of the society as the victim. But the issues of prostitution are not so simple. One may be shocked to know that in fact, most of the prostitutes are the victims of exploitation, compulsion, cheating, commodification of human beings, and trafficking in human beings. As is evident from the various media reports, human beings are used by rackets for making money. Thus, the picture of a person voluntarily offering his or her body for making money gets substituted by the picture of another person exploiting him or her, through compulsion or otherwise, and using him or her as a means to make money. This picture is more shocking than the other, because of the commodification of human beings involved in it, especially, by sexually exploiting them.

1 Amy Otchet, "Should prostitution be legal?", available at < www.unesco.org > (Viewed on 17-01-2012).

2 *Ibid.*

In this situation, the 'mighty' prostitute who stood as a threat to the society is no more there. Instead, only poor girls/boys, or women/men, who are captured or otherwise forced to be prostitutes are coming to the scene. Here who is the villain? The person who captures, or seduces or cheats these poor victims, and compels them to engage in prostitution, so that she/he can make money is definitely the villain. The whole arguments, for and against prostitution gets disturbed here because of the substantial change in the very role played by the so called prostitutes. The old notion of a prostitute sitting near her balcony, seducing her customers, and makes money by exploiting rich men, and throw them away like rubbish, when they becomes worth nothing, gets replaced by another picture. Now, the prostitute whose body is used is only a toy in the hands of many others, and he/she usually gets no financial gain in turn, except the dark future grinning against them. Now, what should the law do? Should it punish these prostitutes who are just victims, or should the law punish only those who are behind dragging these poor human beings into prostitution, and exploiting them? This question happened to be asked because of the changed scenario in the prostitution picture. Now, as different from before, this 'profession' is organised. It is not the prostitutes who are organised but the sex rackets which is organised. So, the attack of law should be on these rackets.

Thus, apart from voluntary prostitution, exploitation of prostitution and forced prostitution also need to be addressed. While, arguments for and against may be cast in the case of voluntary prostitution, there is no room for it in the cases of exploitation of prostitution and forced prostitution. Because trading in human beings is totally against morality, ethics and human conscience. So, international as well as national norms are for total prohibition of exploitation of prostitution, and forced prostitution, and not for making prostitution itself as an offence.

In England, Wales, Brazil, Ghana, Netherlands, Thailand and Canada, prostitution in itself is not an offence, but its exploitation is an offence. In Brazil, even soliciting is not an offence. In Netherlands, while voluntary prostitution is allowed, forced prostitution is prohibited. In Turkey, a totally different scheme exists. There a brothel can be run with a state licence, and the women who choose to register as a prostitute is assured protection from police intervention, and abuse by clients, though they are otherwise subjected

to a plethora of restrictions[3]. So, the important questions that remain are what kind of prostitution is to be prohibited and what kind of prostitution is to be regulated? These questions are very important because in a country, where prostitution in itself is not an offence, and only its exploitation is an offence, arguments for its decriminalisation will mean decriminalisation of exploitation of prostitution. In other words, this argument will mean that exploitation of prostitution should be allowed. Thus, the prostitutes, who are used as devices by other powerful persons for making money, will continue to be harassed and used as materials for trade, and those who exploit them will go unpunished.

This paper is an attempt to analyse the position in India with regard to prostitution and its related problems. What is prohibited in India, prostitution or its exploitation? If a person offers her body for hire is it an offence and whether it is regulated? What are the problems that can be caused if it is not regulated? Whether the present law which deals with prostitution overlooks the distortion in the Act because of a change in the definition of 'prostitution' and 'prostitute'? What should be done to avoid the anomaly caused in this area, if there is any?

In order to answer these questions, the first thing that is to be done is to examine the definition of prostitution. Before analysing the Indian position, an analysis of the international documents is needed to appreciate what is prohibited by the international law prostitution or its exploitation or forced prostitution.

Prostitution under the International Law

The most important international document in this regard is the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949. The Convention mainly mandates the State Parties to make two acts punishable. They are, procuring, enticing, or leading away another person for the purpose of prostitution, even with the consent of that person, and exploitation of the prostitution of another even with the consent of that person[4]. The Convention on the Elimination of All Forms of Discrimination

3 Jo Bindman, *Redefining prostitution as sex work on the international agenda*, available at <www.walnet.org.csis/papers> (Visited on 8-11-2009).

4 Arts. 1(1) and (2). The Convention also mandates to make keeping, managing, financing, knowingly letting etc., of a brothel an offence.

against Women (CEDAW) mandates the State Parties to take all measures to suppress all forms of traffic in women and 'exploitation of prostitution' of women[5]. In the proposed Convention against Sexual Exploitation, 1993, prostitution and trafficking are included as forms of sexual exploitation. Trafficking is defined to include exploitation of the prostitution of others, or other forms of sexual exploitation of the prostitution of others, or other forms of sexual exploitation under the Protocol to the United Nations Convention on Transnational Organized Crime to Suppress, Prevent, and Punish Trafficking in Persons, Especially Women and Children, 2003. But, the Declaration on the Elimination of Violence Against Women, 1994, the Inter American Convention of the Prevention, Punishment, and Eradication of Violence Against Women, 1994, and the Beijing Declaration - Platform for Action, 1995, include 'trafficking in women' and 'forced prostitution' as violence against women.

Thus, there are two kinds of prostitution that are tried to be suppressed. They are exploitation of prostitution and forced prostitution. Though both these terms seem to be different in some sense, essentially there is not much difference. In the former, exploitation of prostitution (though the term is not defined in any of the Conventions) is to be suppressed whether he/she is willing or not. It is clearly mentioned in the Convention that even if a person is procured or enticed, exploited with his or her consent, it is to be punished[6]. In the latter, obviously, the person is not willing and somebody forces him or her to be a prostitute. In both the cases exploitation is there. If not for commercial purpose why a person should be forced into prostitution? As seen earlier, in almost all the countries, it is the exploitation of prostitution that is prohibited, and prostitution *per se* is not prohibited.

This being the position with respect to international law, under the Indian legislation, the picture now is totally different, under the Immoral Traffic (Prevention) Act, 1956. Because, now in India, the word prostitution itself means exploitation of prostitution, which in other words means immoral traffic in human beings. Instead of defining trafficking and trafficker, the Act has amended the definition of the words prostitution and prostitute. However, in

5 CEDAW, Art. 6.

6 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Art. 1.

the rest of the legislation, apart from the definition part, the words prostitute and prostitution are used in its traditional sense. This makes it interesting to go through the provisions of this Act, including, the definition given to the word 'prostitution'.

Prostitution under the Immoral Traffic (Prevention) Act, 1956

The name of the Act was the Suppression of Immoral Traffic in Women and Girls Act, 1956, which was renamed by an amendment in 1986, in order to tackle the prostitution of persons in general, not confining it to women and girls. The Act was enacted in furtherance of India's obligation as party to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949. It is seen that what the international law tries to prevent is not the act of prostitution, but the exploitation of it, or forcing a person to be indulged into it. It follows from that, that if a woman is willingly engaged in selling her body for monetary benefits, the International law is indifferent to it. But there can be national legislations prohibiting even a voluntary act of prostitution, with no element whatsoever of coercion or compulsion, on the ground of morality. However, it is an irony that a legislation which deals with immoral traffic is giving more importance to the word prostitute and prostitution. In fact, the word 'traffic' and 'trafficker' must have been defined, and punishment should have been prescribed for traffic and trafficker. Now, in the light of this discussion, an analysis of the Immoral Traffic (Prevention) Act, by looking into the definition given to the word 'prostitution', is attempted.

The Changed Definition of Prostitution and Prostitute — The Problems Before and After

It is interesting to note that several major amendments were made to the Suppression of Immoral Traffic in Women and Girls Act, 1956, in the year 1986, which includes even its renaming. The word 'person' was substituted for words 'women or girls', indicating that sexual exploitation of even men or boys are also covered under the Act. The most significant change that can be noticed is in the definition of the word 'prostitution'. It is however, an irony that the Act which deals with prevention of traffic does not contain a definition of the word traffic, and it redefined the word prostitution unnecessarily. But it

is also interesting to note that the content of the new definition of prostitution is similar to the content of traffic.

The Old definition

Before the amendment, prostitution was defined under section 2(f) of the Act thus: "Prostitution means the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind" and prostitute was defined as "the female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind"[7].

This approach to the meaning and content of prostitution was clearly different from the international approach. While the international norms tried to restrict or prohibit exploitation, or forced prostitution, the Indian legislation tried to regulate, restrict and prohibit (in public places) the act of prostitution itself. Similarly, the female involved in the prostitution is characterised as prostitute. The word "promiscuous" was the pivotal term in this section, which meant indiscriminate. The indiscriminate sexual intercourse was suggestive of more than a solitary instance of prostitution which meant that there must be indiscriminate sexuality requiring of more than one customer of the prostitute before she could be held guilty[8]. Thus, this definition talk of the prostitute who victimises the society, as discussed above, a woman sitting in the balcony, soliciting the customers etc., who was the villain. It talks about those prostitutes who are depicted in literatures like *Karuna* written by famous Malayalam poet *Kumaran Asan*[9]. So, quite naturally this definition did not take into account the present exploitative scene that is prevalent in the area of prostitution.

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7 Section 2(c).

8 *In Re Ratnamala*, AIR 1962 Mad.31; *T. Jacob* v. *State*, AIR 1972 Ker. 166; *Bai Shanta* v. *State of Gujarat*, AIR 1967 Guj.211.

9 This verse is one of the most read one in Malayalam literature, the native language of Kerala. It describes the story of a prostitute *Vasavadatha* who was very beautiful and was immensely rich because of prostitution. She was infatuated by a Buddhist monk *Ananda* and she sent her maid to him with an invitation to her house. But the monk always replied to the maid that 'the time has not yet come'. Hearing this every time, *Vasavadatha* got highly disappointed. Later on, she and one of her clients were punished for murdering a former client. The punishment was to cut all her limbs and to abandon her in a burial ground. In that situation, where she lost everything, health, wealth and beauty, and was accompanied just by her maid, and hated by all the others, the monk comes to visit her. He said "now it is time for me to come. This was the time I said, and I was waiting for". He then preaches her about the worthlessness of temporary pleasures, wealth and physical beauty. Hearing these words, and being soothed by the monk, she dies.

Thus, this definition does not speak of any coercion, or force under which a female might have offered her body. This definition does not take into account the persons who might be instrumental in the exploitation. The definition presupposes the prostitute as a villain, and the society as a victim. But the Act in other sections prohibits keeping, managing or assisting in keeping a brothel[10], or allowing premises to be used as brothel[11], knowingly living on the earning of prostitution of any other person, procuring, inducing or taking a person for the purpose of prostitution[12], detaining a person in brothel or in any premise with the intent that such person may have sexual intercourse with a person who is not the spouse of such person[13], carrying on prostitution in the vicinity of public place[14], and seducing or soliciting for the purpose of prostitution[15]. In other words, the Act restricted and regulated prostitution itself, and prohibited all kinds of exploitation of prostitution, and forced prostitution, thereby, making it broader than what is envisaged under the Conventions. While the acts such as detaining a person in a brothel, procuring, inducing, etc., were totally prohibited, as they were forms of exploitation, prostitution itself, as defined in the Act was totally prohibited only in the public place[16]. This means that, though the other persons who are involved in prostitution were also envisaged by the Act, they were not the centre of attack of the Act.

The Courts have given verdict to the effect that prostitution in itself is not an offence under the Act save in the manner given in section 7 or section 8[17]. That means, even though a woman is offering her body for promiscuous sexual intercourse for hire, is defined as prostitution, this act in itself is not an offence. What is an offence is doing it in public place, or soliciting or seducing for prostitution. Based on the scheme of the Act, and the definition of the term 'prostitution' then, this holding is correct. But this definition was replaced by a definition in tune with the international norms in 1978, but in a different way.

10 The Immoral Traffic (Prevention) Act, s. 3(1).
11 *Id.*, s. 3(2).
12 *Id.*, s. 5.
13 *Id.*, s. 6.
14 *Id.*, s. 7.
15 *Id.*, s. 8.
16 *Supra* n. 11.
17 *T. Jacob* v. *State*, AIR 1972 Ker.166.

The Amended Definition

The amended definition reads "Prostitution means the sexual exploitation or abuse of persons for commercial purpose, and the expression "prostitute" shall be construed accordingly"[18]. The term brothel is defined as "brothel includes any house, room, conveyance or place or any portion of any house, room, conveyance or place, which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes"[19].

It is clear from this definition that prostitution is defined as the sexual exploitation of another person, by using him or her as an instrument for making money. If this is the definition of prostitution, then, who is a prostitute as per the definition? If prostitution means sexual exploitation or abuse of person for commercial purpose and the expression prostitute shall be construed accordingly. Can it be the same old prostitute who offers her body for sale, as per this definition? The answer is no, because, a prostitute is a person who does the act of prostitution. Here, prostitution is exploitation or abuse of persons for commercial purpose. Thus, only a person who does this act can be construed as prostitute. So, consequently, a prostitute is a person who exploits or abuses persons for commercial purpose. What about the person who offers her body for sale who was considered as prostitute as per the old definition? She is now a person who is exploited, or abused for commercial purpose. She is thus only a victim in this passive voice. In other words, what was defined as prostitution as per the old definition is now, no more an offence. This means, the act of a woman offering her body for promiscuous sexual intercourse for money is decriminalised.

This definition was added by way of an amendment in 1986. The word prostitution appeared in the definition of 'brothel' was also substituted by the words 'sexual exploitation or abuse' by the same amendment. This means that prostitution and the sexual exploitation are considered mutually inclusive by the Indian legislation. The definition also makes it clear that the term exploitation is inherent in the word prostitution. So unlike the International

18 Section 2(f). Section 2(e) was omitted, since the definition of prostitute was also included in this definition.

19 Section 2(h).

Conventions and other norms, there is no need of using the words exploitation of prostitution or forced prostitution while dealing with the Immoral Traffic Act. Thus as the other provisions such as making, keeping of brothel, taking a person for the purpose of exploitation, detaining a person in brothel, etc., which worked as offences different from prostitution before the amendment, are offences as part of the definition now.

The New Definition of Prostitution: Reflection on Other Provisions of the Act and in Judicial Decisions

In effect, the main and the remarkable difference the amendment brought about was to decriminalise the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind. Thus, the Act only tries to regulate sexual exploitation or exploitation of prostitution. But, this cardinal difference does not seem to have attracted the attention of even the legislature which made the amendment, leave alone some judicial decisions. It is very clear from the other provisions of the Act that the conceptual change in the definition is not reflected in other parts of the Act. For example, there is a provision in the Act which deals with the detention of the offender in a corrective institution, in order to rehabilitate him or her[20]. This section speaks about the detention of the offender in case the character, state of health and mental condition are expedient that offender should be subjected to detention for such term and such instruction and discipline as are conducive to her correction.

There are other provisions in the Act which provide for the production of persons who were found to have been living or is carrying on prostitution in a brothel before the Magistrate, and based on an inquiry as to the age, character and antecedents of the person and the suitability of his/her parents, guardian or husband for taking charge of him/her and the nature of the influence which the conditions in his/her home are likely to have on him if he is taken home and for this purpose, the Magistrate may direct a probation officer appointed under the Probation of Offenders Act[21]. There is also provision for proper care, guardianship, education, training and medical and psychiatric treatment of a child or minor who is rescued from a brothel and who is found to have been

20 *Id.*, s. 10A.

21 *Id.*, ss. 16 and 17.

living or is carrying on prostitution in a brothel. There are also provisions which mandate the Magistrate to satisfy himself, before handing over any person rescued from a brothel, to satisfy himself about the capacity or genuineness of the parents, guardian or husband to keep such person[22]. Likewise, under section 19 of the Act, a person who is carrying on, or is being made to carry on prostitution may make an application to the Magistrate for an order that he/ she may be kept in a protective home, or provided care and protection by the court. It is very clear that these provisions aim at the rehabilitation of persons who were offering their body, either out of compulsion, or otherwise. But, as the word prostitute now means a person who sexually exploits or abuses another person, and the word prostitution means sexual exploitation, the above mentioned provisions become redundant, or are to be reformulated. Because these provisions relates to the old prostitute who offers her body for sale due to various reasons, such as, financial constraints or something like that. Perhaps such women need rehabilitation, and counseling, and there is some meaning in keeping them in protective home. But what is the need of sending an exploiter (who is defined as a prostitute as per the amended definition) to protective home, to provide care and protection? Why should she/he be taken care of by the parents, husband, or guardian? Why should such a person be expected to make application before the Court for putting her/him in a protective home? In fact the 'prostitute' under the new definition is a person who is engaged in sexually exploiting other human beings for making money, which is a clear case of socio economic offence.

These offences are done for making money, and they are treated as different category of offences, and all reformatory measures, such as, sending on probation, are taken away from the purview of these offences. Actually this aspect has been taken care of by the Act to some extent by omitting the provision for release on probation of good conduct or after due admonition[23]. In the light of the new definition, it is the victims of the prostitution who need care and protection not the persons who are carrying on prostitution. But, as mentioned earlier, the Act in some of the provisions still provide for measures aimed at the prostitutes who were covered by the earlier definition of a female

22 *Id.*, s. 17A.
23 *Id.*, s.10.

who offers her body for promiscuous sexual intercourse for hire, whether in money, or in kind.

Another major problem occurs is the prohibition of prostitution in the vicinity of public place as is envisaged in section 7(1)(b), which reads:

> "Any person who carries on prostitution and the person with whom such prostitution is carried on, in any premises-
>
> (a) ...
>
> (b) which are within a distance of two hundred metres of any public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or magistrate in the manner prescribed.
>
> Shall be punishable with imprisonment for a term which may extend to three months".

As was mentioned earlier, based on the previous definition of the word 'prostitution', it could be concluded that under the Act it is only the prostitution in the vicinity of public place that is completely prohibited, and prostitution per se is not an offence. But, can it be the same even after the amendment of the definition? As per the present definition prostitution means sexual exploitation or abuse of persons for commercial purpose. Can it still be said that prostitution *per se* is not an offence, but it is an offence only when carried on in the vicinity of public places? Because exploitation and trafficking in any form cannot be allowed anywhere by virtue of Article 23 of the Constitution of India, which states that traffic in human beings and *begar* and similar forms of forced labour are to be prohibited. So the position before the amendment to the definition of the term prostitution that prostitution *per se* is not an offence does not hold good anymore. While looking at the provisions of the Act also we can see that prostitution, which means exploitation, is totally prohibited under the Immoral Traffic (Prevention) Act. This is because, first of all, keeping, managing or acting or assisting in the keeping or management of a brothel is an offence. The brothel is defined as a place used for the purpose of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more

prostitutes. As per the new definition, prostitution means sexual exploitation or abuse of persons for commercial purpose. Reading these provisions together, it can be concluded that keeping, managing, or acting or assisting in the keeping or management of a place used for the purpose of sexual exploitation or abuse of another person are offences under the Act[24], whether in public or in private. In other words, wherever sexual exploitation takes place, it is an offence, and as sexual exploitation now means prostitution, it reaches the conclusion that wherever prostitution takes place, it is an offence, it need not be confined to the places in the vicinity of the public.

Again, in procuring, inducing, or taking persons for the sake of prostitution[25], detaining a person in premises where prostitution is carried on[26], and seducing or soliciting for purpose of prostitution[27] are also offences under the Act, making it impossible for a person to carry on prostitution legally, not only in the public place, but also in the private place. But, as was mentioned earlier, now a person, who offers her body for promiscuous sexual intercourse for hire, is not committing any offence at all. So, there is no need of arguing for the decriminalisation of the act of a person offering his/her body for hire. Now, another question that can be asked is, whether there is any need for legalising the act of a person offering his/her body for hire for money or for kind. In India, which follows the Common Law system whatever is not prohibited is allowed. So, as long as there is no law which makes the act of a person offering the body for hire an offence, it is not an offence. Also, if the argument is for decriminalisation of prostitution, it will mean decriminalisation of sexual exploitation or abuse of persons for gain. This obviously cannot be permitted not only by virtue of Article 23 of the Constitution of India, but also because, if this is decriminalised, the persons who exploit others are the beneficiaries, because then they get a license to exploit others.

It is a fact that the judiciary has also not taken adequate note of this change in the definition and the subsequent application of this term in the other parts of the Act. This is evident from the following decisions.

24 Section 3.
25 Section 5.
26 Section 6.
27 Section 8.

In *Bholanath Tripathi* v. *State of U.P*[28], the Supreme Court held that, "If allegations regarding forcing his wife into prostitution proved against husband, he is liable to be immediately punished". This case was decided after the amendment of the definition of prostitution and prostitute. However, it is obvious from this order that the court considers prostitution as the hiring of a woman's body for money as was the previous notion of the word prostitution. Here, if the husband is forcing his wife into offering her body for hire, he is the prostitute (at least attempting to prostitution), as he is exploiting, or abusing another person sexually. So, here he is not to be punished for forcing the wife into prostitution. Rather he is to be punished for prostitution itself. But then the problem is there is no punishment for prostitution as such. There is only punishment for carrying on prostitution in the vicinity of public place, and soliciting in public place. So, if the husband is sexually exploiting or abusing his wife at home, he cannot be punished for prostitution as per the new definition of prostitution though he is committing the offence of prostitution. However, he could have been punished as per section 5 which is given below as per the old definition of prostitution.

Section 5 (1) reads:

> "Any person who - (a) procures or attempts to procure a person whether with or without his consent, for the purpose of prostitution, or (b) induces a person to go from any place with the intent that he may for the purpose of prostitution become the inmate of, or frequent, a brothel, or (c) takes or attempts to tale a person, or causes a person to be taken from one place to another with a view to his carrying on, or being brought up to carry on prostitution or (d) causes or induces a person to carry of prostitntion; shall be punishable on conviction with rigorous imprisonment for a term of not less tars and not more than seven years and also with fine..., if any offence under this section is committed against the will of any person, the punishment of imprisonment shall extend to imprisonment for a term of fourteen years".

Can the husband be held liable under this provision as per the new definition of prostitution? No, because, he is not procuring or attempts to procure his

28 1990 Supp (SCC) 151.

wife for the purpose of prostitution, neither is he inducing or causing a person to carry on prostitution or the acts covered under this section. Because what he is doing is, he is compelling his wife to indulge in hiring her body for money which itself is prostitution. In other words, he is only compelling his wife to do an act which is not an offence any more. Even though there is punishment for compelling a person to indulge in prostitution under the Act now, what is its implication in the light of the new definition of prostitution? It now means, compelling a person "to sexually exploit or abuse another person for commercial gain". Is he compelling his wife for that purpose? No. Now how can he he punished under this section? The reason why this problem is caused is because, though the definition of prostitution is changed drastically, the legislature has not made respective changes in the other provisions of the Act. Though seems technical, PITA, being a criminal legislation, it will have to be construed strictly. How can a person be punished for compelling a woman, or a girl, or another person to carry on prostitution as per the present definition of the prostitution as an offence?

Now the crucial question that is to be asked is what purpose is being served by changing the definition of prostitution and prostitute? The answer is no particular purpose is served. Because, if the purpose was to bring the sexual exploiters or abusers before the law the Act even before the amendment had provisions for that, as was mentioned before. But, with the change in the definition of prostitution, those provisions are no more applicable to the exploiter, because the persons whom the Act thought as exploiters are now covered by the term prostitutes, and those provisions which aimed at the exploiters are just abettors of their own action, which makes no sense. To make it more clear, the following example can be used. Now, the very act of exploiting a woman who lives by selling her body is called prostitution. Selling body is no more an offence. Then, if a person who is aiding another woman in selling her body (which was the old notion of prostitution), can it be said that he is aiding in prostitution? Or should it be said that he is himself doing the act of prostitution? The second is the answer. In this context, let us consider that there was a punishment (as per the old notion of prostitute) for aiding prostitution. Now, the very aiding itself is prostitution. Then what is the meaning of aiding prostitution? It now simply means the action itself is simply called as aiding.

Another section, i.e., section 8 make things even more complicated. Section 8 reads:

> "Seducing or soliciting for the purpose of Prostitution: Whoever, in any public place or within sight of and in such manner as to be seen or heard from any public place, whether from within any building or house or not-
>
> (a) by words, gestures, willful exposure of her person (whether by sitting by a window or on the balcony of a building or house or in any other way), or otherwise tempts or endeavours to tempt or endeavours to attract the attention of any person for the purpose of prostitution; or
>
> (b) solicits or molests any person, or loiters or acts in such manner as to cause obstruction or annoyance to persons residing nearby or passing by such public place or to offend against public decency for the purpose of prostitution, shall be punishable …with imprisonment for six months …"

Now, who is covered by this section? Is it a person who is engaged in prostitution as per the old definition or new definition? Obviously, this sections aims at a person who is covered by the old definition. Because of the very nature of the offence covered by this section, exploitation of a woman who is offering her body is not what is covered. Now, the irony is that, as per the new definition, prostitution in the vicinity of public place, and seducing or soliciting for purpose of prostitution are the only offences for which punishment is prescribed for a person who is engaged in prostitution. No other section is prescribing punishment for person engaged in prostitution. But, these two offences are not capable of being committed by the new 'prostitutes', by virtue of the very nature of the offence prostitution as per the new definition. In a nut shell, now it should be concluded that just because of the change in the definitions of prostitution and prostitute, the entire Immoral Traffic (Prevention) Act is made worth nothing. But, the Act still continues to work because this factor is not taken note of either by the legislature who made the amendment or the judiciary which puts these provisions into application.

This factor is very obvious when one looks at various other judgments from

the very apex court. In *Gaurav Jain* v *Union of India*[29], Justice Ramaswamy observed:

> "'Prostitution' means the sexual exploitation or abuse of persons for commercial purposes and the expression 'prostitute' shall be construed as it is defined under Section 2(e) of ITP Act. After the amendment to the ITP Act, "prostitution' means sexual exploitation or abuse of person for commercial purpose. Therefore, prostitution is not confined, as in the ITP Act, to offering of the body to a person for promiscuous sexual intercourse. Normally, the word 'prostitution' means an act of promiscuous sexual intercourse for hire or offer or agreement to perform an act of sexual intercourse or any unlawful sexual act for hire as was the connotation of the Act. It has been brought within its frame, by amendment, the act of a female and exploitation of her person by an act or process of exploitation for commercial purpose making use of or working up for exploitation of the person of the women taking unjust and unlawful advantage of trapped women for one's benefit or sexual intercourse. The word 'abuse' has a very wide meaning everything which is contrary to good order established by usage amounts to abuse. Physical or mental maltreatment also is an abuse. An injury to genital organs in an attempt of sexual intercourse also amounts to sexual abuse'. Any injury to ptivate parts of a girl constitutes abuse under the JJ Act. 'Public place' means any place intended for use by, or accessible to the public and includes any public conveyance. It is not necessary that it must 'be public property. Even if it is a private property, it is sufficient that the place is accessible to the public. It must be a place to which the public, in fact, resorts or frequents"[30].

It is very clear from this part of the judgment that the judge has still in his mind the old notion of prostitute, though he has mentioned the change in the word prostitution. This is because, in this part of the judgment, the judge is referring to the definition of the word 'neglected juvenile' in the Juvenile Justice Act, 1986, which includes *inter alia* a juvenile who "lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitute or any other person who leads

29 (1997) 8 SCC 114, MANU/SC/0789/1997.

30 MANU, paras. 17 and 18.

an immoral, drunken or depraved life". Even here the definition is used keeping in mind the old definition of the word prostitute. Though, the PITA changed the definition in 1986, the JJ Act, 1986, continued to refer to PITA for the definition of prostitute. However, this happened because, the PITA was amended in 1986 which came into effect on January 26th of 1987. That means, the definition of prostitution as on the date of the JJ Act remained the old one. The amended definition and the old definition is different as cheese is from chalk. So, it goes without saying that it was only an overlook on the part of the Parliament that after the change in the definition they did not either amend JJ Act, 1986 also accordingly, or delete it. This is very clear from the fact the in the definition of the "child in need of care and protection" (the counter part of the 'neglected child' in the 1986 Act) in the JJ Act, 2000, a child who is living with a prostitute is absent. It seems that in 1997 when *Gaurav Jain* was decided the judge also somehow could not connect the contradiction seen in JJ Act, 1986, referring its definition of prostitution and prostitute to the ITPA even after the substantial difference in the content in the definition. But the judge has said that now prostitution is not confined to hiring of the body for promiscuous sexual relationship, but also means it exploitation. This gives an impression that even hiring the body for promiscuous sexual relationship is also now covered under the term prostitution. However, as was explained before, that is not the position in India now, and the courts as well as legislators have somehow missed the crux. The consequence is not trivial or just technical. If even the old category of women is also now considered as prostitutes, the very purpose for which the definition was amended in accordance with the international ethos is defeated.

Prostitution in India is totally prohibited, and is made an offence not only in public place but also in private place, but as the meaning is changed, the old prostitutes are not to be arrested, or harassed in the name of prostitution. The act of a person offering his/her body for promiscuous sexual intercourse for hire whether in money or in kind, is not an offence, and thus not illegal rather it is decriminalised. But, though this is the position legally and theoretically, there is no mechanism to find ont persons who are voluntarily involved in prostitution, and those who are involved in exploitation, or forced prostitution. This results in the maltreatment and harassment of persons who are not prohibited from offering their body for hire by the police. But if the police is prevented from taking any action against any sex worker, those who live on

the earnings of prostitution will go scot-free. This makes the situation more complicated. On the one hand law demands total prohibition of exploitation of and forced prostitution, on the other, it allows voluntary prostitution, as a part of autonomy of persons. But there is no mechanism to filter this and to find out which is voluntary and which is not.

This state of affairs have culminated in cases like *Sahyog Mandal* v. *State of Gujarat*[31], wherein sections 7(1)(b), 14 and 15 of the Immoral Traffic (Prevention) Act was challenged as violative of various fundamental rights of sex workers, as police is given arbitrary powers to arrest, and search without warrant which is misused by them to harass these sex workers, to arrest them, and to search their premises without any valid reason thus interfering with their day to day life. Upholding the validity of the provisions, the Gujarat High Court issued certain guidelines to regulate the power of the police in this regard[32] which included the setting up of a State Level Rehabilitation Committee for the effective supervision and control of the rehabilitation of prostitutes[33]. But these guidelines are mostly aimed at the protection of victims of prostitution, and do not give a practical solution to the problems caused by the distinction between voluntary prostitution, forced prostitution and exploitation of prostitution. This is because those who are voluntarily offering their body for money does it for money for making both the ends meet. What they need is an assurance for an alternative income. Otherwise, they do not need any rehabilitation because what they are doing is not an offence under the Act. But, the persons who need rehabilitation are those who are compelled to subject themselves to prostitution. In this case, apart from helping these victims, law should handle the exploitators very harshly, and the police should use their power, to search or arrest without warrant. This call for a very effective mechanism which can prevent exploitation of prostitution and forced prostitution, and can find out instances of voluntary prostitution, which is not so far prohibited by law and is left as the individual freedom.

31 [2004] 17 ILD 340 (Guj.).

32 *Id.*, pp. 380-384.

33 It seems that the use of the word prostitute here is inadvertent. Because, as seen earlier, prostitute as per the Act, means a person who sexually exploits, or abuses others. They do not need any rehabilitation. They are to be dealt with harshly by the law. But in the guidelines, later on, the word used is 'trafficked' persons and females and children who are required to be rehabilitated under the Act.

Any discussion in India on decriminalisation of prostitution, and the argument of the sex workers that they should be allowed to carry on prostitution as part of their fundamental freedom to carry on any occupation, trade, or business under Article 19(1)(g) of the Constitution of India, will be erroneous because, in India, prostitution means exploitation of prostitution. A person cannot claim a right to exploit others or to trade with human beings as a part of their freedom to carry on trade by virtue of Article 23 of the Constitution. Further, article 19(6) allows the State to impose reasonable restrictions on the freedom to carry on any profession, occupation, trade or business in the interests of the general public. So a trade in human being can be prohibited in the interest of general public. Again in India, decriminalisation of prostitution means, decriminalisation of sexual exploitation or abuse of persons for commercial purpose. This means that sexual exploitation or abuse of persons for commercial purpose shall be allowed, which will go against the mandate of Article 23 of the Constitution of India. But, if the argument is advanced for those who are voluntarily offering their body for promiscuous sexual intercourse for hire, whether in money or in kind, their act is not at all an offence as per the laws in India. Thus their freedom is not curtailed.

But, even with regard to voluntary prostitution, the hands off approach taken by the State will cause a lot of problems. These sex workers may become the carriers of various epidemics, like, HIV/AIDS and other venereal diseases, which can affect the health of the community, and even of the future generation. Thus, even the detection and regulation of voluntary prostitution is needed. This may be done by permitting persons to carry out rendering their sexual service, only as per the stipulations given by the state authorities, such as, compulsorily undergoing HIV/AIDS test, using condoms, and other sanitary measures. A license may be issued by the State authorities to this effect that these persons can be identified from those who are engaged in exploitation, or helping exploitation. This will also help them by preventing the police from interfering in their affairs unnecessarily and limiting police interference only with respect to the conditions to be satisfied by these persons as stipulated by the State authorities.

Conclusion and Suggestions

To sum up, it may be concluded that in India, prostitution as defined in the

Immoral Traffic (Prevention) Act is an offence whether committed in public place or not. In that sense, it is totally prohibited, as it is a form of trafficking in human being, which is prohibited by the Constitution. A person voluntarily offering her/his body for promiscuous sexual intercourse for hire whether in money or in kind is not an offence, rather, it was decriminalised by the amendment made to the definition of prostitution in the year 1986. Thus the latter is allowed as the freedom of the individual in which the State will not interfere.

But, there are certain problems that arise out of this. One is that the changed definition did not serve any purpose in two senses that on the one hand it could not leave the persons who sell their body (the old notion of prostitute) without being tortured, and on the other hand the amendment has also made it impossible to bring the offenders before the law. The proposed amendments to the PITA in 2006, by the Immoral Traffic (Prevention) Amendment Bill, 2006[34], also seem not to have noticed the cardinal change in the concept of prostitution and prostitute. This is evident from many factors, such as, the amendment still retains all the other provisions which considers prostitution in its earlier sense, like, sections 4, 5, 6, 7, etc. However, section 8 which speaks about soliciting in public place is proposed to be deleted. This does not seem to be due to the reason that it is meaningless to speak about 'prostitution in public and prostitution in private" as was discussed above. Had that been the reason, sections 4, 5, 6 and 7 and many other sections which talk about prostitution and prostitute in the older notions would have been deleted, or restructured in the proposed amendment. So the reason for deleting only this section seems to be to protect the prostitute in the old notion, as it is one of the objectives of even the re-definition of prostitution. In brief, now what happens is that, the prostitute in the old notion is spared from any legal consequence (theoretically, as the harassment by the police still continues). But, the offenders cannot be punished as in all the other sections, prostitution and prostitute is used in the traditional sense itself, even in the proposed amendments. This problem can

34 The Bill was referred to the Standing Committee on Human Resource Development by the Chairman, Rajya Sabha in consultation with the Speaker and intimation thereof was published in Bulletin Part -II, dated 5 June, 2006 vide para. No. 2499. However, it lapsed. Details are from <http://164.100.47.132/LssNew/Business/Bulletin2detail.aspx?bull2date=06/07/2006> (Viewed on 11-10-2011). The Bill is available at <http://wcd.nic.in/640ls.pdf> (Viewed on 11-10-2011).

be cured by two methods. One, the root cause of all these problems is the redefinition of the word prostitution and prostitute in a totally different way than from its ordinary meaning. So, it is better to leave those definitions in the same old manner. As the name of the Act itself is to prevent immoral traffic and not prostitution, the words traffic and trafficker need to be defined. In fact, what sections 4, 5, and 6 are defining as offences is actually immoral traffic. So, the Act before the amendment of the definitions of prostitution and prostitute served the same purpose as prevention of sexual exploitation of prostitution. The only change that was required was to decriminalise the act of prostitution. That purpose will be served when sections 7 and 8 (which punish a prostitute) are dealt as mentioned below. Traffic may be defined as "those acts which are referred to in sections 4, 5, and 6 and all the other acts which contribute to the exploitation of prostitution of others".

However, since prostitutes are now not to be punished for anything which they do, the sections which make prostitution punishable should be deleted or amended suitably. Actually, there are only two such provisions and they are sections 7 and 8. Section 8 which deals with seduction or soliciting in the public for the purpose of prostitution is proposed to be deleted in the proposed amendment Bill. However, section 7 which prescribes punishment for the prostitute and her client for carrying on prostitution in the vicinity of certain public places, like, educational institutions, religious institutions, hotels and hospitals is not proposed to be amended. If it is not amended or deleted, the prostitutes are to be punished, along with the clients. However, international law seems to be against any kind of punishment for the prostitute (in the traditional sense). So, as in the case of section 8, it is better to delete this section also. Otherwise, both these sections can be retained in the interest of public. But there is no logic in deleting one and retaining the other.

The other method to overcome this situation will be a hectic and complex task, of correcting in the entire Act, the word prostitution, in its new sense, and by deleting all those sections where it is even ridiculous to use that word. For example, it is ridiculous and meaningless to say in section 7, "prostitution in the vicinity of the public", when prostitution means exploitation of prostitution. Likewise, to quote another example will be the words "Any person who, procures or attempts to procure a person whether with or without his consent, for the purpose of prostitution" in section 5(1)(a). Here the word

prostitution is used in the sense of "hiring one's body for promiscuous sexual relationship" which is the old definition. In the context of changed definition of prostitution it will have to be redrafted as "Any person who procures or attempts to procure a person...for the purpose of having promiscuous sexual relationship with others". Otherwise it will be equivalent to say "any person who procures or attempts to procure a person...for the purpose of exploitation of prostitution", which only means, if a person brings a pimp from somewhere, he is covered by this section, and a person who brings a woman or a man for having promiscuous sexual relationship with another will not be covered by this section. These are only few examples. In fact, these types of corrections will be necessary in almost every section of the Act, as was pointed out in the early part of this paper, if the second method as a suggestion is adopted. So, it seems that the first method of leaving the definition of prostitution and prostitute as it was before amendment, and by newly defining traffic, and trafficker, and applying the punishments only to them and not to the prostitutes will be the easiest and fair method to solve the problem caused by the new definition of prostitution and prostitute.

However, the problems related to prostitution do not end with that. In fact, there begins the problems. The problem caused by allowing the prostitutes to carry on their profession, as part of their liberty, can cause a lot of health problems, especially, in the wake of the spread of epidemics like HIV/AIDS. This can be cured by State intervention in the form of issuance of licence, as was mentioned earlier. So, the State is required to regulate this area in order to ensure that while voluntarily rendering sexual services for hire, the sex workers do not become carriers and spread fatal diseases, and also to ensure that persons involved in activities which are not made offences by the legal system are also not arrested or harassed by the police.

Thus, on the one hand, when the law leaves the prostitutes without considering them as criminals, and target the traffickers as offenders, the prostitution as a profession shall also be strictly regulated and controlled by the State In the interest of the general public as in the case of any other profession.

'TOTAL DISABLEMENT' UNDER THE EMPLOYEES COMPENSATION ACT, 1923 — NEED FOR A FRESH LOOK

Dr. S. Surya Prakash*

Abstract

The Employees Compensation Act, 1923, is a colonial social security legislation. The object is to make the employer liable to pay compensation to the workman who suffers disablement due to an accident arising out of and in the course of employment. The payment of compensation is in the general social interest. From the time of 'common employment' to the 'welfare state' there was a sea change in the pattern and perception of industrial processes. The concept of 'total disablement', laid down in the Act, is subject to two interpretations. The issue is whether the total disablement should be in reference to the work or profession that the workman was performing at the time of accident or his capacity to do all work under the sky. Social security legislation should be given beneficial interpretation for whose benefit the legislation was brought. The inconsistency in the approach of the judiciary in interpretation is causing injustice and agony to the working class. It is not mere interpretation; it is the interpretation of life or death to the workman and his family. The century old experience of the principles and philosophy of the law on disability compensation needs a thorough review and amendments to the existing law. Today, India is a welfare state and the law should be compatible to the constitutional goals. The present article throws light on some of the judicial pronouncements highlighting the need for amendment and beneficial interpretation of the existing law.

Introduction

The Workmen's Compensation Act, 1923, was the first step towards social security in India. During 19th century, the payment of compensation to the workers constantly attracted international attention due to increase in the number of industrial accidents through out the world. Initially, the law regarding payment of compensation was governed by the law of torts under the doctrine of 'common employment' where the employer was held not liable

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as the contract of employment is not an agreement of indemnity for the loss caused by the fellow worker. The courts considered that there was an implied consent on the part of the injured workmen to undertake risks of employment. The employer was held liable for the industrial accidents only when there was negligence or fault of the employer. The change in the perception of the workers rights provided a little relief under the Fatal Accidents Act, 1855. Later, it was not considered enough to protect the rights of workers in case of industrial accidents which caused physical disablement or death of a workman.

The problem of extending legislative protection to the workers working in factories and other establishments was solved with the enactment of the Workmen's Compensation Act, 1923[1]. The Act amplifies that in a civilised society the state cannot remain a mute spectator to the sufferings of the workers, particularly, when the loss of life or disablement takes place due to an accident arising out of and in the course of employment. Provisions were made for suitable compensation not only in the case of accidents but also in cases where the workers are affected by any occupational diseases of the work. The Workmen's Compensation Act, 1923, was amended in 2009 and the nomenclature of the Act has been changed to the Employee's Compensation Act, 1923 (herein after the Act).

Law of Compensation

Section 3 of the Act imposes liability on the employer to pay compensation to an employee in case of personal injury. Sub-section (1) of the section provides that the employer shall be liable to pay compensation if "personal injury is caused to an employee by accident arising out of and in the course of his employment"[2]. Personal injury always need not be a bodily or physical injury. It includes even mental strain, shock or injury that affects the health of the employee. An accident means a mishap which is neither pre-designed nor a pre-meditated event. When there is an accident that may lead to disablement

1 The ILO Conventions, *viz.*, C. 17, Workmen's Compensation (Accidents) Convention, 1925, C 18, Workmen's Compensation (Occupational Diseases) Convention, 1925, further imposed a liability on the member states to make law in consonance with the Conventions.

2 However, the employer is not liable if the injury does not exceed for a period more than three days or in respect of any injury, not resulting in death, or permanent total disablement caused by an accident due to drinks or drugs consumed by the workman or wilful disobedience of safety rules or wilful removal or disregard of safety devices.

of employee and also reduces his earning capacity, law will take cognizance (technically) of his loss in the earning capacity only. In fact, law of compensation should recognise two elements — i) disablement (loss of limb) and ii) loss of earning capacity. Law of compensation is meant only for the future loss of earnings and is silent on compensation for the loss of limb. In this regard, the law of compensation[3] is very narrow in its approach; neither has it made any provision for the pain and suffering, nor loss of consortium, unlike, the compensation under the Motor Vehicles Act, 1988. The calculation of compensation reflects the colonial approach towards the working class in India.

Law of Disablement

Disablement technically means loss in the earning capacity. Total disablement means total loss in the earning capacity and partial disablement means partial loss in the earning capacity of the employee. The Act recognises both total and partial disablement and also disablement may be permanent or temporary in nature. The Schedule I, Part-I of the Act enumerates six kinds of disablement as total disablement (100% loss in the earning capacity) and Part-II gives the list of injuries that are treated as permanent partial disablement and the corresponding percentage of loss in the earning capacity.

The expression 'disablement' has been defined in the Act as 'total disablement' and 'partial disablement' as follows:

> Section 2(l) reads: "'Total disablement' means such disablement, whether of a temporary or permanent nature, as incapacitates an employee for all work which he was capable of performing at the time of the accident resulting in such disablement.
>
> Provided the permanent total disablement shall be deemed to result from every injury specified in Part I[4] of Schedule I or from any combination

3 See, the Employee's Compensation Act, s. 4, for details of compensation in case of death, permanent total disablement and permanent partial disablement.

4 The Part-I, Schedule-I, enumerates six types of injuries of Permanent Total Disablement, i.e., 1) Loss of both hands or amputation at higher sites, 2) Loss of a hand and a foot, 3) Double amputation through leg or thigh or amputation through leg or thigh on one side and loss of other foot, 4) Loss of sight (to such an extent as to render claimant unable to perform any work for which eyesight is essential, 5) Very severe facial disfigurement, and 6) absolute deafness and the corresponding percentage of loss of earning capacity is 100% for any specified injury.

of injuries specified in Part II[5] thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amount to one hundred per cent or more".

Section 2(g) reads: "'Partial disablement' means where the disablement is of temporary nature, such disablement as reduces the earning capacity of an employee in any employment in which he was engaged at the time of accident resulting in disablement, and, where the disablement is of permanent nature, such disablement as reduces the earning capacity in every employment which he was capable of undertaking at that time; Provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement".

The compensation is paid to the employee because of his loss in the earning capacity due to the accident which he suffered out of and during the course of employment. The injury may lead to reduction in the earning capacity, i.e., due to partial disablement or there may be total loss in the earning capacity, i.e., total disablement. In fact, when the employee is terminated from work because of his employment injury, his loss in the earning capacity is total irrespective of the nature of injury, whether it is total or partial disablement because it is always not possible to secure another employment with his partial disablement. But in all cases the judiciary did not consider the loss of employment or incapacity to continue the same profession as total disablement, which is causing enormous loss and agony to the workman.

The dilemma is very simple. For example, if a driver loses his hand in an accident, which has arisen out of and during the course of employment, such personal injury amounts to permanent partial disablement with a corresponding 60% loss[6] in the earning capacity. The fact of the matter would be that he would never be able to drive the vehicle with a single hand. Then there is total loss in the earning capacity. If the employer offers him some other work which he could perform with his physical disability the loss in the earning capacity would be partial as per Part II of Schedule I of the Act. However, it would

5 The Part-II, Schedule-I, provides list of 48 injuries leading to amputation and injuries that result in permanent partial disablement with corresponding percentage of loss of earning capacity for each injury, such as, amputation through shoulder joint - 90% to loss of bone of toe - 1%.

6 See, the Employee's Compensation Act, Schedule I, Part II, Serial No. 4.

be a grave injustiee if personal injury (loss of hand) is treated as permanent partial disablement without providing alternative employment to the injured employee. In a country like India where there is abundant supply of labour more than the demand, any employer will prefer efficient fresh hands than the disabled persons. Though it is a harsh reality, it is the fact of the day.

The Supreme Court has taken a beneficial approach in *Pratap Narain Singh Deo* v. *Srinivas Sabata and Anr.*[7]. The injured workman in this case is a carpenter by profession. By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only. This is obviously a reasonable and correct finding. Here the court read the injury with reference to the profession or nature of work which he was performing at the time of accident though the nature of injury suffered by the workman falls under the category Permanent Partial Disablement under Part-II of Schedule I. The court adopted the realistic approach and upheld the view of the Additional Commissioner of Compensation and held the injury amount to total disablement.

Much earlier, a similar approach was adopted by the Kerala High Court in *Rukiyabai* v. *George D'Cruz*[8], where a worker was incapacitated for his work by a spinal injury due an accident arisen out of and in the course of employment the court considered it as permanent total disablement, even though he may do some other work which did not require much locomotion.

Speaking through the court Justice M. S. Menon observed that, "Section 2(1) of the Workmen's Compensation Act, 1923, defines "total disablement" as such disablement "as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement". There is no evidence to show that the workman was at the time of the accident capable of doing any work other than that of an ordinary labourer engaged in the physical handling of cargo at the Port, or that it is possible for him to obtain any employment whatsoever in his present condition. "Incapacity for work" is not the same thing as "incapacity to work" as stated Fay Earl Loreburn, L.C., in Ball v. William Hunt and Sons, Ltd. 1912 AC 496 500, "there is incapacity for work when a man has a physical defect which makes his labour unsaleable

7 AIR 1976 SC 222.

8 AIR 1961 Ker. 108.

in any market reasonably accessible to him" (Butterworth's Workmen's Compensation Cases, Vol. V. p. 459)"[9].

Similar approach was adopted by courts at different times. In *New India Assurance Co. Ltd.* v. *Kotam Appa Rao and another*,[10] where a lorry driver met with an accident and unable to walk without a stick the court considered as total disablement. Recently, the Supreme Court followed the principle and philosophy of *Narayana Pratap Singh Dev* v. *Srinivasa Sabata and others* in *K. Janardhan* v. *United India Insurance Co. Ltd. and Anr*[11]. The claimant-appellant a tanker driver, while driving his vehicle from Ayanoor towards Shimoga met with an accident with a tractor coming from the opposite side. As a result of the accident, the appellant suffered serious injuries and also an amputation of the right leg up to the knee joint. He thereupon moved an application before the Commissioner for Workmen's Compensation praying that as he was 25 years of age and earning Rs. 3,000/- per month and had suffered 100% disability, he was entitled to a sum of Rs. 5 lakhs by way of compensation. The Commissioner in his order observed that the claimant was 30 years of age and the salary as claimed by him was on the higher side and accordingly, determined the same at Rs. 2000/- per mouth. The Commissioner also found that as the claimant had suffered an amputation of his right leg up to the knee, he was said to have suffered a loss of 100% of his earning capacity as a driver and accordingly, determined the compensation payable to him at Rs. 2,49,576/- and interest *@* 12% p.a. thereon from the date of the accident. An appeal was thereafter taken to the High Court by the Insurance Company. The High Court accepted the plea raised in appeal that as per the Schedule to the Workmen's Compensation Act, the loss of a leg on amputation amounted to a 60% reduction in the earning capacity and as the doctor had opined to a 65% disability, this figure was to be accepted and accordingly reduced the compensation as already mentioned above. In appeal, the Supreme Court held that the disablement amounts to total disablement as he could no longer drive the vehicles and set aside the decision of the High Court.

But the Courts have not followed the beneficial approach in all cases, at all times, where the workman lost his employment due to employment injury

9 *Id.*, para. 8.

10 (1995) II LLJ 436 AP.

11 AIR 2008 SC 2384.

and total loss in the earning capacity. In *Divisional Manager KSRTC* v. *Bhimaiah*[12], the respondent Bhimaiah was in the service of the Karnataka State Road Transport Corporation, Bangalore Division. While driving the bus from Tumkur to Bangalore, he sustained injuries due to an accident. One of the front wheels of the bus broke off from the vehicle as a result of which there was an accident. In the said accident he sustained injury to his left arm. The medical evidence shows that the injury sustained by Bhimaiah resulted in an impairment of free movement of his left hand, disabling him from driving vehicles. He made an application under the Workmen's Compensation Act, 1923. His case was that the injury sustained by him was a permanent 'total disablement' within the meaning of section 2(1) of the Act. The KSRTC, the appellant herein, contended that the injury suffered by Bhimaiah was not a permanent total disablement. The Commissioner for Workmen's Compensation, on consideration of the evidence, held that it was a case of permanent total disablement and held that since Bhimaiah was no longer fit for the job of a driver he was entitled to the compensation payable for permanent and total disablement. On appeal, the High Court held that the disablement suffered by Bhimaiah did not amount to permanent total disablement because, he is capable of performing duties and executing works other than driving of motor vehicles. Therefore, the Commissioner was not correct in holding that the injury suffered by Bhimaiah amounted to permanent total disablement within the meaning of the Act.

Further, in *Shivalinga Shivanagowda Patil and Ors.* v. *Erappa Basappa Bhavihala and Ors.*,[13] where the driver who suffered injuries to the knee joint and patella and was incapable of driving the vehicle, the court considered the injury as permanent partial disablement. The Court held that the words employed in section 2(1) make it clear that in order to determine the total disablement, whether of a temporary or permanent nature, what is to be seen is whether the injury complained of incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement. Therefore, it is clear the question is not whether the workman is incapacitated to do the work which he was doing before the accident. Even though he was doing a particular work if he was capable of performing other

12 1976 Indlaw Kar. 7.

13 2004 Lab.I.C. 286.

work at that point of time, the question is whether after the accident even though he is disabled from performing the work which he was performing before the accident whether he is able to perform the other work which he was capable of performing before the accident. In that view of the matter, it is not possible to accept the contention that once it is shown that the injured is not capable of doing the work which he was performing before the accident, it amounts to total disablement.

In *General Manager of the GIP Railway, Bombay* v. *Bhankar*[14], a railway servant who met with an accident lost one eye and two teeth as a result of a collision between two engines. The Medical Officer declared that the servant was unfit for jobs in Class A1 and B because of his defective vision but was fit for Class C2 and the job in Class C2 was offered by the railway but was not accepted by the servant who claimed compensation on the basis of total disablement. On appeal, the court rejected the contention and held that this inability did not imply his inability to do other work. Disablement must be of such a character that the person concerned is unable to do any work. The reasoning of the learned Commissioner has proceeded as if the words were 'for the work which he was performing at the time of the accident' in place of the words which 'for all work which he was capable of performing at the time of the accident'.

There are numerous cases with similar interpretation. Recently, in *Palraj* v. *Divisional Controller, NEKRTC*[15], the Supreme Court has added totally a new dimension to the disablement. The court has introduced 'functional disability'[16] for the purpose of calculating loss in the earning capacity apart from 'permanent disability'. The court rejected that physical inability of the driver did not amount to permanent total disablement because he was offered alternative employment without financial loss. However, the Court endorsed the unwarranted concept of 'functional disablement' which may have far reaching consequences in future, while deciding the compensation cases under the Act[17]. The judicial decisions reflect an inconsistent picture as far as 'permanent total disablement' is concerned.

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14 AIR 1950 Nag. 201.

15 2011 Lab.I.C. (SC) 628.

16 The Employees Compensation Act, 1923, nowhere mentions about 'functional disablement'.

17 Under the Employees Compensation Act, 1923, in the first instance, the cases are to be decided by the Commissioners appointed under the Act and the appeal lies before the High Court concerned. See, the Employees Compensation Act, 1923, ss. 20 and 30.

Conclusion

Thongh the Employees Compensation Act, 1923, is a social security legislation, bnt its colonial character is visible because it is more employer oriented tban providing social security to tbe working class in distress. It is nnfortunate that even after independence we are continuing the same colonial legislation without any substantial changes in the principles and philosophy in tune with the Constitutional goals enshrined in the Preamble, Fundamental Rights and the Directive Principles of State Policy whicb are meant to strive for socio-economic justice to all citizens, including the working class.

Once, Justice Holmes said that 'Life of law is not logic, but it is experience'. The social security legislation like the Employees Compensation Act, 1923, is a beneficial legislation to the working class. The existence and continuation of the Act is in larger interest of the society. When a beneficial legislation is susceptible of two interpretations, the interpretation should be aimed at protecting the interests of the class for whose benefit the legislation was brought. But, the 'independent' judiciary is giving literary interpreration, thereby, causing grave injustice to the injured workers when they no longer continue in their employment.

The two possible interpretations before the conrt, i.e., eitber to consider the loss of band as permanent total disablement, reading incapacity to 'all work' with reference to work or profession which the workman was performing at the time of accident instead of all kinds of work available under the sky. Every living human being is capable of doing some work even one may suffer any one of the injuries stated under 'total disablement' under Schedule-I, Part-I. Even a blind person may work as announcer in a railway station. But, practically, it is not possible that every blind person would get a job of announcer in the railways. It is next to impossible in a country like India because of abundant supply of man power. Further, the disablement for the purpose of compensation should only be the factual disablement as stated in the Act and the concept of functional disablement should be totally disregarded. If the nature of injury is not mentioned in the Schedule-I, only the factual disablement should be assessed by the medical practitioner and the corresponding loss in the earning capacity.

In view of the continuing inconsistency there is a need to amend section 2(l)

total disablement to meet the ends of justice. A sub-clause should be added to section 2(1) for total disablement reading: "For any accident if the employment is terminated due to the injury the loss of the earning capacity is total unless the employer provides alternative employment to the injured workman protecting his wages drawing at the time of accident. Such disablement shall be deemed to be permanent total disablement irrespective of percentage of loss given in Part II of Schedule I for such injury." Thus, the amendment may fulfill the objectives of the Constitution.

SUSTAINABLE DEVELOPMENT: AN IMPORTANT TOOL FOR THE PROTECTION OF RIGHT TO ENVIRONMENT AND RIGHT TO DEVELOPMENT

Aneesh V. Pillai*

"The traditional concept that development and ecology are opposed to each other, is no longer acceptable. 'Sustainable Development' is the answer"

Justice Kuldip Singh[1]

Abstract

For the growth and prosperity of a nation, as well as for the overall development of an individual, it is essential for a country to undertake various developmental activities. However, this quest for development has far reaching impact on the environment. Every developmental activity has some repercussions on the environment in one or more ways and this cannot be ignored. Thus, there is a reciprocal relationship between environment and development and it is necessary to strike a balance between development and environment. To reconcile this apparent conflict international environmental law has, during the last three decades, evolved a practical tool, i.e., the concept of sustainable development. The paper examines the scope of the principle of sustainable development for the enhancement of environmental protection and the promotion of socio-economic development.

Introduction

Right to development is an inalienable and basic human right which is essential for the economic growth and progress of a nation as well as the individuals. The very objective of development is to create an environment in which people can develop their full potential and lead productive, creative lives, according to their needs and interest. It not only means providing the basic amenities, like, food, clothing and shelter, but also opportunities for their all round welfare. This quest for development has far reaching impact on the environment. Every

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1 See, <http://www.thefreelibrary/> (Visited on 25-1-2011).

developmental activity has some repercussions over the environment in one or more ways and this cannot be ignored. It is to be noted that right to clean and healthy environment is also a fundamental and inalienable basic human right. It is an accepted fact that there is a reciprocal relationship between environment and development. Thus, it is necessary that a balance should be made between right to development and right to environment. To reconcile this apparent conflict international environmental law has, during the last two decades, evolved a practical tool, i.e., the concept of sustainable development. This paper attempts to evaluate the utility of sustainable development for the enhancement of environmental protection and the promotion of socio-economic development. It also examines the various principles of sustainable development and their application in India. So also it gives some practical suggestions for achieving sustainable development in India.

Human Right to Development

The right to development is essential for protection of other fundamental human rights which are closely linked to and dependent upon its realisation. Thus, right to development is the most basic human right essential for the survival and progress of mankind. Development is a comprehensive process involving sustainable improvement of the economic, social and political well being of all individuals and peoples. Development aims for the realisation of all human rights — civil, cultural, economic, political, and social — and for the greatest possible freedom and dignity of every human being[2]. The evolution of right to development as a human right can be traced to the formation of the United Nations Organisation on 24th October 1945. The Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10th December 1948, laid down a common standard of achievement for all peoples from all nations, based on the principle that all men are born free and equal in dignity and rights. The UDHR contains 30 articles, comprising civil, political, economic, social and cultural rights, and provides the foundation upon which the subsequent international human rights documents are based. The civil and political rights are historically regarded as basic rights from which the whole philosophy of human rights has developed. The economic, social and cultural rights are those rights which are regarded as concerned with the material,

2 See, <http://www.pdhrc.org/rights/development.html> (Visited on 25-1-2011).

social and cultural welfare of persons[3].

The consensus over the unity of civil and political rights and economic, social, and cultural rights was broken in the fifties, with the spread of the cold war. Two separate Covenants, one covering civil and political rights and other covering economic, social, and cultural rights, were promulgated to give them the status of international treaties in the late sixties. Thus, the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights were adopted in 1966 and came into force in 1976. Further, it took many years of international deliberations and negotiations for the world community to get back to the original conception of integrated and indivisible human rights. As a result, the Declaration on the Right to Development, 1986, was adopted[4].

The Declaration on Right to Development recognises the centrality of the human dimension to development and states that the human person is the central subject of development. It calls upon member states to ensure access to the basic resources, education, health services, food, housing, employment and fair distribution of income[5]. Though, 27 years have elapsed since right to development has been formally recognised by the UN General Assembly as "an inalienable human right"[6], there continues to be some degree of confusion with regard to its definition among the academicians. Ultimately, the basic premise of the right to development finds its origin in Article 28 of the UDHR that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized". This Article is similar to Article 1 of the Declaration on Right to Development, 1986, which states that "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political

3 Anant Mane, "Human Rights and Development", Speech delivered on 21st March 2003 at M.S.S. Institute of Social Work, Nagpur, p. 3.

4 Arjun Sengupta, "The Right to Development as a Human Right", available at <http://www.harvardfxbcenter.org/resources/> (Visited on 25-1-2011).

5 UNESCO, *Sustainable Human Development United Nations Economic Commission for Africa*, available at <http://www.unesco.org/iau/sd/sd_definitions.html> (Visited on 25-1-2011).

6 United Nations, *General Assembly Resolution 41/128 Declaration on the Right to Development*, December 4, 1986, operative para. 1.

development, in which all human rights and fundamental freedoms can be fully realized". Article 3 of the same Declaration emphasises that "States have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development".

The right to development is an integral part of the fundamental human freedoms and thus, it is a human right which is both individual and collective, which depends more than any other human right on international cooperation and which raises issues of norms and policy coherence among different disciplines and processes. Many scholars have pointed out that these numerous definitions do not lead to clarity and often result in significant ambiguity of the concept. Hence, in recent sessions, the Working Group of the UN General Assembly avoided debating the definition of right to development. In fact, rigid definitions are in essence incompatible with the very nature of the right to development, which is process oriented. According to Professor Sengupta, an expert on the right to development, opines that right to development means a right to "a particular process of development". He describes this process thus:

> "A country can develop by many different processes ... However, they will not be regarded as a process of development, as objects of claim, as human rights, so long as they are attended by increased inequalities or disparities and rising concentrations of wealth and economic power, and are without any improvement in indicators of social development, education, health, gender balance and environmental protection and, what is most important, if they are associated with any violation of civil and political rights. Right to development is a right to only that process of development 'in which all human rights and fundamental freedoms can be fully realized"[7].

Such a functional approach to the definition of the right to development is particularly useful in the context of both developing and developed countries. These countries are in different stages of development and in order to increase their economic growth they undertake various developmental activities

7 Arjun Sengupta, *Third Report of the Independent Expert on the Right to Development*, E/CN.4/2001/WG.18/2, para. 5, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c98c8f2dcb713ff4c12569dc0058c5c2/$FILE/G0110070.pdf> (Visited on 25-1-2011).

resulting in environmental degradation[8]. Recognising a right as a human right means that the right is raised to the status of universal applicability. Thus, it articulates a norm of action for the people, the institution or the State and international community on whom that claim is made. The implementation of that right confers a first priority claim to national and international resources and capacities and, furthermore, it obliges the nation state and the international community, as well as other agencies of society, including, individuals, to implement that right[9]. Therefore, the affirmation of the right to development as a human right means the recognition of the need to realise all the human rights and fundamental freedoms inherent in it[10]. The right to development is very closely related to the right to environment. The environment not only provides the raw materials in the form of natural resources for various developmental activities, but also is vital for the survival of life on earth. The right to clean and healthy environment is a basic human right recognised by international documents.

Human Right to Environment

A healthy environment is a basic human right and is nature's gift[11]. Environment simply means surroundings and that is why Einstein defined it as "Environment is everything that is not me"[12].

Obviously, environment is a concept and if used in this sense, environment could include virtually anything and everything. The Environment Protection Act, 1986, defines environment as including water, air and land and the interrelationship which exists among and between water, air and land and human beings, other living creatures, plants, micro-organisms and property[13].

8 Stephen P. Marks, *Implementing the Right to Development. The Role of International Law*, Friedrich-Ebert-Stiftung, Geneva, 2008, p. 118.

9 A. Sengupta, *Second Report of the Independent Expert on the Right to Development*, Un Doc. E/CN.4/2000/WG.18/CPR.1 para. 10, available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/612/82/pdf/N0061282.pdf?> (Visited on 25-1-2011).

10 Alessandro Sitta, "The Role of the Right to Development in the Human Rights framework for Development", available at <http://www.capabilityapproach.com/pubs/5_1_Sitta.pdf> (Visited on 25-1-2011).

11 Ajeet Lal, "Right to Live in Healthy Environment vis-à-vis Human Environment", B.P. Singh (Ed.) *Human Rights in India - Problems and Perspectives*, Deep & Deep Publications, New Delhi, 1995, pp. 370-381.

12 *David* Wilkinson, Environment and Law, Routledge, New York, 2002, p. 41.

13 Section 2(a); See, S. Shantakumar, *Introduction to Environmental Law*, 2nd Edn., Wadhwa & Company, Nagpur, 2005, p.1.

Thus, environment means everything that surrounds us. It includes places where we live in and things we depend upon. Our natural environment has both living and non-living things such as, plants, animals and micro-organisms, besides, the sun, the moon, the sky, air, water, soil, rivers, mountains, land and forests. All these things affect us and like other life forms we also depend on them directly or indirectly[14]. This environment is essential for our survival.

The need for preservation and protection of environment was recognised at the universal level with the formation of United Nations Organisation in 1945. The significance of the preservation of human environment and its improvement was acknowledged for the first time in the UN Conference on Human Environment, 1972, by the adoption of the Stockholm Declaration. This Declaration is popularly known as the Magna Carta on human environment. It proclaims that man is both the creator and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. Both aspects of man's environment, natural and man made, are essential to his well being and to the enjoyment of basic human rights, even the right to life itself[15]. This emerging concern for the protection and preservation of environment which was recognised and accepted by the participating countries also found expression in their national Constitutions and legislations. India was a party to this Conference. In order to fulfill its international obligations and to give effect to the basic principles enshrined in the Stockholm Declaration, an amendment was made in the Indian Constitution itself.

The Constitution 42nd Amendment Act, 1976, incorporated two new provisions, viz., articles 48A and 51A, for environmental protection. Article 48A directs that "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". Further, article 51A(g) imposes a duty on every citizen of India to protect and improve the natural environment, including, forests, lakes, rivers and wild life, and to have compassion for living creatures. Indian Constitution is one of the few democratic constitutions in the world which has incorporated provisions for

14 Ram Naresh Thakur and Surendra Kumar, "Environment, Human Life and Sustainable Development", Bihar Economic Journal, 13th Annual Conference Volume, 2000, p. 57.

15 S. Shantakumar, *Introduction to Environmental Law*, 2nd Edn., Wadhwa & Company, Nagpur, 2005, p 394.

the protection of environment. The Indian judiciary, through its dynamic interpretation of Constitutional provisions and by its mechanism of judicial activism, has made the right to live in a healthy environment a fundamental right and hence, it has become a justiciable right[16]. This fundamental right to environment is a comprehensive right having very wide connotations, and includes right to wholesome environment[17], right to sweet and potable water[18], right to clean air[19], right to healthy environment[20], and the right to the highest attainable standard of health[21], etc. The right to environment is often violated due to the various developmental activities which are undertaken for economic growth and development.

Developmental Activities and their Impact on Environment

The human being is the central subject of development and the states have a duty to formulate appropriate national development policies that aim at the constant improvement of the well being of the entire population[22]. The various developmental activities which are constantly carried out so as to fulfill the right to development and the needs of the population have tremendous impact on the environment. It poses numerous challenges to the protection of environment. Some of the major challenges are discussed below.

1. Impact on the Ecosystems

The healthy existence and preservation of the essential ingredients of life requires a stable ecological balance[23]. The major impacts of developmental activities are over the ecosystems and natural resources. One of the biggest

16 *Damodhar Rao* v. *Municipal Corporation, Hyderabad*, AIR 1987 AP 170; *V. Lakshmipathy* v. *State of Karnataka*, AIR 1992 Kant 57; *Chetriya Pardushan Mukti Sangarsh Samiti* v. *State of UP*, AIR 1990 SC 2060; *Subhash Kumar* v. *State of Bihar*, AIR 1991 SC 420.

17 *B.L. Wadehra* v. *Union of India*, (1996) 2 SCC 594; *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715; *AP Pollution Control Board* v. *M.V. Nayudu*, (1999) 2 SCC 718.

18 *F.K. Hussain* v. *Union of India*, AIR 1990 Ker 321.

19 *Subhash Kumar* v. *State of Bihar*, AIR 1991 SC 420.

20 *Ibid.*

21 *Virendra Gaur* v. *State of Haryana*, (1995) 2 SCC 577.

22 The Declaration on Right to Development, 1986, Art. 2(3).

23 Paramjit Jaiswal and Nishitha Jaiswal, "Making to Live in Healthy Environment as Fundamental Right: An Assessment of Judicial Attitude and People's Concern", B.P. Singh (Ed.), *Human Rights in India -Problems and Perspectives*, Deep & Deep Publications, New Delhi, 1995, p. 396.

challenge before the government is to provide basic amenities and land for making human habitats in cities and towns. Hence, major forest areas are cleared to provide space. Trees are cut down and there is large scale deforestation to clear land for setting up industries and constructing allied transportation facilities. It results in soil erosion and loss of soil fertility. The large scale developmental activities are leading to the disappearance of the natural water resources, such as, streams, ponds, underground springs and rivers day by day. The toxic wastes from the industries are causing pollution of land, water and air ecosystems. The over all result of these activities is irreparable damage to the ecosystems, which in turn, is leading to ecological imbalance[24].

2. Water Pollution

Water is the basic necessity of life. In fact water is life and there cannot be any life without water. Potable and sweet drinking water is a fundamental human right. But, the rapid and unplanned developmental has led to pollution and degradation of water resources. The major cause of water pollution is the release of untreated industrial effluents and toxic chemical wastes by the industries into the rivers and open spaces[25]. Further, the water resources are becoming scarce and there is a shortage of water and, on the other hand, the available water resources are being polluted by the indiscriminate release of industrial effluents and domestic wastes. The polluted water adversely affects the health and quality of life of the individuals. It also affects the agriculture, the plants and the animals.

3. Air and Noise Pollution

Air is essential for living beings. Human beings cannot survive for a moment without air, hence, the air should be clean and pollution free. But, it is difficult to get clean and fresh air due to unplanned industrialisation, urbanisation, overpopulation and vehicular traffic[26]. Anyone familiar with large Indian cities is well aware of high levels of air pollution caused by smoke from industries, factories and automobile emissions[27]. The opening of Oxygen Parlours in the

24 See, <http://www.chow.com/facts 5541278 effects-pollution-ecosystems.html#ixzz10qy VftIY > (Visited on 15-8-2010).

25 *Supra* n. 15, p. 13.

26 *Supra* n. 11.

27 S. C. Shastri, *Environmental Law*, 3rd Edn., Eastern Book Company, Lucknow, 2008, p.16.

City of Chennai and in other metropolitan cities is a standing example of non-availability of pure oxygen even for breathing. Days are not far, when we will be buyiug oxygen cylinders from the roadside shops just as we are buying drinking water now[28]. Another type of pollution associatcd with air pollution and having serious consequence is noise pollution. It has been identified as a slow killer. It is a gift of modern industrial civilisation which is invading the environment in threatening proportions and is an invisible but insidious form of pollution. This is yet another consequence of unplauned developmental activities[29].

4. Disposal of Solid, Hazardous and other Wastes

The increasing urbanisation has also brought with it the problem of indiscriminate waste disposal and land pollution. Due to increasing population there is generation of large amount of domestic wastes from residential areas and commercial establishments. In many cities this waste is simply dumped on the roadsides or on the land without any treatment. The Indian cities are overburdened with population which utilise the natural resources as well as cause release of huge amount of domestic wastes, industrial wastes and commercial wastes. Such indiscriminate dumping of wastes without any treatment on open lands spoils the natural heauty of an area and causes land pollutiou. Ii creates unhygienic conditions as the dumping grounds become breeding centres of germs, mosquitoes and flies which cause numerous diseases to human beings. The toxic chemicals result in the soil losing its fertility. The wastes also deeompose and seep into the land thus causing pollution of underground waters. The management and disposal of solid waste is one of the essential services and it is an obligatory duty of municipal bodies to arrange for daily street cleaning and for the transport, processing and disposal of waste in urban areas[30].

5. Lack of Open Space and Green Parks

Green parks and open spaces are said to be the lungs of the land. They are essential for maintaining tho quality of air as well as for preserving natural beauty

28 *Supra* n. 15, p. 13.
29 *Id.*, p. 21.
30 *Id.*, p. 208.

of the land. In fact, fresh and clean air and green trees are the gifts of nature and are vital for living a healthy life. However, the unplanned development is destroying the bounties of nature. Due to ill planned development most of the cities are facing the problems of heavy traffic, congestion, lack of open spaces and green parks. There are concrete jungles in the form of huge buildings and shopping malls and there is absence of green trees and open spaces. The concrete jungles, along with vehicular pollution, contribute significantly to global warming and climate change.

6. Climate Change

The removal of trees, construction of roads and tall buildings modifies the natural absorption of water by the soil and affects the drainage system, ventilation of air and thermal conductivity of the area. Lack of trees coupled with increasing automobile emissions and industrial pollution causes an increase in the temperature resulting in global warming[31]. All these are having a significant impact on the weather and climate conditions and in turn affect the very existence of human beings.

The ill-planned developmental activities have thus lead to a large scale environmental pollution and degradation. Today, mankind is facing the dauntiug challenges of loss of natural resources and biodiversity, extinction of plants and auimals, pollution of all the major ecosystems on earth, ozone layer depletiou and global warming. The adverse impacts of the developmental processes are creating obstacles in the protection and preservation of environment and are thus violating the right of the individuals to live in a clean aud healthy environment. It is to be remembered that clean and healthy environment is a prerequisite to a healthy and dignified life. In fact most of the human rights are interrelated with the right to a clean and healthy environment. The Hon'ble Apex Court of India has also in numerous decisions emphasised that a healthy and wholesome environment is a fundamental right which gives meaning to right to life. Thus a healthy environment is vital for the proteetion and preservation of right to life and it also includes the right to development. In fact the right to development means an improvement in the quality of life of individuals and is closely related to the quality of environment in which

31 U. S. De and V. K. Soni, "Climate Change, Urbanization - What Citizens Can Do", J. Ind. Geophys. Union, 2009, Vol. 13, No. 1, pp. 43-48.

they live. Hence, there is a need to balance the conflict between right to development and environmental protection. In order to resolve this apparent conflict between environment and development, one of the major concepts which has emerged is Sustainable Development. It means development which aims towards economic growth and is also environment friendly.

Sustainable Development: A Tool to Resolve the Conflict

Economic development without environmental considerations can cause serious environmental damage and impair the quality of life of present and future generations. Such an indiscriminate development is in fact against the very notion of development which includes within its meaning the right to improvement in quality and standard of life of all peoples. Sustainable development attempts to strike a balance between the demands of economic development and the need for protection of the environment. It seeks to combine the elements of economic efficiency, intergenerational equity, social concerns and environmental protection[32]. Lexically 'sustainable development' is a sort of development which can endure and sustain without damaging the environment, and the concept of sustainability is often regarded in terms of the renewable resources like forests, marine resources, green pastures, soil and water, as well as the human force[33].

The concept of sustainable development is not a new concept. It came to be known as early as in 1972 in the Stockholm Declaration. It had been stated in the declaration that: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being and he bears a solemn responsibility to protect and improve the environment for present and future generations"[34]. But the term 'sustainable development' was introduced for the first time by the Brundtland Commission in the Report titled *Our Common Future* in 1987[35]. The Brundtland Report defined sustainable development as "development that meets the needs

32 See also, <http://www2.ohchr.org/english/issues/> (Visited on 20-1-2011).

33 Akbar Valadbigi, "Sustainable Development and Environmental Challenges", European Journal of Social Sciences, Vol. 13, No. 4 (2010) 542.

34 See also, <http://www.jurisonline.in/.../sustainable-development-a-conflict-between-environment-and-development/> (Visited on 20-1-2011).

35 Swathy Gopal, "Sustainable Development - A Conflict between Environment and Development", available at <http://www.juroisonline.com > (Visited on 20-1-2011).

of the present without compromising the ability of future generations to meet their own needs"[36].

Sustainable development implies economic growth together with the protection of environmental quality, each reinforcing the other. The essence of this form of development is a stable relationship between human activities and the natural world, which does not diminish the prospects for future generations to enjoy a quality of life at least as good as our own. Many observers believe that participatory democracy, undominated by vested interests, is a prerequisite for achieving sustainable development[37]. Macnon defined it as "Sustainable development means valid and efficient management and exploitation of the basic, natural, and financial resources as well as human force for accessing to an accepted pattern of consumption along with using technical possibilities and suitable structures in order to meet the needs of the present and future generations in a continual and satisfactory way"[38].

The concept of sustainable development got a legal recognition in the UN Conference on Environment and Development, known as the Earth Summit, held in Rio de Janeiro in 1992. The Summit was attended by the largest number ever of heads of State and of government, thus, indicating the importance that had become attached by then to the subject of environmental deterioration. It emphasised on the need to find ways of reconciling environmental protection with economic development policies at the international level. The Rio or Earth Summit focused on two key issnes - firstly, the link between environment and development and secondly, the practical issues surrounding the promotion of sustainable development and especially, the introduction of policies that balance environmental protection with social and economic concerns, particularly in the Third World. The Earth Summit resulted in five documents which gave an ambitious programme for promoting sustainable development. Firstly, the Rio Declaration on Environment and Development was agreed upon, presenting 27 principles of sustainable development. Secondly, Agenda 21 was agreed, which presented not only an astute analysis of the causes and symptoms of unsustainable forms of development, but an authoritative set of

36 WCED, *Our Common Future*, 1987, p. 44.

37 See also, <http://www.gdrc.org> (Visited on 20-1-2011).

38 *Supra* n. 33.

ideas on how to promote sustainable development in practice. Thirdly, two legally binding Conventions, the UN Framework Convention on Climate Change and the Convention on Biological Diversity as well as a 'Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests' were signed at Rio. Most importantly, the Rio Summit led to the establishment of new institutions. Chief among these was the Commission on Sustainable Development (CSD), whose primary role is to monitor progress on the agreements reached at Rio.

The concept of sustainable development has been further developed by the World Summit on Sustainable Development (WSSD) which was held in Johannesburg in 2002. The Summit resulted in the Johannesburg Declaration on Sustainable Development. This Declaration refers to the need to promote sustainable development through multi-level policy actions, adopting a long term perspective and encouraging broad participation. The Johannesburg Summit widened the meaning of sustainable development and defined it as including within its ambit the three components of environmental sustainability, economic sustainability and social sustainability which are interrelated and indivisible three pillars of sustainable development. However, the Declaration is criticised as being more in the nature of a political compromise, desperately needed to lend weight and legitimacy to the closing moments of the Summit[39].

At the international level, Philips Sand, an academician, has identified four recurring elements of the concept of sustainable development, as reflected in international agreements:

"1. The need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity);

2. The aim of exploiting natural resources in a manner which is 'sustainable' or 'prudent' or 'rational', or 'wise' or 'appropriate' (the principle of sustainable use);

3. The 'equitable' use of natural resources, which implies that use by one state must take account of the needs of other states (the principle

39 Susan Baker, *Sustainable Development*, Routledge, New York, 2006, p. 63.

of equitable use, or intergenerational equity); and

4. The need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, and that development needs are taken into account in applying environmental objectives (the principle of integration)" [40].

The concept of sustainable development thus aims at maximising the net benefits of economic activities, subject to maintaining the stock of productive assets (physical, human and environmental) over time and providing a social safety net to meet the basic needs of the poor.

Some of the authors support a 'strong sustainability' rule which requires a separate preservation of each category of critical asset, assuming these to be complements rather than substitutes while some other authors have argued in favour of 'weak sustainability' which seeks to maintain the aggregate monetary value of the total stock of assets, assuming a high degree of substitutability among the various asset types. Sustainable development, therefore, attempts to accelerate development in an environmentally responsible manner keeping in mind the intergenerational equity requirements[41]. All these various international environmental law documents have led to the recognition of certain basic principles of sustainable development which have been accepted by the member states.

Principles of Sustainable Development

a) Inter-Generational Equity The central theme of this principle is the right of each generation of human beings to benefit from the cultural and natural inheritance of the past generations as well as the obligation to preserve such heritage for future generations. Inter-generational equity requires conserving the diversity and quality of biological resources and of renewable resources, such as, forests, water and soils[42]. The theory of intergenerational equity stipulates that we, the human species hold the natural environment of our planet

40 P. Sands, *Principles of International Environmental Law*, 2nd Edn., Cambridge University Press, Cambridge, 2003, p. 253.

41 See also, <http://www.indiabudget.nic.in/es98-99/chap1102.pdf> (Visited on 20-1-2011).

42 P. S. Jaswal and Nishtha Jaswal, *Environmental Law*, 2nd Edn., Allahabad Law Agency, 2009, p. 120.

in common with all members of our species — past generations, the present generation and the future generations. As members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it. Thus, the present generation being a trustee, has the right to benefit from the use of the natural resources which constitute trust property[43]. The Supreme Court of India has also upheld this principle in *State of Himachal Pradesh* v. *Ganesh Wood Products & Ors.*[44].

b. The Precautionary Principle — Precautionary principle plays a significant role in determining whether developmental process is sustainable or not. Precautionary principle requires that the developmental activity must be stopped and prevented if it causes serious and irreversible environmental damages[45]. Principle 15 of the Rio Declaration on Environment and Development, 1992, provides that, in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used a reason for postponing cost effective measures to prevent environmental degradation. The main purpose of the precautionary principle is to ensure that a substance or activity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof for linking that particular substance or activity to environmental damage. The substance or activity implies substance or activities introduced as a result of human intervention[46].

Justice Kuldip Singh in *Vellore Citizens Forum* v. *Union of India*[47] explained the precautionary principle in the context of municipal law. It means (1) Environmental measures by the State Government and statutory authorities, must anticipate, prevent and attack the cause of environmental degradation. (2) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation[48].

43 Gurdeep Singh, *Environmental Law in India*, Mac Millan Quality Law Books, New Delhi, 2005, p. 22.
44 (1995) 6 SCC 363.
45 *Supra n.* 43, p. 28.
46 *Supra n.* 42, p.123.
47 (1996) 5 SCC 647.
48 *Supra* n. 27, p. 56.

c. Polluter Pays Principle — Polluter pays principle establishes the requirement that the costs of pollution should be borne by the person responsible for causing the pollution[49]. The principle basically means that the producer of goods or other items should be responsible for the costs of preventing or dealing with the pollution which the process causes. This includes environmental costs as well as the direct cost to the people or property. The costs include full environmental costs and not just those which are immediately tangible[50]. Remediation of the damaged environment is part of the process of sustainable development and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology[51].

d. Use and Conservation of Natural Resources — In order to meet the needs of the people on a sustainable basis, it is absolutely necessary to use the earth's natural resources carefully and the natural resource base must be conserved and enhanced. it is a part of our moral obligation to other living beings and future generations. The resources must be conserved and enhanced to meet the needs of the growing population[52].

e. Obligation to Assist and Co-operate — The environmental problem is not a problem of any one individual or any one country. It is a global problem and it can be tackled only with the assistance and co-operation of all. Principle 9 of the Rio Declaration provides that the States should co-operate to strengthen indigenous capacity building exchanges of scientific and technological knowledge, adaptation, diffusion and transfer of technologies, including, new and innovative technologies. The same line of obligation is mentioned in Principles 10, 12 and 27 also. Thus, obligation to assist and co-operate is also one of the important principle of sustainable development[53].

f. Eradication of Poverty — The concept of sustainable development has to address the problem of the large number of people who live in absolute poverty and who cannot satisfy even their basic needs. The UN Conference

49 P. Sands, *Principles of International Environmental Law*, 2nd Edn., Cambridge University Press, Cambridge, 2003, p. 279.

50 *Supra* n. 43, p. 31.

51 *Supra* n. 42, p.127.

52 United Nations, *The World Commission on Environment and Development: Our Common Future*, 1987, p. 57.

53 *Supra* n. 42, p. 129.

on Environment and Development, i.e., 'Earth Summit' of 1992 has brought about a leap in public awareness with respect to the key environmental and developmental issues and rightly projected that elimination of poverty is a must for Sustainable Development, particularly in the developing countries. The key to achieve sustainability is to break the vicious cycle of poverty[54].

These principles of sustainable development are regarded as important principles of international environmental law and some of them are regarded as binding principles of customary international law. India has also adopted many of these principles by way of judicial activism. However, environmental degradation and pollution requires urgent and immediate attention from the State and the individuals. Therefore, to strike a balance between environment and development, it is essential to develop mechanisms for effective implementation of the principles of sustainable development. The Government should adopt appropriate rules and regulations for the effective implementation of the principles of sustainable development.

Conclusion and Suggestions

The achievement of right to development is dependent upon the realisation of all human rights, and development is dependent upon maintenance and enhancement of environmental and social quality. Under the concept of sustainable development, both the right to development and the right to environment are complementary aspects of each other. It is too uncertain at the moment to state that a right to sustainable development has been recognised in general by the international community. This is because the different nations of the world are in different stages of development and have different patterns of development as per their social and economic needs. Acceptance of the existence of both a right to development and a right to environment, however, would create the necessary conditions for the emergence of a new right to sustainable development[55]. It is very essential to implement effectively the concept of sustainable development in India as it is a developing country and needs to carry out economic activities for providing basic amenities to the vast

54 *Ibid.*

55 Owen J. Lynch, "Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society", available at <http://www.ciel.org> (Visited on 10-12-2011).

population and also needs to protect the environment and natural resources. For the effective implementation of this concept some of the suggestions proposed are as follows:

1. Proper planning should be done while designing the plans for the developmental projects. The plan should consider the needs of the growing population as well as the available environmental resources. This planning should not be for short term gains but it must be for long term benefits and for improving the quality of life.

2. Environment Impact Assessment should be done mandatorily for all the developmental projects. It should be reviewed and monitored by environmental experts.

3. The principles of sustainable development, such as, inter-generational equity, polluter pays principle and precautionary principle should be properly applied for dealing with environmental issues. So also, the doctrine of public trust and *parens patriae* should be kept in mind by the authorities who have an obligation to formulate developmental plans and projects.

4. The developmental plans should take into account the residential areas, open spaces and green parks and recreational areas. Industries and factories should not be set up in residential areas and cities and should be atleast 15 kms. away from cities to avoid tragedies, like, Bhopal Gas Disaster and Oleum Gas Leak case.

5. The specific laws should be implemented in a strict and stringent manner so as to tackle the problem of air pollution, water pollution and land pollution. The authorities under these legislations should be adequately equipped with staffs and other infrastructure for their effective functioning. To control automobile emissions, use of Compressed Natural Gas in vehicles should be made mandatory.

6. There should be a Buffer Zone of green trees between the industrial area and the cities.

7. In order to mainlain greenery and open spaces in residential areas in

cities it should be mnde mandatory for the commercial builders to leave sufficient space for planting trees. The ground lloor should be left vacant for parkiug space and should not be used for shops and other commercial purposes.

8. NGO's, media and public spirited citizens play a major role in creating awareness about the need to protect and preserve the environment and natural resources. They can also assist the government for resolving the conflict between environment and development by evaluatiug the impact of developmental projects, conducting field study, etc.

9. Environmental Courts and Green Benches should be set up for speedy disposal of environmental cases involving damage to the environment and individuals.

10. Last, but uot the least, the citizens have a major role to play by adopting an eco-friendly life style.

HUMAN RIGHTS AND ADMINISTRATION OF CRIMINAL JUSTICE

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Abstract

The history of human rights is a fascinating one. Most of our existing fundamental and inalienable rights have sustained the struggle for freedom, liberty, equality and fraternity everywhere since the inception of mankind. It has roots in all the situations and cases relating to criminal jurisprudence. For the advancement of human rights, criminal law has always played a grand role. Basic human rights, such as the presumption of innocence, protection against self-incrimination and the burden of proof on the prosecution are also the pillars on which a just criminal justice system stands. The Constitution of India has conferred a number of Fundamental Rights upon the citizens. The article examines the various Human Rights conferred by the Constitution and the various constitutional safeguards available to the citizens for the administration of Justice. It further examines the rights of arrested persons and the prisoners. It is essential to knock the door of all societies in the world as to awaken them to the reality that the accused and prisoners have the same rights as any other person in the society has. The Judiciary has always been an exemplary in this regard. The Supreme Court of India displayed remarkable craftsmanship to promote and protect human rights.

Introduction

Human rights are those rights which a person is entitled to because of the fact that he is a human being and it becomes operative from birth. These rights are essential for one's physical, economic and intellectual development. The attention of the world community towards these rights was attracted mainly after the excesses committed on humanity during the Second World War. The memories of Nazi atrocities, flagrant violation of human rights, loss of millions of innocent lives, compelled the world community to develop the human rights jurisprudence. These rights are inalienable rights.

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Many countries, after the Second World War, adopted the idea of human rights principles in their Constitutions. The International Community adopted the Universal Declaration of Human Rights (UDHR), 1948, the Covenant of Civil and Political Rights (ICCPR), 1966, the Covenant of Economic, Social and Cultural Rights (ICESCR), 1966. Thus, the concept of human rights is a worldwide phenomenon guaranteed to every person irrespective of his nationality. The standards of national human rights protection is observed and regulated by the world community.

The first documentary use of the term 'human rights' was made in the Charter of United Nations, in 1945. One of the declared goals of the United Nations was to reaffirm faith in Fundamental Human Rights. It is the modern name of what has hitherto been known as 'Natural Rights'.

There exists a reciprocal relationship between human rights, and the guiding principles of criminal justice administration. This relationship underlines the fact that effective employment of human rights is a decisive factor in the removal of conditions promoting criminal behaviour, as well as, for positive effects on the prevention of crime and the treatment of offenders — the central pursuit of criminal justice administration. This substantive relationship between the protection of human rights on the one hand, and the prevention of crime and treatment of offender on the other, has been increasingly recognised important in the organisational and procedural arrangement with the United Nations[1].

Criminal law has contributed to the growth and development of many human rights. Basic human rights, such as, the accused is presumed to be innocent until proven guilty beyond reasonable doubts, the right to silence of the accused and the burden of proof of the prosecution are also the pillars on which a just criminal justice system stands[2]. Everything that concerns men and women as individuals could fall within human rights, thereby, embracing practically every aspect of personal, social and public life. Therefore, both under national as well as international human rights law, the State is obliged to

1 See, Dogra Bharat, "Worldwide denial of Human Rights", Civil & Military Law Journal, 2000, pp. 194-195.

2 See, N. K. Chakarvartty, "Criminal Justice Policy of Humanitarian Law: Theories, Analysis and Application", Aligarh Law Journal, 1996.

uphold and ensure observances of basic human rights. Human Rights are not the bounties of the State or gifts of the Government. It is the duty of the State or the Government, as the case may be, to recognise and enforce them[3].

Many international instruments make provisions for the following rights:

- The right of equality of a fair and public hearing by an independent and impartial tribunal. All persons shall be equal before the courts and tribunals;
- The rights concerning the arrest and detention pending trial and without trial;
- The right of accused person in connection with trial in court;
- The rights of convicted person;
- The rights of all detainees to be protected against torture and other cruel inhuman or degrading treatment or punishment;
- The protection of community against crime;
- The standards of conduct for judges, lawyers, the police and other persons in law enforcement process; and
- The principles of non-discrimination in matters pertaining to administration of justice.

Notwithstanding the elaborate human rights provisions and mechanisms evolved by the United Nations through consensus and concurrence of member States, there is probably no country that has been able to ensure respectful compliance of the standards. There is often variance in the degree of compliance, some have better record and some have worse. Where does India stand is a question which this paper addresses. However, it is limited to examining the observation and breach of human rights in the domain of criminal justice alone.

The Protection of Human Rights Act, 1993, defines 'human rights' as the rights

3 See, <http://hipa.nic.in/banerjea.pdf> (Viewed on 1-2-2012).

relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India[4]. The Constitution of India confers a number of fundamental rights upon citizens. India is a signatory to various international instruments on human rights, like, the UDHR which states that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment"[5]. Also important is the ICCPR which provides that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"[6].

The Indian socio-legal system is based on spiritual salvation, non-violence, mutual respect and dignity of every person in the society. If a person commits any crime, it does not mean that by committing a crime, he ceases to be a human being and that he can be deprived of those aspects of life, which constitutes human dignity. Even the prisoners have human rights. The prison torture is not "the last drug in the Justice Pharmacopoeia" but "a confession of failure to do justice to living man"[7]. For a prisoner all fundamental rights are an enforceable reality, though restricted by the fact of imprisonment[8].

In the administration of criminal justice system, ensuring human rights does not merely mean the protection of the rights of under-trials or detainees or convict, but it has to be given a wide connotation, which means that every individual has the right of access to Courts of Justice[9]. Article 10 of the UDHR while emphasising on this crucial aspect, provides that:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"[10].

4 Section 2(d).

5 The Universal Declaration of human Rights, Art. 5.

6 The International Covenant on Civil and Political Rights, Art. 10.

7 V. R. Krishna Iyer, *Justice and Beyond*, Deep and Deep Publications, New Delhi, 1980, p. 144.

8 See, Paramjit S. Jaswal, "Public Accountability for Violation of Human Rights and Judicial Activism in India: Some Observations", (2002) 3 SCC 6 (J).

9 S. B. Sinha, "Human Rights vis-à-vis the Criminal Justice System", available at <http://jkmtrust.tripod.com/id5.html> (Viewed on 13.2.2012).

10 *Ibid.*

In fact the right of fair trial is the most important amongst other human rights. It is the judiciary that plays a vital role to develop these rights along side the criminal justice system and constitutional jurisprudence. The principles of justice and fairness in the criminal justice system are not new to India. However, in the past century, these rights have become enshrined in the various laws in India. Chief among these laws is the Constitution of India. While dealing with human rights in criminal jurisprudence, we deal primarily with human rights conferred by the Constitution.

Constitutional Safeguards

The main objects enshrined in the Preamble of the Constitution are to secure to all its citizens, justice, liberty, equality of status and dignity to individual — all basic for the concept of administration of justice. Part III of the constitution guarantees an array of fundamental rights. Individuals can enforce these rights in Courts when they are violated by the action or inaction of a government authority or official, but not when they are violated by other private individuals or companies[11]. However, certain fundamental rights are enforceable against private individuals as well[12].

Article 14 guarantees equality before the law, a milestone towards a fair trial. It means there should be no discrimination between one person and another. Action must not be arbitrary but must be based on some valid principles which itself must be rational[13]. Reasonable classification is justifiable, for example, classification made on the ground of proceeding initiated on police report and those initiated otherwise is reasonable, as the object of such classification is to secure speedy disposal of cases.

Article 19(1) provides all citizens the right to freedom of speech, expression, assembly, association, movement, residence, and profession[14]. The freedoms

11 This principle is embodied in the doctrine of 'state action' in Article 12 of the Constitution.

12 Rights contained in Articles 17, 18, 23 and 24 are enforceable against the State and private individuals.

13 *Kasturi* v. *State of J&K*, AIR 1980 SC 1922.

14 Art. 19(1) reads: "All citizens have the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations and unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (g) to practice any profession, or to carry on any occupation, trade or business".

enumerated in this Article do not encompass all the rights of a free person[15] but are basic rights that have been recognised as natural rights inherent in citizenship[16]. However, these freedoms are not absolute; reasonable restriction may be imposed in the interest of the general public, security of the State, and public order, etc[17]. The Constitution does not define 'reasonable restriction', the Supreme Court has held that the reasonableness of a restriction should be determined by the courts, not the legislature[18], on a case by case basis[19], and that the restriction should not be arbitrary or of an excessive nature beyond what is required in the interest of the public[20].

Article 21 prohibits any inhuman, cruel or degrading treatment to any person whether he is a national or foreigner[21]. Before a person is deprived of his life or personal liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of person affected. *Maneka Gandhi's case* has located a new dimension to right to life and liberty by essentially prescribing reasonable, fair and just, procedure of law is reasonable as against arbitrariness and fanciful[22].

Articles 20 and 22 are most important provisions for securing fair trial and rights of detainees[23]. Article 20, clause (1) lays down such safeguards, known in other words as principle of legality based on the doctrine '*nullum crimen since lege, nulla poea sine lege*' which means that there must be no ponishment of crime except in accordance with fixed predetermined law[24]. What is prohibited under clause (1) is only conviction or sentence under *expost facto* law and not the trial thereof. Article 20(2) deals with immunity from double punishment,

15 *A.K Gopalan* v. *State of Madras*, AIR 1950 SC 27, 107.

16 *State of West Bengal*. v. *Subodh Gopal Bose*, (1954) SCR 587, 592.

17 See, the Constitution of India, Arts. 19(2) - (6).

18 *Chintaman Rao* v. *State of MP*, (1950) SCR 759, 765.

19 *State of Madras* v. *V.G. Row*, (1952) SCR 597, 607.

20 *Chintaman Rao* v. *State of MP*, (1950) SCR 759 to 763.

21 Art. 21 guarantees, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

22 *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

23 Article 20 lays down that no person shall be convicted of any offence except for violation of law in force at the time of the commission of an act charged as an offence, no one be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

24 G. William, *Criminal Law*, 2nd Edn., Steven & Sons, London, 1961, p. 575.

which is known as doctrine of double jeopardy. In the clause it has been guaranteed that no person shall be prosecuted and punished for the same offence more than once. This is an important principle of the administration of criminal justice. In fact, the rule is contained in the common maxim '*nemo debet bis vexari*' which means that previous acquittal or previous conviction may be pleaded by the accused as a bar to the subsequent trial.

Article 20(3) provides protection to the accused against self-incrimination[25]. This guarantee said to be the off-shot of the cardinal principle of criminal jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime. The accused need not make any admission or statement against his own free will and that he must be presumed to be innocent until the contrary is proved. Subjecting a person to polygraph and brain fingerprinting tests involuntarily has been held as amounting to forcible interference with his mental process. The right of privacy as enshrined in Article 20(3) is violated. It has also been held that subjecting a person to polygraph and brain fingerprinting tests, voluntarily or involuntarily, violates the right against cruel inhumane or degrading treatment. Subjecting an accused person compulsorily to Narco test affects the right to fair trial. The accused has no access to legal advice. Such tests also impede the fact finding role of the judge and dilute standards of proof required in a criminal trial[26].

Article 22 provides procedural safeguards to the accused against arrest and detention[27]. Clauses (1) and (2) lay down the procedure which is to be followed when a person is arrested. They ensure four rights:

(a) right to be informed regarding grounds of arrest;

(b) right to consult and to be defended by a legal practitioner of choice;

25 Article 20(3) reads: "No person accused of any offence shall be compelled to be a witness against himself".

26 *Selvi and Others* v. *State of Karnataka*, AIR 2010 SC 1974.

27 Article 22(1) reads: "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall be denied the rights to consult, and to be defended by a legal practitioner of his choice. Clause (2) further extends protection to the detainees that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest to the Court of Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate".

(c) right to be produced before a Magistrate within 24 hours; and

(d) freedom from detention beyond the said period except by order of the Magistrate.

In 1978 the privilege against self-incrimination was, as it were, rediscovered and resurrected by the Supreme Court in *Nandini Satpathy* v. *P. L. Dani*[28]. This decision exhaustively dealt with the philosophy behind the privilege against self-incrimination and defined and delineated the contours of this privilege. It breathed a new life into this privilege which had otherwise become merely a paper protection. The court, speaking through Krishna Iyer, J., laid down in this case a few propositions intended to act as concrete guidelines to provide protection to an accused person in police custody. The court pointed out that the prohibitive sweep of the protection against self-incrimination goes back to the stage of police interrogation and is not confined only to court proceedings. The ban on self-accusation and the right to silence, the court pointed out, goes beyond the case in question and protects the accused in regard to other offences pending or imminent which may deter him from voluntary disclosure of incriminatory matter. The court held that if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the police in obtaining information from an accused strongly suggestive of guilt, it becomes compelled testimony violative of the privilege against self-incrimination. The court also held that compulsion may be presumed in case of custodial interrogation by the police "unless certain safeguards erasing duress are adhered to".

Rights of an Arrested Person

Though the police have been given powers for facilitating the making of arrest, the powers are subject to certain restraints. The imposition of these restraints is in recognition of the rights of the arrested persons. There are provisions expressly creating important rights in favour of the arrested persons. These are as follows:

(a) Right to be Informed of the Grounds for Arrest

According to section 50(1) of the Criminal Procedure Code, every police

28 AIR 1978 SC 1025.

officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested[29]. This is a precious right of the arrested person and has been recognised by the Constitution of India[30].

(b) Right to be Informed of Right to Bail

Every police officer arresting without a warrant any person other than a person accused of a non-bailable offence, is required to inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf[31].

(c) Right to be Produced before Magistrate without Delay

In case of every arrest, whether the arrest has been made with or without a warrant, the person arresting is required, without unnecessary delay and subject to the provisions regarding bail, to produce the arrested person before the Magistrate or court having jurisdiction in the case[32]. It is categorically provided that such a delay in no case shall exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court. This right has been created with a view to prevent arrest and detention for the purpose of extracting confessions, to prevent police stations being used as though they were prisons and to afford an early recourse to a judicial officer independent to the police on all questions of bail or discharge[33].

(d) Right to Consult a Legal Practitioner

Section 303 of the Criminal Procedure Code recognises the right of every arrested person to consult a legal practitioner of his choice[34]. The right begins from the moment of arrest. The consultation with the lawyer may be in the presence of police officer.

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29 See, G.S. Bajpai, "On Informal Arrests and Human Rights Violations", IASSI Quarterly, 2001, pp. 95-104.

30 Art. 22(1).

31 The Criminal Procedure Code, 1973, s. 50(2).

32 *Id.*, ss. 56 and 76.

33 See, Sudesh Kumar Sharma, "Human Rights, Police and Custodial Violence: A Perspective", M.D.U. Law Journal, 2000.

34 The Criminal Procedure Code, 1973, s. 303 and the Constitution of India, Art. 22(1).

(e) Right to be examined by a Medical Practitioner

If any arrested person alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody, that the examination of his body will afford evidence which will establish the commission by him of any offence or which will establish the commission by any other person of any offence against his body, than the Magistrate, on the request of the arrested person is required to direct the examination of his body by a registered medical practitioner. However, the Magistrate need not give such a direction if he considers that the request for examination has been made by the arrested person for the purpose of vexation or delay or for defeating the ends of justice[35]. The Apex Court further imposes a duty on the Magistrate to inform the accused about his right to be medically examined in terms of section 54[36].

Apart from the above mentioned rights, the Hon'ble Supreme Court in *D.K. Basu* v. *State of West Bengal*[37], issued the following directions:

(1) The police personnel carrying out the arrest and handling the investigation and interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of arrestee must be recorded in register.

(2) The police officer carrying out the arrest of a arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by arrestee and shall contain the time and date of arrest.

(3) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the district and the police station of the area

35 *Id.*, s. 54.

36 *Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96.

37 (1993) 2 SCC 746.

concerned telegraphically within a period of 8 to 12 hours after the arrest.

(4) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body must be recorded at that time. The 'inspection memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee free of cost.

(5) The arrestee should be subjected to medical examination by trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by the Director, Health Services of the State or Union Territory concerned. The Director, Health Services should prepare such a panel for all Tehsils and Districts as well. Copies of all the documents including the memo of arrest referred to above should be sent to the illaqa Magistrate for his record.

(7) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout interrogation.

(8) A police control room should be provided at all districts and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the Police Control Room it should be displayed on a conspicuous Notice Board.

Rights of the Prisoner

An accused after conviction becomes a convict and the court concerned awards punishment to him. However he does not lose all his human rights and he cannot be dealt with in any inhuman manner by the jail administration. The following is a brief extract of the rights of prisoners[38].

38 See also, P. K Singh, *Supreme Court on Human Rights and Social Justice*, Ist Edn., Allahabad Law Agency, Allahabad, 2001.

(i) Right to have free legal aid

In *Hoskot* case[39], the petitioner was awarded punishment up to the rising of the court. He was punished for fabricating the seal of the Karnataka University. On appeal, the High Court increased the punishment to three years rigorous imprisonment. Against this, the petitioner after four years preferred an appeal. He had undergone the period of imprisonment during this period. As to why the appeal to the Supreme Court was filed after four years. It was disclosed that the copy of the High Court's judgment was given to the petitioner after five years of the judgment. There was no record with the jail authorities that they had given the copy to the applicant. The Supreme Court reasoned that Article 21, the repository of 'due process', includes the principles of natural justice. The petitioner must have a right to appeal and to exercise this right within time he should be given the copy of judgment earlier. He is moreover entitled to free legal aid. All this is the responsibility lying on the shoulders of the state. The Supreme Court in this case not only cleared the legal position of a prisoner but also issued guidelines as to the issue of a copy of the judgment and legal aid available to the prisoner.

(ii) Protection of the Rights of the Undertrial Prisoners

Hussainara Khatoon cases, group nos. 1 to 6, disclose the heartbreaking conditions prevailing in jails of Bihar state. The jail contained hundreds of prisoners who were languishing for years in jail in utter misery. Those against whom there were charges of petty offences were detained in jail for 3 to 10 years without filing charge sheet. The existence of these prisoners was simply rendered to a ticket number. As observed by Justice Bhagwati in the case this is a shame for the law and legal administration. The procedure of law, which keeps in detention such a large number of persons for years together in jail can hardly be said to be reasonable, just and proper. As to factors responsible for this state of affairs it was observed that our bail system is in favour of the rich or persons having property. The delay in starting a case is the second reason. Absence of prompt hearing of a case renders the whole system of legal administration a precious mockery and nullifies the fundamental right as to personal liberty and right to life[40].

39 *M. H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 584.

40 *Hussainara Khatoon (I)*, (1980) 1 SCC 81, AIR 1979 SC 1360.

As observed in *Hussainara Khatoon (I and III)* cases[41] the State Government should withdraw those cases wherein it cannot or could not file a charge sheet within 3 months after the expiry of 2 years in investigation. Under section 167(2), Cr.P.C., all the under trials should be presented before court at proper time and this provision should be complied strictly. Those against whom charge-sheet was not filed within the limitation period contained in section 468(1), Cr.P.C., should be released at once.

In *Hussainara Khatoon (IV)*, the Supreme Court had reasons to doubt that its orders were not properly obeyed and consequently it ordered the Bihar Government to at once release all the under trial prisoners. The court reiterated that availability of free legal aid, reasonable, just and proper procedure were the important things never to be missed in regard to under trial prisoners. The court called for the list of under trial prisoners in jails from Bihar Government. In subsequent cases (Nos. V and VI) the same issues were involved and the court made similar orders to release the undertrials.

Hussainara case at least brought the issue of undertrials to light and the court issued directions and pursued the matter. However, to what extent it has been able to bring change in jail administration is a question to which no definite answer is given.

The judiciary has worked extremely hard in order to prevent the denial of the right of speedy trial to under-trial prisoners. The Supreme Court of India in various decisions has recognised this. The Andhra Pradesh High Court has noticed all these judgments and in *Mir Mohammed Ali* v. *Government of Andhra Pradesh*[42] has given number of directions for release of under-trial prisoners who have been languishing in prison without proper trial for a long time.

(iii) Right to Protection of Individual Liberty

In *State of Maharashtra* v. *Prabhakar Pandurang Sangzgiri*[43], the Supreme Court observed that a prisoner in a jail imprisoned under the Defence of India

41 (1980) 1 SCC 98, 1980 SCC (Cri) 40, AIR 1979 SC 1369 and (1980) 1 SCC 108.
42 2000 (4) ALT 541.
43 AIR 1968 SC 424.

Rules, 1962, had a right to publish a book written by him in jail and for this purpose the jail authorities should allow him to send the same outside for publication. To write a book is a personal right of a prisoner and to violate it is to violate individual liberty guaranteed under the Constitution.

In *D.B.M. Patnaik* v. *State of A.P.*[44] the Naxalite prisoners challenged the action of the government in putting live electric wires on prison walls 14 feet high from the ground. The challenge failed and it was ruled that the action of the authorities was not violative of Article 21 of the Constitution.

In *Sunil Batra* case[45] a convict was sentenced to death. From that day he was kept in solitary confinement by the jail authorities (as per section 30 of the Prisons Act). However, this was challenged, as this confinement was similar to the confinement described under Section 73 IPC. And only a court could order such a confinement. The court distinguished the word 'separate' from 'solitary' and ordered that he should not be kept in solitary confinement.

Similarly, in *Charles Sobhraj* v. *Union of India*, the undertrial prisoner was kept in heavy chains on his hands and feet continuously for two years. The authorities described him as a dangerous person but the court did not accept the argument and ordered to keep him free in jail. The court issued directions and guidelines as to when a prisoner could be put under chains or fetters[46].

(iv) Right to Protection of the Rights of the Prisoners in Police Custody

In *Sheela Barse* v. *State of Maharashtra*[47] the Supreme Court gave directions to the State and the Superintendent of Prisons to protect the rights of women-prisoners and to behave humanely with them.

(v) Right to Obtain Compensation for Illegal Detention

In the past, the Indian courts have been reluctant to award compensation to persons whose fundamental rights have been violated by the state or its officers. Often courts have refrained from awarding such compensation on the ground that the state is immune from such liability under the doctrine of 'sovereign

44 (1975) 3 SCC 185, 1974 SCC (Cri) 803, AIR 1974 SC 2092.

45 *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1575.

46 See also, *Kishore Singh* v. *State of Rajasthan*, 1981 Cri LJ 17.

47 (1983) 2 SCC 96, 1983 SCC (Cri) 353, AIR 1983 SC 378.

immunity' (which basically means that a state or its officers cannot be held liable for damages caused during the exercise of their official functions)[48].

Similarly, the courts have been reluctant to grant compensation under their writ jurisdiction under Articles 32 or 226. This also has changed. For example, in *M. C. Mehta* v. *Union of India*[49], the Supreme Court held that its power under Article 32 includes the power to issue writs and directions as well as the power to forge new remedies and fashion new strategies. Under Article 32, the court prevents breaches of fundamental rights as well as provides relief in the form of monetary compensation for the breach of fundamental rights in appropriate cases.

With the advancement of human rights, Indian courts, including, the Supreme Court have been willing to abandon the notion of sovereign immunity and to use their writ power to hold the state and its officers liable to pay monetary damages. This has also been true in the context of prisoners' rights where several courts have awarded monetary compensation to prisoners whose rights have been violated by prison officials. A discussion of a few of these cases will be fruitful.

In *Challa Ramkonda Reddy* v. *State of A.P.*[50], a prisoner told the prison authorities that he feared for his life while in jail and requested extra guards for protection. One day, because of the negligence of the prison guards on duty, a bomb was thrown at the prisoner by persons who had broken into the jail. The prisoner died and his family brought a civil suit against the state for monetary damages. The A.P. High Court held that the state officers (the jail guards) were grossly negligent and that this negligence caused the death of the prisoner. The court further held that the state was liable to pay monetary damages to the amount of Rs. 44,000 /-. It stated "Where a citizen has been deprived of his life, or liberty, otherwise than in accordance with the procedure prescribed by law, it is no answer to say that the said deprivation was brought about while the officials of the state were acting in discharge of the sovereign functions of the state ... The claim for damages must succeed. Indeed, this is the only

48 *Kasturilal* v. *State of U.P.*, AIR 1965 SC 1039.

49 (1987) 1 SCC 395,1987 SCC (L&S) 37, AIR 1987 SC 1086.

50 AIR 1989 AP 235.

mode in which the right to life guaranteed to the deceased by Article 21 can be enforced". It is unclear whether their case would apply in circumstances in which a prisoner was deprived of his or her right to life and liberty (Article 21) by the gross negligence of prison or other state officials, but did not actually die as a result. However, the language of the court in general would seem to allow such an action: "Only where they (state officials), act with gross negligence, resulting in deprivation of the life and liberty of the citizen, does the state become liable for compensation".

In *Rudal Shah* v. *State of Bihar*[51], a prisoner was kept in prison for a period of 14 years on the ground that he was insane. A petition under Article 32 was filed on his behalf. The Supreme Court released him and awarded him compensation of Rs. 35,000/- on account of the deprivation of his fundamental right to life and liberty under Article 21. The court held "Article 21, which guarantees the right to life and liberty, will be denuded of its significant content if the power of this court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of the right can reasonably be prevented and due compliance with the mandate of Article 21 secured is to make its violators pay monetary compensation. Therefore, the state must repair the damage done by its officers to the Petitioner's rights". In other words, the Supreme Court held that it was proper for a court to award money to a person where there was violation of Article 21 by a state officer. This case also showed that damages may be awarded for violations of Article 21 that do not result in the death of the prisoner.

In *Bhim Singh* v. *State of Jammu and Kashmir*[52], a politician was arrested 'with mischievous and malicious intent' in violation of Articles 21 and 22(2). The Supreme Court stated that this was an appropriate case for awarding of monetary damages and ordered the state of Jammu and Kashmir to pay Rs. 50,000 in damages.

In *Sebastian M. Hongary* v. *Union of India*[53], two persons were arrested by army jawans. In response to an Article 32 petition for habeas corpus the Supreme Court ordered the two persons to be produced. They were never produced. The

51 (1983) 4 SCC 141, 1983 SCC (Cri) 798, AIR 1983 SC 1086.
52 (1985) 4 SCC 677, 1986 SCC (Cri) 47, AIR 1986 SC 494.
53 AIR 1984 SC 1206.

Supreme Court awarded Rs. 1 lakh to the wives of the untraceable persons.

In light of the above cases, it is clear that Indian courts have the power to award damages to prisoners whose human rights have been violated. Whether or not a court actually awards such damages in a particular case is a different matter. Much would appear to depend on the attitude of the judge hearing the case and the seriousness of and the extent to which the prisoner's rights had been violated.

Failure to comply with the requirements above mentioned shall, apart from rendering the official concerned liable for departmental action, also renders him liable to be punished for contempt of court and the proceedings for contempt of court may be initiated in any High Court of the country having territorial jurisdiction over the matter. In case of unlawful arrest and detention, the Supreme Court has recognised the right to compensation for the victim.

All over the world, in every society, it is essential to sensitise the people about the reality that the accused and prisoners have same rights, which are almost equal to the rights of other people in the society. It has been the judiciary that has played the most crucial role in this regard. The Apex Court showed extraordinary and notable craftsmanship to develop and protect the human rights. By what Justice Krishna Iyer termed "judiatrics", the Supreme Court has done commendable task by incorporating some of the Directive Principles of State Policy into Part III of the Constitution – an incredible judicial creativity praised even by the highest courts of other jurisdictions[54].

In this regard, the Supreme Court recognised various rights of prisoners and arrestee, such as, in *Prabha Dutt* v. *Union of India*[55] the right to interview for prisoners was recognised, the right to a fair trial was recognised in *Police Commissioner, Delhi* v. *Registrar, Delhi High Court*[56], in *Prem Shankar Shukla* v. *Delhi Administration*[57] the right against handcuffing was recognised and the

54 See, P. N. Bhagwati, "Human Rights in the Criminal Justice System", Journal of the Indian Law Institute, Vol. 27(1), January-March, 1985, pp. 1-22; See also S. B. Sinha, "Human Rights vis-à-vis the Criminal Justice System", available at <http://jkmtrust.tripod.com/id5.html> (Viewed on 13.2.2012).

55 AIR 1982 SC 6.

56 AIR 1997 SC 95.

57 (1980) 3 SCC 526.

right against torture and custodial violence as a human right was recognised in *D. K. Basu* v. *State of West Bengal*[58], the human right of being presumed innocent until proven guilty beyond reasonable doubt was also recognised in *Narendra Singh* v. *State of M.P*[59], and have the right of access in the broadest possible terms, including access with free legal aid was recognised in *State of Maharashtra* v. *M. P. Vash*[60] and in *Abdul Rehman Antulay* v. *R. S. Nayak and Ors.*[61] the most expedited manner possible.

An essential characteristic of a fair trial is the 'balancing of interests' of the rights of the detainees and the interests of national security. Sometimes, the interests of victims are marginalised for want of rules that require the court to give equal merit to the accused[62]. In many cases like that of terrorist activities the rule that the guilt of the accused must be proved beyond all reasonable doubt does render it improbable to give corresponding weight to the interests of the victims, and the society at large. Even in *State of M.P.* v. *Shyamsunder Trivedi*[63], the Supreme Court referred to the recommendations of the 113th Law Commission Report to insert section 114B in the Indian Evidence Act and emphatically observed:

> "The exaggerated adherence to and insistence upon the establishment of proof beyond reasonable doubt, ignoring the ground realities, the fact situations and the peculiar circumstances of a given case ... often results in miscarriage of justice and makes the justice delivery system a suspect"[64].

Conclusion

Protection of Human Rights is of cardinal importance to the administration of criminal justice at all stages of investigation, trial and punishment, though, there is no unanimity regarding the catalogue of certain minimum rights which are to be protected by all civilised systems of criminal procedure. Human

58 (1997) 1 SCC 416.
59 2004 (4) SCALE 543.
60 AIR 1996 SC 1.
61 (1992) 1 SCC 225.
62 See, P.N. Bhagwati, "Human Rights in the Criminal Justice System", Journal of the Indian Law Institute, Vol. 27, No. 1, 1985, pp. 1-22.
63 (1995) 4 SCC 262.
64 *Ibid.*

rights jurisprudence requires that the victims must have ready access to the legal system that prompt and effective steps are to be taken by the system to ensure that effective disciplinary, administrative, civil and criminal action is taken against those guilty of acts of omission or commission resulting in the violence of Human Rights. The Criminal Procedure Code in India contains salient features in this respect and the failure was in the enforcement of these provisions. Judicial contribution is not sufficient in this regard. In this respect the role of Human Rights Commission in India is also worth mentioning. The National Commission interfered in appropriate cases of Gujarat violence, custodial violence, case of fake encounter and torture by police or security forces and directed the State to pay compensation to the victims in number of cases.

The life is not merely animal existence. The souls behind the bars cannot be denied the same[65]. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that Right. A prisoner, be he a convict or under-trial or a detenue, does not cease to be a human being. They also have all the rights which a free man has but under some restrictions. Just being in prison does not deprive them of their fundamental rights. Even when lodged in jail, he continues to enjoy all his Fundamental Rights. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights.

The importance of affirmed rights of every human being needs no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Supreme Court has gone a long way fighting for their rights. However, the fact remains that it is the police and the prison authorities that need to be trained and oriented so that they take prisoner's rights seriously.

65 See, < http://www.legalserviceindia.com/articles/po.htm > (Viewed on 12-2-2012).

USE OF METHOD OF SOCIOLOGY IN CONSTITUTIONAL ADJUDICATION: A CRITICAL ANALYSIS OF CARDOZO'S PERSPECTIVES

Samarth Agrawal*

Abstract

Justice B.N. Cardozo was perhaps the first jurist to talk on judicial process so extensively and intrinsically. He envisaged the novel concepts in judicial process in his seminal work *Nature of Judicial Process*. His four methods of judicial adjudication came at the time when there was no ray of hope in issues relating to 'filling gaps' in law. Method of sociology is perhaps the most relevant and used methods in the field of judicial adjudication, particularly, constitutional adjudication.

Law cannot be given a treatment which is isolated from the society. It is to be accorded such interpretation which truly reflects the sentiments and needs of the society. There was a time when a narrow and pedantic view was prevalent, wherein, 'original intent' was dominant and progressive interpretation was thrown to the winds. However, with the changing times and growing complexity in society, it was seen that such view was nothing but an impediment in the development of constitutional law as well as other legal rules and principles which draw their strength from the constitution.

Even in USA, where the debate of 'original intent' was mostly deliberated, there was a time when the Supreme Court of USA was forced to accept the progressive interpretation. In the Indian context, through the PIL jurisprudence such novel concepts were imported into the Indian judicial system as well.

The paper focuses on the use and importance of method of sociology in constitutional adjudication. With the changing times, the constitutional concepts and values need a different outlook. This can only be achieved in taking into consideration the societal trends, values and aspirations of the public. In fact, Justice Cardozo has impliedly conceded that method of sociology takes precedence over all other methods.

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Introduction

"A constitution states or ought to state not rules for the passing hour, but priuciples of expanding future"[1].

These words of the great judge and philosopher of law[2], Benjamin N. Cardozo, most briefly describe the importance of constitution and its significance in unending discourses of time. Cardozo's comprehensive analysis of judicial process is one of the greatest contributions to the realm of law, which intrinsically forms the part of his first work[3]. In the most eloquent manner Cardozo describes the judicial process by this novel conception of four methods, viz., method of philosophy, method of tradition or custom, method of history and method of sociology. He emphasises on fillings gaps in law[4]. The description of the method of sociology is exhibited in the terminological verisimilitude of his genius work[5]. He unequivocally stresses on the importance of social justice and welfare of the society[6]. The method of sociology is best exemplified in the field of constitutional law, where it mediates between the traditional claims of liberty or property and the conflicting demands for social legislation[7].

"The constitution is not the home for legal curiosities. It is the epitome of nationai aspirations of a free political society"[8]. It goes without saying that constitution provides broad general framework for the working of the state. It is much more than a mere statute in a sense. It is an instrument embodying fundamental law[9]. Constitution is nurtured in the societal environment of a country and it logically follows that it needs to be constantly interpreted in a manner which furthers the changing aspirations of people with changing societal mores.

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1 Benjamin N. Cardozo, *The Nature of Judicial Process*, 9th Indian Reprint, Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2011, p. 83.

2 Edwin W. Patterson, "Cardozo's Philosophy of Law", Univ. Penn. L. R. 88 (1939) 71.

3 *Supra* n. 1.

4 *Id.*, p. 14.

5 *Id.*, p. 65, "Finally, when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in pursuit of other larger ends".

6 *Id.*, p. 66.

7 *Id.*, pp. 76-94.

8 See, *Sakal Papers* v. *Union of India*, AIR 1962 SC 305.

9 Bryan A. Garner (Ed.), *Black's Law Dictionary*, 9th Edn., West Publishing Company, Thomson and Reuters Group, USA, 2009, p. 353.

Constitutional Adjudicatiou — Classical Approach

Adjudication means the legal process of resolving a dispnte or a process of judicially deciding the case[10]. The use of prefix 'constitutional' restricts the sense of adjudication to the limits of constitutional framework. Once that is recognised, a fundamental issne emerges. ts the constitution a rigid blueprint - a detailed and exhaustive statement of founders' intention - or a set of general principles designed as a broad framework or outline for national government? In other words, what is the principle of interpretation to be applied to the constitution which is to operate in circumstances and conditions so very different from circumstances and conditions prevailing at the time of making of the constitution?[11]. By and large, there has been an ongoing controversy between the original intent school of interpretation and progressive and dynamic interpretation[12].

'Originalism'[13], 'Interpretivism' and 'Intentionalism'

The courts are universally acknowledged as the final and authoritative expositors of the constitution[14]. Yet the questions concerning the power to interpret the constitution remain. The primary of those revolves around the substantial standards of constitutional adjudication[15]. For originalists the constitution is the supreme law and as such must bind the judges as well and other government officials[16]. Thus, a necessary bond exists between legitimate judicial decision making and maintaining the original nnderstanding[17]. The originalist maintained that in the process of constitutional interpretation the original intention of the framers of the constitution should be paid heed.

10 *Id.*, p. 47.

11 Anthony Mason, "Trends in Constitutional Interpretation", UNSWLJ 18(2) (1995) 237.

12 *Id.*, p. 238.

13 The words 'orignialism', 'original intent' and 'original understandihg' are interchangeably used.

14 See, *Cooper* v. *Aron*, 358 U.S. 1 (1958), pp. 17-19; Wechsler, "The Courts and the Constitution", 65 Colum. L. Rev. 1001, 1008 (1965).

15 Henry P. Monaghan, "Constitutional Adjudication: The Who and When", YLJ 82 (7) (1973) 1363.

16 See, Address by Jndge Robert Bork, University of San Diego Law School (Nov. 18, 1985) reprinted in the Great Debate: Interpreting our Written Constitution, 43 (Occasional paper no. 2 Federalist Society, 1986).

17 Henry P. Monaghan, "Stare Decisis and the Constitutional Adjudication", Col. L. Rev. 88 (2) (1988) 723.

Therefore, any interpretation which defies the original intent is *non-est*.

Another variant of orignialism is interpretivism or intentionalism. Interpretivism can be defined as judicial practice of giving meaning to a legal text in accordance with the original purpose or intention of those who enacted it. Interpretivism can be traced back to the famous case of *Scott* v. *Sandford*[18]. Interpretivism has not, however, produced unequivocal constitutional results. Its most notable failure occurred in *Brown* v. *Board of Education*[19], where the court asked the litigants to analyse whether the framers of the fourteenth amendment intended it to prohibit segregation in public education, but, concluded that those intentions were too indefinite to answer the constitutional question before it. Accordingly, the court resolved the case in a realistic fashion by reference to sociological data and its own vision of racial equality.

Criticism of Originalism, Interpretivism and Intentionalism

The fiercest of the criticisms that is levelled against orignialism is that the doctrine fails to provide coherent methodology in its application to old documents, such as, the constitution[20]. It is patently difficult to ascertain the original intention of the framers of the constitution ages ago, given the fact that the socio-economic and political considerations have undergone a sea change post promulgation of the constitution. The framers themselves may not have intended that their deliberations over the making of the constitution would provide authoritative guidance[21]. Moreover, it is quite difficult to say with strong conviction that those who drafted the constitution had intended to provide a particular meaning to a provision having same sense of perception, years later. There is always a possibility that they might have agreed over a particular thing but for different reasons.

Thus, the goal of accurately aggregating the preferences of so many persons is an unrealistic one[22]. Insistence upon the original understanding as the only

18 60 U.S. (19 How.) 393 (1857).

19 347 U.S. 483 (1954).

20 See, Brest, "The Misconceived Quest for Original Understanding", B.U.L. Rev. 60 (1983) 204.

21 See, Powell, "The Modern Misunderstanding of Original Intent", U. Chi. L. Rev. 54 (1987) 1513.

22 R. Dworkin, *Law's Empire*, Belknap Press, USA, 1986, pp. 320-21, cited in *supra* n. 17, p. 727.

legitimate standard for judicial decision making entails a massive repudiation of the present constitutional order. Much of the present constitutional order is at variance with original understanding[23]. It has been largely referred to as a dead horse, patently absurd and a misguided attempt to bind us to the "dead hand of the past"[24]. It goes without saying that major decisional lines are vulnerable to the original intent.

Perhaps the most noteworthy claims are those concerning the school disaggregation cases. No satisfying conception of orignialism seems capable of accounting for *Brown* v. *Board of Education*[25]. *Brown's* discussion of the difference between education in 1868 and 1954 is unpersuasive; public schooling was a practice clearly understood at the time and it is conceded that the claim that the practice was invalid would have been rejected by those who had framed or ratified the fourteenth amendment. In such a case, the practice does not become constitutionally invalid with the passage of time on the premise that its significance and meaniug, not the meaning of the amendment, has changed over time. The argument that the two relevant and contradictory sets of intention lacks any historical foundation[26].

The most ardent criticism of interpretivism has come from the Critical Legal Studies Scholars (CLS)[27]. CLS critique rests on a particular understanding of the nature of historical knowledge, which is labelled as "model of history as contextualisation"[28]. This model starts with an assumption that an isolated fact from the past, taken by it is without meaning and can be given meaning only by placing it in some context with meaning in the present[29]. The contextualist emphasise that past must always be translated into the present. They unmistakably draw a conclusion that interpretation must further the present societal concerns. One of the conclusions that can be derived from this is the fact that as the historian renders the past meaningful, he cannot avoid changing

23 *Supra* n. 17, p. 727.

24 H. J. Powell, "The Original Understanding of Original Intent", 98 Harv. L. Rev. 885 (1985).

25 347 U.S. 483 (1954).

26 *Supra* n. 17.

27 See, Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles", Harv. L. Rev. 96 (1983) 781.

28 William E. Nelson, "History and Neutrality in Constitutional Adjudication", Virg. L. Rev. 72 (7) (1986) 1237.

29 *Ibid.*

its meaning[30]. A contextualist historian selects one historical interpretation in preference to others on the basis of consistency with the world view. Thus, social vision is a prime ingredient of interpretivism[31].

Progressive Interpretation and Method of Sociology

The function of law is basically to regulate the behaviour of society. The regulation of behaviour is a dynamic thing. Behaviours keep on changing with changing trends of the society. Slavery was a justified behaviour before thirteenth amendment of US constitution. It no longer remains so. Hence, it becomes apparently necessary for the law to keep pace with the changing times. "The final cause of the law is the welfare of the society. The rule that misses its aim cannot permanently justify its existence"[32].

Before proceeding to the level of progressive interpretation in light of method of sociology, it needs to be understood why prime importance is attached to the interpretation of the constitution in the light of social welfare and why not to other laws? Perhaps, the answer to this question lies in the words of Cardozo when he says "...the great generalities of the constitution have a content and significance that vary from age to age"[33]. The constitution reflects the sentiments of the people of the country. Being the jurisprudential foundation of all the laws, it becomes imperative to accord such interpretation to the constitution which constantly gives the nourishment to the other laws by keeping pace with the march of the societal mores. "The content of constitutional immunities is not constant but varies from age to age"[34]. The basic difference between the interpretation of the constitution and of a statute, *vis-a-vis* method of sociology, is underlined by the fact that the statute is designed to meet the fugitive exigencies of the hour[35] and the constitution is meant for the expanding future[36]. Cardozo explains that in so far as the deviation is made from the generalities and details and particulars are supplanted, it loses its flexibility,

30 *Ibid.*
31 *Supra* n. 28, p. 795.
32 *Supra* n. 1, p. 66.
33 *Supra* n. 1, p. 17.
34 *Supra* n. 1, p. 83.
35 *Ibid.*
36 *Ibid.*

the scope of interpretation contracts, the meaning hardens. Its true function is to maintain its power of adaptation[37].

Advocates of progressive interpretation see the constitution as the outline framework of the government. Not that they do not give importance to the text. Dynamists argue that the constitution framers were aware of the fact that they were shaping constitution for the future and not for present generation only[38]. The meaning that the constitution has for the present generation is not necessarily the meaning that the constitution had when it was enacted[39]. Constitution is an instrument of government meant to endure and conferring powers, expressed in general propositions, wide enough to be capable of flexible application to the changing circumstances[40]. In the interpretation of the constitution, words of width are both a framework of concepts and means to achieve the goals in the preamble. Concepts may keep changing to expand and elongate rights. Constitutional issues are not solved by mere appeal to the meaning of the words without an acceptance of the line of growth[41]. When the judges are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of the society fix the path, its direction and its distance[42].

The court as the vehicle of transforming the nation's life should respond to the nation's needs, interpret the constitution with pragmatism to further public welfare to make the constitutional animations a reality and interpret the constitution broadly and liberally enabling the citizens to enjoy the rights[43]. Marshall J. famously quoted in *McCulloch* v. *Maryland* "...we must never forget, that it is the Constitution we are expounding"[44]. As changes come in social and political life, the constitution embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words,

37 *Supra* n. 1, p. 84.

38 *Supra* n. 11, p. 239.

39 *Theophanous* v. *Herald and Weekly Times Ltd.*, (1993) 124 ALR 1.

40 *Australian National Airways Pvt. Ltd.* v. *Commonwealth*, (1945) 71 CLR 29.

41 M. N. Rao and Amita Dhanda, *N.S. Bindra's Interpretation of Statutes*, 10th Edn., Lexis Nexis Butterworths Wadhwa, New Delhi, 2008, p.1291.

42 *Supra* n. 1, p. 67.

43 *Supra* n. 43, p. 1291; See also, *Vidya Sagar Gupta* v. *State of Uttar Pradesh*, (1997) 5 SCC 201.

44 4 Wheat 316.

while the powers granted do not change, they apply to generations to all the things to which they are in their nature applicable[45].

The true content of the words are not to be gathered by simply taking dictionary in one hand and words in other, for the provisions of the constitution are not the mathematical formulae which have their essence in mere form[46]. It is the duty of the court to determine in what particular meaning and particular shade of meaning the words or expressions were used by the constitution makers. The courts must take into account the context in which the words occur. The relevance must also be attributed to the societal conditions prevalent at the time of formation of the constitution and the time when it is being interpreted[47].

When Cardozo speaks of filling gaps in law[48] he necessarily implies interpretation of statutes. He always asserts that in every case, without exception, it is the business of the court to supply what the statute omits, but always by means of an interpretative function[49]. However, he brilliantly carves out a difference between interpretation of a statute and that of a constitution. Freedom of a judge in interpretation vis-a-vis method of sociology is limited in cases where the statute has supplied the finer details and particulars. For, then, the judge has to remain in confines of the words written in the statute. This is not the case with the constitution. Constitutions are more likely to enunciate general principles, which must be worked out and applied thereafter to the particular conditions[50].

Social welfare is a broad term. It is not susceptible to precise definition and form. Perhaps for the first time, in series of articles published between 1896 to 1901, Edward A. Ross gave the idea of social control, and of the means of social

45 See, *Missouri* v. *Holland*, 252 US 461, per Holmes J.: "When we are dealing with the words that also are a constituent Act, like Constitution, we must realize that they have called into life as being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and had cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago".

46 *State of West Bengal* v. *Anwar Ali Sarkar*, [1952] SCR 284, p. 359, per Bose J.

47 *H. H. Maharajadhiraja Madhav Rao* v. *Union of India*, (1971) 1 SCC 85.

48 *Supra* n. 1.

49 Kiss, *Equity and Law*, 9 Modern Legal Philosophy Series, cited in *supra* n. 1, p. 70.

50 *Supra* n. 1, p. 71.

control, putting law as the most specialised and highly finished engine of social control employed by society[51]. A totally new line of jurisprudence emerged since the inclusion of social welfare in the application of law. Sociological jurisprudence proceeds from historical and philosophical jurisprudence to utilisation of social sciences, towards a broader and more effective science of law. It begins with Holmes[52] and was taken to a socio-philosophical direction by Pound[53] and Cardozo[54]. Indian courts have also emphasised the need of reading the constitution in the light of social welfare. In fact, they have developed altogether a new stream of law, in the nomenclature of public interest litigations (PIL), to give reality to the close nexus between constitution and society. One draws precise meaning from a vaguely worded document, such as, the constitution, by reading values into its clauses[55].

Social value has greatly become an important aspect. It is regarded as a test of growing power and importance[56]. A rule which embodies a social value is regarded with utmost respect, precisely because people are able to find their aspirations in that rule. Something which is society oriented in close to the hearts of masses. The usefulness of such rule is indispensable.

There has been a change in the thinking. The emphasis is changed from the content of the rule and the existence of a remedy to the effect of the rule in action and the availability and efficiency of the remedy to attain the ends for which the rule was designed[57].

Constitutional adjudication cannot be divorced from the reality of the situation or the impact of adjudication. Constitutional deductions are never made in the vacuum. These deal with life's problems in the reality of a given situation[58]. It must also be kept in mind that constitutional adjudications are not limited to

51 Roscoe Pound, "Sociology of Law and Sociological Jurisprudence", Univ. Tom. Law J. 5 (1) (1943) 2.

52 Oliver W. Holmes, "The Path of the Law", 10 Harv. L. Rev. 467 (1897).

53 Roscoe Pound, "Scope and Purpose of Sociological Jurisprudence", Harv. L. Rev. 24 (1911) 591.

54 *Supra* n. 1.

55 *Union of India* v. *Sankalchand Himmatlal Seth and Anr*, (1977) 4 SCC 193.

56 *Supra* n. 1, p. 73.

57 *Ibid.*

58 *Charan Lal Sahu* v. *Union of India*, (1990) 1 SCC 613.

the present generation only. They are done with an eye on the future[59]. Justice Cardozo has opined that reason and conscience are to be interrogated, to discover in our inmost nature, the very basis of justice[60]. On the other hand, we are to address ourselves to social phenomena, to ascertain the laws of harmony and the principles of order which they exact[61].

Cardozo speaks of generalities in constitution. He believes that the application of this method is best illustrated in the constitutional provisions. No one shall be deprived of liberty without the due process[62]. This is the concept of greatest generality. The term 'liberty' is not defined. However, the courts have carved out its meaning over the period of time[63]. The problem arises in ascertaining its meaning and application which is spread over a period of time. Like what Cardozo has asked "Does liberty mean the same thing for successive generations?"[64]. Restraints that were arbitrary yesterday become useful today and vice-versa[65]. It is just because of change of social values that we have transited from *lassize faire* to welfare state. The meaning of 'life and liberty' in welfare state is a lot different from that of a police state.

Constitution of India talks of 'life and personal liberty'[66] which cannot be taken away without 'procedure established by law'. These phrases used in the constitutional text are vulnerable to shades of meaning in any given societal context. The interpretation in the time of *A.K. Gopalan* v. *State of Madras*[67] is at great variance with that of *Maneka Gandhi* v. *Union of India*[68]. This is nothing but a sheer illustration of constitutional adjudication as described by Cardozo[69]. Liberty was conceived of at first as something static and absolute[70]. The Declaration of Independence has enshrined it; the blood of Revolution

59 *Ibid.*

60 Benjamin N. Cardozo, *The Nature of the Judicial Process*, available at <http://www.constitution.org/cmt/cardozo/jud_proc.htm.> (Visited on 12-2-2012).

61 *Supra* n. 1.

62 14th Amendment to the Constitution of United States of America.

63 *Supra* n. 1.

64 *Supra* n. 1, pp. 76-77.

65 *Supra* n. 1, p. 77.

66 Art. 21.

67 AIR 1950 SC 27.

68 AIR 1978 SC 597.

69 *Supra* n. 1.

70 *Ibid.*

has sanctified it[71]. Political philosophy of Rousseau and Locke and later of Herbert Spencer and of the Manchester school of economists had dignified and rationalised it[72]. The transition in later stage is the movement from individualistic liberalism to unsystematic collectivism and bad brought changes in the social order which carried with them the need of a new formulation of fundamental rights and duties[73]. It is this transition which is effectuated by the method of sociology. The courts know today that the statutes are to be viewed not in isolation, or *in vacuo*, as pronouncements of abstract principals for the guidance of an ideal community, but in the setting and framework of present day conditions[74].

The concept of 'life and liberty' in Indian scenario has marched ahead. Largely, due to magnitude of constitutional adjudications in the form of judicial review, or as many would call it 'judicial activism'. Whatever its form may be, the fact of the matter remains that the method of sociology has flourished all along. For instance, *Anuj Garg* v. *Hotel Association*[75] is a recent example of a new social dimension. Women were allowed to work in the liquor shops and statutory restrictions were lifted. If the same factual matrix would have been deliberated upon some fifty-sixty years ago the outcome would have been different. One of the cardinal principles of constitutional adjudication is that the mode of interpretation ought to be the one that is purposive and conducive to ensure that the constitution endures for ages to come[76].

Critical Appraisal of Cardozo's Perspectives

The whole conception of Cardozo's perspectives traces their foundation in the fact that when the judge is confronted with the situation where the colour index fails, statutes provide no relief and precedents are not direct on point, then the serious business of the judge begins[77]. He proposes four methods, not necessarily in order of priority of application, which a judge should apply in

71 *Ibid.*
72 *Id.*, p. 77.
73 *Supra* n. 1, p. 78.
74 *Muller* v. *Oregon*, 208 U.S. 412.
75 AIR 2008 SC 663.
76 *Indian Medical Association* v. *Union of India*, (2011) 6 SCALE 86.
77 *Supra* n. 1, pp. 20-21.

judicial process of case at hand[78]. Initially, he talks of consistency in law and, therefore, stresses on drawing logical deductions from precedents. However, when he switches to the method of sociology, he brings in an element of social welfare. Throughout his lectures on judicial process, he has never talked of preference of methods. There might be a case when the judge is again confronted with the situation as to which method to apply. The preference of one method over other is a subjective choice which a judge has to make. There are no set guidelines in deciding a case, like, whether the judge will choose logical consistency or will he move away from consistency to shape the law which pulsates in the societal mores, etc. Nonetheless, Cardozo fearlessly advocates method of sociology in terse words when he says that there is no branch where the method is not fruitful[79]. Even when it does not seem to dominate, it is always in reserve[80]. It is an arbiter between other methods determining in the last analysis the choice of each, weighing their competing claims setting bounds to their pretensions, balancing and moderating and harmonising them all[81].

It has been discussed earlier that constitutional adjudication is an integral part of the method of sociology. It transpires that when any judge tickles the settled law, under the pretext of social change and subsequent welfare, the question will arise as to what are the objective standards to decide social change. It might be the judge's own perceptions that guide him in assessing the social change. In such a scenario, it is not wise, by any stretch of imagination, to fiddle with the supreme law of the land under the pretext of social change and such a judgment attracts criticism from varions sections of the society. We must not throw to the winds the advantages of consistency and uniformity[82]. We must keep within those interstitial limits which precedent, custom and the long and silent and almost indefinable practice of other judges, through centuries of common law, have set to judge made innovations[83]. The manoeuvring of

78 Method of philosophy, method of history, method of tradition or custom and method of sociology.

79 Benjamin N. Cardozo, *The Nature of the Judicial Process*, available at <http://www.constitution.org/cmt/cardozo/jud_proc.htm.> (Visited on 15-2-2012).

80 Benjamin N. Cardozo, *The Nature of the Judicial Process*, available at <http://www.constitution.org/cmt/cardozo/jud_proc.htm.> (Visited on 15-2-2012).

81 *Supra* n. 1, p. 98.

82 *Id.*, p. 103.

83 *Ibid.*

consistency and changes in society is a herculean task which is wrapped in a riddle. Cardozo emphasises on the fact that those rules which have become obsolete are diseased[84], should be done away with. He means to say that in changing trends of the society the rules which loses its utility must be cut and extirpated.

The tendency has changed towards growing liberalism. The law has outgrown its primitive stage of formalism, when the precise words were sovereign's talisman and every slip was fatal[85]. The discourse of the method of sociology proceeds on the path that there has been a considerable change in the legal system. The new spirit has made its way gradually; and its progress is visible in the path which has been traversed[86]. The old form remains but the contents are new. The instrument of method of sociology is found in the contribution of Jhering's conception of law. According to him, the ends of the law determine the direction of its growth. Most meticulously, Cardozo tells us that there can be no wisdom in the choice of the path unless we know where it will lead[87]. There is no doubt in saying that welfare of the society should be kept at a level higher than other concerns. But, at times, it becomes difficult to clearly see the path and its destination when there are conflicting claims in the society. At times it will be like forcing a judgment of court on those who do not subscribe to the particular viewpoint of the society.

Cardozo does not agree with Savigny's jurisprudential conception of law insofar as it implies that the mores of the day automatically shape the law. Somewhere he is critical in this respect and appreciates the role of the judge in shaping the law and not history alone. Here we can sense the element of sociology. Perhaps he is very right when he says that the standards or patterns of utility and morals will be found by the judge in the life of the community[88]. In a homogenous society it might be feasible to carve out standards or patterns of utility. In a complex and heterogeneous society it is utterly difficult to find one.

84 *Id.*, p. 98.

85 *Wood* v. *Duff Gordon*, 222 N.Y. 88; See also, Benjamin N. Cardozo, *The Nature of the Judicial Process*, available at <http://www.constitution.org/cmt/cardozo/jud proc. htm.> (Visited on 12-2-2012).

86 *Supra* n. 1, p. 100.

87 *Id.*, p. 102.

88 *Id.*, p. 105.

To draw sum and substance of Cardozo's perspectives, in the light of method of sociology in particular, it would be apt to state that it is a very fine attempt by him to bring under one roof various aspects of judicial process. Constitutional adjudication, in particular, is of great importance in this field inasmuch as it has a direct bearing on society in which it is cultured. However, conflicting claims of consistency and continuous changes in society needs a reconcilement in order to bring more efficiency in the arena of constitutional adjudication.

Conclusion

It would be suffice to conclude that the method of sociology best reflects the dynamics of social change and social welfare. It has a direct bearing on the constitutional text and its adjudication. Without any iota of doubt it can be safely affirmed that in case of shift in the societal mores adjudicators turn to the constitution and give it such colour and texture through interpretation which matches the societal change. A shift from the classical approach to constitutional adjudication to the progressive approach is largely due to the method of sociology and its impact on courts. Hence, method of sociology is best suited in constitutional adjudication but should be exercised with great care and caution so as not to disturb the equilibrium of consistency unduly against any particular section of people.

CASE COMMENT

'Sentinel on the *Qui Vive*' Indeed: A Comment on the *2G Spectrum Case*

Prof. H. W. R. Wade observed:

> "The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended. The decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority"[1].

The power of judicial review of the High Courts as well as the Supreme Court has been laid down in a series of decisions of the Supreme Court. However, it is equally significant that the Courts will not exercise its jurisdiction to entertain a writ petition wherein a public law element is not involved[2]. In a legal system where the 'Montesquieuen' doctrine of separation of powers is in vogue, this intervention ought to be with some limitation. India does not believe in a total watertight separation among the various wings of the State.

1 H.W.R. Wade, *Administrative Law*, Oxford University Press, Oxford, 1994, p. 399.

2 See for instance, *Life Insurance Corporation* v. *Escorts*, AIR 1986 SC 1370; *ECIL* v. *Jagannath Dutta*, AIR 1993 SC 1494; *State of Gujarat* v. *Meghraj Peth Raj Shah Charitable Trust*, (1994) 3 SCC 552; *Assistant Excise Commissioner* v. *Issac Peter*, (1994) 4 SCC 104; *National Highway Authority of India* v. *M/s. Ganga Enterprises & another*, 2003 (7) SCALE 171.

What we practice is a policy of mutual 'checks and balances'. A methodology adopted by the judiciary in this regard is the practice of self restraint. The only check on the judiciary's own exercise of power is the judicial sense of self-restraint[3] or resorting to what may be called self imposed limitations[4]. Generally, a deviation from the traditional restricted interference is made in exceptional situations where the policy of the executive is either against law or is tainted with *mala fides*. The recent decision of the Supreme Court on the 2G Spectrum case[5] is an illuminating instance of a sharp deviation from this policy of 'self restraint' in a very significant matter of public importance.

In this case the Supreme Court very succinctly laid down its policy:

> "The executive authority of the State must be held to be within its competence to frame policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere *ipsi dixit* of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes in conflict with any statutory provision, the Court cannot and should not out step its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long as the same does not offend any provision of the statute or the Constitution of India. The supremacy of each of three organs of the

3 See the observation of Justice Harlan Fiske Stone in *U.S. v. Butler*, (1936) 294 US 78 at p. 88 that: "While unconstitutional exercise of power by the executive and legislative branches is subject to judicial restraint the only check on our own exercise of power is our own sense of self-restraint... Courts are not the only agency of government that must be assumed to have capacity to govern..."

4 For instance, the judicial attitude of non intervention in the matters of policy.

5 Centre for P.I.L. & Ors. v. Union of India & others, available at <http://indiankanoon.org/doc/116116642/>, (2012) 3 SCC 1. The writ petition No. 423 of 2010, decided by a Bench consisting of Justice G.S. Singhvi and Justice Asok Kumar Ganguly on February 2, 2012. 2G is the short form for second generation wireless telephone technology. The comparative advantages of 2G over its predecessors were, (a) phone conservations are digitally encrypted; (b) 2G systems are far more efficient on the spectrum allowing for greater mobile phone penetration levels; and (c) 2G introduces data services for mobiles.

State i.e., the legislature, executive and judiciary in their respective field of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of the constitutional scheme so that there may not be any occasion to entertain misgivings about the role of the judiciary in out stepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciates the need for mutual respect and supremacy in their respective field"[6].

The Issues

The '2G Spectrum case', as is popularly known, examined the following issues:

(i) Whether the Government has the right to alienate, transfer or distribute natural resources or national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution?

(ii) Whether the recommendations made by the Telecom Regulatory Authority of India (TRAI) on August 28, 2007, for grant of Unified Access Service Licence (for short 'UAS Licence') with 2G spectrum in 800, 900 and 1800 MHz at the price fixed in 2001, which were approved by the Department of Telecommunications (DoT), were contrary to the decision taken by the Council of Ministers on October 31, 2003?

(iii) Whether the exercise undertaken by the DoT from September 2007 to March 2008 for grant of UAS Licences to the private respondents in terms of the recommendations made by TRAI is vitiated due to arbitrariness and malalides and is contrary to public interest?

(iv) Whether the policy of first-come-first-served followed by the DoT for grant of licences is ultra vires the provisions of Article 14 of the

6 *M.P. Oil Extraction* v. *State of M.P.*, (1997) 7 SCC 592, para. 41. See also, *Balco Employees Union (Regd.)* v. *Union of India and others*, available at <http://indiankanoon.org/doc/1737583/> (Visited on 12-1-2012).

Constitution and whether the said principle was arbitrarily changed by the Minister of Communications and Information Technology (referred to as 'the Minister of C&IT'), without consulting TRAI, with a view to favour some of the applicants?

(v) Whether the licences granted to ineligible applicants and those who failed to fulfill the terms and conditions of the licence are liable to be quashed?[7]

The Background

Before delving into the details of the case it is pertinent to peruse the National Telecom Policy, 1994 (herein after NTP, 1994)[8]. The objectives of the policy were:

(i) affording telecommunication for all and ensuring the availability of telephone on demand;

(ii) providing certain basic telecom services at affordable and reasonable prices to all people and covering all villages;

(iii) giving world standard telecom services, addressing consumer complaints, dispute resolution and public interface to receive special attention and providing widest permissible range of services to meet the customers' demand and at the same time at a reasonable price;

(iv) creating a major manufacturing base and major export of telecom equipment having regard to the country's size and development; and

(v) protecting the defence and security interest of the country.

In furtherance of NTP 1994, licences were granted to eight Cellular Mobile Telephone Service (CMTS) operators[9]. In the second phase[10], after following

7 On the basis of the findings on the other four issues the Supreme Court cancelled the licences allocated to 122 incompetent telecom companies.

8 Announced on 13-5-1994 which was the first major step towards deregulation, liberalisation and private sector participation.

9 Two in each of the four metropolitan cities of Delhi, Mumbai, Kolkata and Chennai.

10 In December, 1995.

a competitive bidding process, 14 CMTS licences were awarded in 18 state circles, 6 Basic Telephone Services (BTS) licences were awarded in 6 state circles and paging licences were awarded in 27 cities and 18 state circles. However, this did not yield the intended results apparently because revenue realised by the cellular and basic operators was less than the projections and the operators were unable to arrange finances for their projects. As a consequence, on the directions of the Prime Minister, a High Level Group on Telecommunications (GoT) was constituted[11] to review the existing telecom policy and suggest further reforms. On the basis of the report of the GoT, a draft New Telecom Policy, 1999 (NTP 1999) was formulated. After its approval by the Cabinet, NTP 1999 was announced to be effective from April 1, 1999. NTP 1999 had the following objectives:

(i) to make available affordable and effective communications for the citizens, considering access to telecommunications as a matter of utmost importance for achievement of the country's social and economic goals;

(ii) to provide universal service to all uncovered areas including the rural areas and also to provide high level services capable of meeting the needs of the country's economy by striking a balance between the two;

(iii) to encourage development of telecommunication in remote, hilly and tribal areas of the country;

(iv) to create a modern and efficient telecommunications infrastructure taking into account the convergence of IT, media, telecom and consumer electronics which will in turn propel India to become an IT superpower;

(v) to convert PCOs wherever justified into Public TeleInfo Centres having multimedia capability, such as, Integrated Services Digital Network (ISDN) services, remote database access, government and community information systems, etc.;

11 On 20-11-1998.

(vi) to transform, in a time bound manner, the telecommunications sector in both urban and rural areas into a greater competitive environment providing equal opportunities and level playing field for all players;

(vii) to strengthen research and development efforts in the country and provide an impetus to build world class manufacturing capabilities;

(viii)to achieve efficiency and transparency in spectrum management;

(ix) to protect defence and security interests of the country; and

(x) to enable Indian Telecom Companies to become truly global players.

NTP 1999 categorised 8 services in the telecom sector. Further, the policy on spectrum management as enumerated in NTP 1999 was as under:

(i) Proliferation of new technologies and the growing demand for telecommunication services has led to manifold increase in demand for spectrum and consequently it is essential that the spectrum is utilised efficiently, economically, rationally and optimally.

(ii) There is a need for a transparent process of allocation of frequency spectrum for use by a service provider and making it available to various users under specific conditions.

(iii) With the proliferation of new technologies it is essential to revise the National Frequency Allocation Plan (NFAP) in its entirety so that it becomes the basis for development, manufacturing and spectrum utilisation activities in the country amongst all users. NFAP was under review and the revised NFAP was to be made public by the end of 1999 detailing information regarding allocation of frequency bands for various services, without including security information.

(iv) NFAP would be reviewed no later than every two years and would be in line with radio regulations of the International Telecommunication Union (ITU).

(v) Adequate spectrum is to be made available to meet the growing need of telecommunication services. Efforts would be made for relocating frequency bands assigned earlier to defence and others. Compensation for relocation may be provided out of spectrum fee and revenue share.

(vi) There is a need to review the spectrum allocation in a planned manner so that required frequency bands are available to the service providers.

(vii) There is a need to have a transparent process of allocation of frequency spectrum which is effective and efficient and the same would be further examined in the light of ITU guidelines. In this regard the following course of action shall be adopted, viz.,: (a) spectrum usage fee shall be charged; (b) an Inter-Ministerial Group to be called Wireless Planning Coordination Committee, as a part of the Ministry of Communications for periodical review of spectrum availability and broad allocation policy, should be set up; and (c) massive computerisation in WPC Wing would be started in the next three months so as to achieve the objective of making all operations completely computerised by the end of the year 2000.

Subsequently, the Government established the Telecommunication Commission and the Telecom Regulatory Authority of India (TRAI). In the year 2003 TRAI submitted its recommendations to the Government in the matter of licensing.

TRAI recommended that the existing system of licensing in the Telecom Sector should be replaced by Unified Licensing or an Automatic Authorisation Regime. The Unified Licensing or an Automatic Authorisation Regime had been recommended to be achieved in a two-stage process with the Unified Access Regime for basic and cellular services in the first phase to be implemented immediately. This is to be followed by a process of consultation to define the guidelines and rules for achieving a fully Unified Licensing or Authorisation Regime. TRAI also recommended that it will enter into a consultation process so that the replacement of the existing licensing regime by a Unified Licensing Regime gets initiated within six months. Further, for the selection of new operators the TRAI recommended that all new operators barring DOT or

MTNL be selected through a competitive process. This was recommended to be a multi stage bidding process preceded by a pre-qualification round.

Further developments in this regard were marked by a comprehensive recommendation by TRAI relating to the spectrum policy, in May 2005. However, these recommendations were not placed before the Telecom Commission[12]. In 2006, the Prime Minister approved the constitution of a Group of Ministers[13] to look into issues relating to vacation of spectrum. The Terms of Reference of the Group of Ministers, among other things, included suggesting a Spectrum Pricing Policy and examining the possibility of creation of a spectrum relocation fund. After five days, the Minister of ICT wrote a letter dated February 28, 2006 to the Prime Minister that the Terms of Reference of the GoM were much wider than what was discussed in his meeting with the Prime Minister. He appears to have protested that the Terms of Reference would impinge upon the work of his Ministry and requested that the Terms of Reference be modified in accordance with the draft enclosed with the letter. Interestingly, the Minister's draft did not include the important issue relating to Spectrum Pricing. Thereafter, vide letter December 7, 2006, the Cabinet Secretary conveyed the Prime Minister's approval to the modification of the Terms of Reference. The revised Terms of Reference did not include the issue relating to Spectrum Pricing. On December 14, 2005, the DoT issued revised guidelines for UAS Licence. Paragraph 11 of the new guidelines read: "The licences shall be issued without any restriction on the number of entrants for provision of unified access services in a Service Area"[14].

After this the DoT vide its letter dated April 13, 2007, requested TRAI to furnish its recommendations under section 11(1)(a) of the 1997 Act on the issues of limiting the number of access providers in each service area and review of the terms and conditions in the access provider licence mentioned

12 Though, the then Secretary, DoT, submitted the file to the then Minister of IT on 16-8-2005 for information with a note that he will go through the recommendations and put up the file to the Minister for policy decision, the file was returned on 12-9-2006, i.e., after one year and no further action was taken. See, *2G Case*, para. 23.

13 The GoM consisted of Ministers of Defence, Home Affairs, Finance, Parliamentary Affairs, Information and Broadcasting and IT, Deputy Chairman, Planning Commission was a special invitee.

14 *2G Case*, para. 25.

in the letter[15]. In furtherance of the aforesaid communication, TRAI made recommendations emphasising the principles of fair competition, no restriction on the number of access service providers in any service area, need for spectrum management, measures to increase spectrum efficiency, allocation of spectrum and compliance of roll out obligations by the service providers. It was also recommended that in future all spectrum excluding the spectrum in 800, 900 and 1800 MHz bands in 2G services should be auctioned[16]. The Authority further made a detailed recommendation that a far stricter norm of subscriber base for allocation of additional spectrum beyond the initial allotment of spectrum may be taken. The additional acquisition fee beyond 10 MHz could be decided either administratively or through an auction method from amongst the eligible wireless service providers[17]. TRAI, therefore, recommended that in future all spectrum excluding the spectrum in 800, 900 and 1800 bands should be auctioned as to ensure efficient utilisation of this scarce resource. In the 2G bands (800 MHz/900 MHz/1800 MHz), the allocation through auction was not done as the service providers were allocated spectrum at different times of their license and the amount of spectrum with them varies from 2X4.4 MHz to 2X10 MHz for GSM technology and 2X2.5 MHz to 2X5 MHz in CDMA technology. Therefore, to decide the cut off after which the spectrum is auctioned was difficult and would raise the issue of level playing field.

These recommendations of TRAI were first considered by an Internal Committee of the DoT under the Chairmanship of the Member, Telecommunication.

15 Paragraph 2 of that letter reads:

"2. Fast changes are happening in the Telecommunication sector. In order to ensure that the policies keep pace with the changes/developments in the Telecommunication sector, the government is contemplating to review the following terms and conditions in the Access provider (CMTS/UAS/Basic) license

i. Substantial equity holding by a company / legal person in more than one licensee company in the same service area (clause 1.4 of UASL agreement).

ii. Transfer of licences (clause 6 of the UASL).

iii. Guidelines dated 21.02.2004 on Mergers and Acquisitions. TRAI in its recommendations dated 30.1.2004 had opined that the guidelines may be reviewed after one year.

iv. Permit service providers to offer access services using combination of technologies (CDMA, GSM and/or any other) under the same license.

v. Roll-out obligations (Clause 34 of UASL).

vi. Requirement to publish printed telephone directory".

16 *2G Case*, para. 27.

17 *Ibid.*

The report of the Committee was placed before the Telecom Commission on October 10, 2007. In this meeting of the Telecom Commission, which was attended by the officials of the DoT only, the report of the Internal Committee was approved. On October 17, 2007, the Minister of C&IT accepted the recommendations of the Telecom Commission and thereby approved the recommendations made by TRAI. However, neither the Internal Committee of the DoT and the Telecom Commission nor the Minister of C&IT took any action in terms of the recommendations wherein it was emphasised that the existing spectrum allocation criteria, pricing methodology and the management system suffer from a number of deficiencies and the whole issue should be addressed keeping in view issues linked with spectrum efficiency and its management. The DoT also did not get in touch with the Ministry of Finance to discuss and finalise the spectrum pricing formula which had to include incentives for the efficient use of spectrum as well as disincentives for sub-optimal usage in terms of the Cabinet decision of 2003[18].

In the meanwhile, on September 24, 2007, the DDG (AS), DoT prepared a note mentioning therein that as on that date, 167 applications had been received from 12 companies for 22 service areas and opined that it may be difficult to handle such a large number of applications at any point of time. He suggested that October 10, 2007, may be announced as the cut-off date for receipt of new UAS Licence applications. The Minister of C&IT, at the relevant time, did not agree with the suggestion and ordered that October 1, 2007, be fixed as the cut-off date for receipt of applications for new UAS Licence. Accordingly, press note dated September 24, 2007, was issued by the DoT stating that no new application for UAS Licence will be accepted after October 1, 2007. Between September 24, 2007 and October 1, 2007, more than 300 applications were received for the grant of UAS Licences.

Following these developments, the Member (Technology), Telecom Commission and Ex-officio Secretary to the Government of India sent a letter dated October 26, 2007, to the Secretary, Department of Legal Affairs, Ministry of Law and Justice, seeking the opinion of the Attorney General of India or Solicitor General of India on the issue of the mechanism to deal

18 The 2003 Cabinet decision dated October 31 required the Department of Telecom and Ministry of Finance to discuss and agree on spectrum pricing.

with the 'unprecedented situation' created due to receipt of a large number of applications for grant of UAS Licence. Paragraph 11 of the said letter outlined four alternatives:

(i) The applications may be processed on first-come-first-served basis in chronological order of receipt of applications in each service area as per existing procedure. LoI may be issued simultaneously to the applicants (the numbers will vary based on availability of spectrum to be ascertained from WPC Wing) who fulfil the eligibility conditions of the existing UASL Guidelines and are senior most in the queue. The time limit for compliance should be 7 days as per the existing provision of LoI and 15 days for submission of PBG, FBG, entry fee, etc. as per the existing procedure. However, those who fulfil the conditions of LoI within the stipulated time, their seniority of license/spectrum will be on the basis of their application date. The compliance of eligibility conditions as on the date of issue of LoI may be accepted. No relaxation of this time limit will be given and LoI shall stand terminated after the stipulated time period (however, the applicant may have the right to apply for new UAS Licence again as and when the window for submission of new UAS Licence is opened again). Subsequent applications may be considered for issue of LoI if the spectrum is available.

(ii) LoIs to all those who applied by September 25, 2007 (date on which the cut-off date for receipt of applications were made public through press) may be issued in each service area as it is expected that only serious players will deposit the entry fee and seniority for license or spectrum be based on (i) the date of application or (ii) the date or time of fulfillment of all LoI conditions.

(iii) DoT may issue LoIs to all eligible applications simultaneously received up to the cut-off date. Since LoIs will clearly stipulate that spectrum allocation is subject to availability and is not guaranteed, the LoI holders are supposed to pay the entry fee if their business case permits them top wait for spectrum allocation subject to availability of an initial roll out using wire line technology.

(iv) Any other better approach which may be legally tenable and sustainable for issue of new licences.

The Law Secretary placed the papers before the Minister of Law and Justice. When the note of the Law Minister was placed before the Minister of C&IT, he approved the note prepared by Director (AS-1) and authorised the ADG (AS-1) to sign the LoIs on behalf of the President of India. Simultaneously, he sent a D.O. letter dated November 2, 2007, to the Prime Minister and criticised the suggestion made by the Law Minister by describing it as totally out of context. He also gave an indication of what was to come in the future by mentioning that the DoT has decided to continue with the existing policy of first-come-first-served for processing of applications received up to September 25, 2007, and the procedure for processing the remaining applications will be decided at a later date, if any spectrum is left available after processing the applications received up to September 25, 2007[19]. In the meanwhile, the Prime Minister sent a letter dated November 2, 2007, to the Minister of C&IT and suggested that a fair and transparent method should be adopted for the grant of fresh licences[20]. However, the Minister concerned did not accept many of the recommendations and brushed aside the suggestion given by the Prime Minister by saying that it will be "unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants as it will not give them a level playing field"[21].

On November 20, 2007, the Secretary, DoT had made a presentation on the spectrum policy to the Cabinet Secretary. The Finance Secretary, who witnessed the presentation made by the Secretary, DoT, dispatched a letter dated November 22, 2007, to the Secretary, DoT and expressed his doubt as to how the rate of 1600 crores determined in 2001, could be applied without any indexation for a licence to be given in 2007. He also emphasised that in view of the financial implications, the Ministry of Finance should have been consulted before the matter was finalised at the level of the DoT. Secretary, DoT replied to the Finance Secretary by stating that as per the Cabinet decision dated October 31, 2003, the DoT had been authorised to finalise the details of implementation of the recommendations of TRAI and in its recommendations

19 *2G Case*, para. 33.

20 For the complete letter, see, *2G Case*, para. 34.

21 *2G Case*, para. 35.

dated August 28, 2007, TRAI had not suggested any change in the entry fee or licence fee. In further correspondences the Minister of C&IT asserted that the matter of entry fee has been deliberated in the department several times in the light of various guidelines and the TRAI recommendations, and accordingly a decision was taken not to revise the entry fee.

A letter dated December 26, 2007, sent by the Minister of C&IT, in an apparent bid to show that he had secured the Prime Minister's approval to this act of his, *inter alia*, reads:

> "1. Issue of Letter of Intent (LOI): DOT follows a policy of First-cum-First Served for granting LOI to the applicants for UAS licence, which means, an application received first will be processed first and if found eligible will be granted LOI.
>
> "2. Issue of Licence: The First-cum-First Served policy is also applicable for grant of licence on compliance of LOI conditions. Therefore, any applicant who complies with the conditions of LOI first will be granted UAS licence first. This issue never arose in the past as at one point of time only one application was processed and LOI was granted and enough time was given to him for compliance of conditions of LOI. However, since the Government has adopted a policy of 'No Cap' on number of UAS Licence, a large number of LOI's are proposed to be issued simultaneously. In these circumstances, an applicant who fulfils the conditions of LOI first will be granted licence first, although several applicants will be issued LOI simultaneously. The same has been concurred by the Solicitor General of India during the discussions"[22].

However, the Court observed that records produced before it did not show "as to when the policy of first-come-first-served was distorted by the Minister of C&IT"[23].

After 12 days, DDG (AS), DoT prepared a note incorporating therein the changed first-come-first-served policy to which reference had been made by

22 *2G Case*, para. 38.

23 *Ibid.*

the Minister of C&IT in the abovementioned letter[24]. On the same day, the Minister of C&IT approved the change. Following this, a meeting of the full Telecom Commission, which was scheduled to be held on January 9, 2008, to consider (1) performanee of telecom seetor and (2) pricing of spectrum, was postponed to January 15, 2008. After three days of the announcement[25] of the postponement of the meeting of the Telecom Commission, a press release was issued by the DoT under the signature of DDG (AS), DoT that the DoT has decided to issue licences on a first-come-first-served basis and that the cut-off date was preponed to September 25, from October 1, 2007.

On the same day, another press release was issued by DoT asking "all the applicants to assemble at the departmental headquarters within 45 minutes to collect the response(s) of the DoT" and to "submit compliance of the terms of LoIs within the prescribed period"[26]. The Court found that all the applicants "including those who were not even eligible for a UAS Licence collected their LoIs on January 10, 2008. The acceptance of 120 applications and compliance with the terms and conditions of the LoIs for 78 applications was also received on the same day"[27]. Quite interestingly, soon after obtaining the licences, some of the beneficiaries "off-loaded their stakes" to others, "in the name of transfer of equity or infusion of fresh capital by foreign companies, and thereby made huge profits"[28].

Soon after these developments S. Tel Ltd., who was an applicant for a licence, pursuant to the press note dated September 24, 2007, but was ousted from the zone of consideration because of the cut-off date fixed by the Minister of CIT, filed a Writ Petition[29] in the High Court of Delhi with the prayer that the first press release dated January 10, 2008, may be quashed. After hearing the

24 Dated 26-12-2007 sent to the Prime Minister.

25 On 10-1-2008.

26 *2G Case*, paras. 41-42.

27 *2G Case*, para. 43.

28 Companies like Unitech and Swan Telecom got licenses without any prior telecom experience. Swan Telecom got the license even though it did not meet eligibility criteria. Swan got license for 1,537 Crore and then it sold 45% stake to UAE based company Etisalat for 4,200 Crore. Unitech Wireless, a subsidiary of the Unitech Group, got the license for 1,661Crore and later sold 60% stake for 6,200 Crore to a Norway based company Telnor.

29 No. 636 of 2008.

parties, the learned Single Judge declared[30] that the cut-off date, i.e., September 25, 2007, was totally arbitrary and directed the respondents in the writ petition to consider the offer made by the writ petitioner to pay 17.752 Crores towards additional revenue share over and above the applicable spectrum revenue share. The observations made by the learned Single Judge on the justification of fixing September 25, 2007, as the cut-off date read as under:

> "Thus on the one hand the respondent has accepted the recommendation of the TRAI in the impugned press note, but acted contrary thereto by amending the cut-off date and thus placed a cap on the number of service providers. The stand taken by respondent and the justification sought to be given for fixing a cut-off date retrospectively is on account of large volume of applications, is without any force in view of the fact that neither any justification was rendered during the course of argument, nor any justification has been rendered in the counter affidavit as to what is the effect of receipt of large number of applications in view of the fact that a recommendation of the TRAI suggests no cap on the number of access service providers in any service area. This recommendation was duly accepted and published in the newspaper. Further as per the counter affidavit 232 UASL applications were received till 25.9.2007 from 22 companies. Assuming there was increase in the volume of applications, the respondent has failed to answer the crucial question as to what was the rationale and basis for fixing 25.9.2007 as the cut-off date. Even otherwise, admittedly 232 applications were made by September 25, 2007 and between 25.9.2007 and 1.10.2007 only 76 applications were received. It was only on 1.10.2007 that 267 applications were made. Thus on 28.8.2007 it cannot be said that large number of applications were received. Thus taking into consideration the opinion of the expert body, which as per the press note of the respondent itself was accepted by the respondent, certainly the respondent cannot be allowed to change the rules of the game after the game had begun, to put it in the words of the Apex Court especially when the respondent has failed to give any plausible justification or the rationale for fixing the cut-off date by merely a week. Taking into consideration that on 13.4.2007 the Government of India had recommended TRAI to furnish its recommendation in terms

30 Vide order dated 1-7-2009.

of 11 (e) of the TRAI Act, 1997 on the issue as to whether a limit should be put on the number of access service providers in each service area. The TRAI having given its recommendations on 28.8.2007 which were duly accepted by the Government, the respondent cannot be allowed to arbitrarily change the cut-off date and that too without any justifiable reasons"[31].

The letters patent appeal filed against the order of the learned Single Judge was dismissed by the Division Bench of the High Court[32].

The Union of India challenged the judgment of the Division Bench in the Supreme Court[33]. During the pendency of the special leave petition, some compromise was reached between the writ petitioner and the authorities. Therefore, an additional affidavit was filed along with agreed minutes of order before the Supreme Court[34]. In view of this development, the Court disposed of the appeal arising out of the special leave petition but specifically approved the findings recorded by the High Court with regard to the cut-off date by observing that "taking the additional affidavit and the suggestions made by the learned Attorney General, this appeal is disposed of as requiring no further adjudication"[35]. However, the Court made it clear that the findings recorded by the High Court with regard to the cut-off date was not interfered with and disturbed by the Supreme Court in the present case.

Contentions of the Petitioners

1. The procedure adopted by the DoT was arbitrary, illegal and in complete violation of Article 14 of the Constitution. They have relied upon the order passed by the learned Single Judge of the Delhi High Court as also the judgment of the Division Bench, which was approved by the Supreme Court and pleaded that once the Court has held that the cut-off date, i.e., September 25, 2007, fixed for consideration of the applications was arbitrary and unconstitutional, the entire procedure adopted by the DoT for grant of UAS Licences

31 *2G Case*, para. 45.
32 Vide judgment dated 24-11-2009.
33 SLP(C) No.33406/2009.
34 12-3-2010.
35 *2G Case*, para. 47.

with the approval of the Minister of C&IT is liable to be declared illegal and quashed.

2. The DoT violated the recommendations made by TRAI that there should be no cap on the number of Access Service Providers in any service area and this was in complete violation of Section 11(1) of the 1997 Act. The petitioners have relied upon the report of the Comptroller and Auditor General (CAG) and pleaded that the consideration of large number of ineligible applicants and grant of LoIs and licenses to them was ex facie illegal and arbitrary.

3. The entire method adopted by the DoT for grant of licence is flawed because the recommendations made by TRAI for grant of licences at the entry fee determined in 2001 was wholly arbitrary, unconstitutional and contrary to public interest.

4. While deciding to grant licences, which are bundled with spectrum, at the price fixed in 2001 the DoT did not bother to consult the Finance Ministry and thereby, violated the mandate of the decision taken by the Council of Ministers in 2003.

5. The principle of first-come-first-served is by itself violative of Article 14 of the Constitution and in any case distortion thereof by the Minister of C&IT and the consequential grant of licences is liable to be annulled.

6. Even though a number of licensees failed to fulfill the roll out obligations and violated conditions of the licence, the Government of India did not take any action to cancel the licences.

Contentions of the Respondents

1. The petitioners are not entitled to challenge the recommendations made by TRAI and the policy decisions taken by the Government for grant of UAS Licenees.

2. The Court cannot review and nullify the recommendations made by TRAI in the matter of allocation of spectrum in 800, 900 and 1800 MHz bands at the rates fixed in 2001.

3. The report prepared by the CAG cannot be relied upon for the purpose of recording a finding that the procedure adopted for the grant of UAS Licences is contrary to Article 14 of the Constitution. The private respondents have also claimed that the observations made by the CAG and the conclusions recorded by him are seriously flawed and are based on totally unfounded assumptions.

4. The UAS Licences were given strictly in accordance with the modified first-come-first-served policy. That the respondents were able to fulfil LoI conditions because newspapers had already published stories about the possible grant of licences in the month of January, 2008.

5. That those who had made applications in 2004 and 2006 cannot be clubbed with those who had applied in the month of August and September, 2007, because in terms of the existing UASL guidelines they were entitled to licences.

6. That private respondents have made huge investments for creating infrastructure to provide services in different parts of the country and if the licences granted to them are cancelled at this stage, public interest would be adversely affected.

7. That the private respondents have been able to secure foreign direct investment of thousands of crores for providing better telecom services in remote areas of the country and any intervention by the Court would result in depriving the people living in those areas of telecom services.

8. The Government and TRAI have already initiated action for levy of penalty or liquidated damages for non-compliance of the roll out obligations and violation of conditions of the license. That the licensees have not violated any conditions of the license and that the notices issued by TRAI alleging the same have already been challenged before TDSAT and in most cases, interim orders have been passed. That the remedy, if any, available to the petitioners is to approach the TDSAT.

9. Some of the respondents have also questioned the application of the policy of first-come-first-served by asserting that even though they had applied in 2004 and 2006, and licences had been granted to them before September 25, 2007, the allocation of spectrum was delayed till 2008 and those who had applied in 2007 were placed above them because they could fulfil the conditions of LoI in terms of the distorted version of the policy first-come-first-served.

The rejoinder filed by the petitioners reiterated that the grant of UAS Licences was fundamentally flawed and was violative of the Constitutional principles. They also placed on record the report of the One Man Committee[36], comprising Justice Shivaraj V. Patil which was constituted by the Government of India to examine the appropriateness of the procedure followed by the DoT in issuance of licences and allocation of spectrum during the period 2001 to 2009. The petitioners in their contentions heavily relied on the report of the CAG and the One Man Commission. However, the Court did not consider it proper to refer to the findings and conclusions contained therein as the CAG report was being examined by the Public Accounts Committee and Joint Parliamentary Committee of Parliament. Likewise, the Court did not consider it necessary to advert to the observations and suggestions of the One Man Committee because the Government of India had already taken a decision to segregate spectrum from licence and allotting the same by auction.

The Decision on Issue No. 1

The Court opined that natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value. Further, the State is empowered to distribute natural resources. However, as they constitute public property or national assets, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust[37] and ensure that no action is taken which may be detrimental to public interest. This is particularly so in the light of Article 39 (b) which provides that the ownership and control of the material

36 On 31-1-2011.

37 The doctrine of public trust is the principle that certain resources are preserved for public use, and that the government is required to maintain them for the reasonable use of the public.

resources of the community should be so distributed so as to best sub-serve the common good[38]. It is significant to note that in India, the Courts[39] have given an expansive interpretation to the concept of natural resources and have from time to time issued directions[40], for protection and proper allocation or distribution of natural resources and have repeatedly insisted on compliance of the constitutional principles in the process of distribution, transfer and alienation to private persons.

In *Secretary, Ministry of Information & Broadcasting, Govt. of India* v. *Cricket Assn. of Bengal*[41], the Supreme Court while dealing with the right of organisers of a sport tournament, to its live audio-visual broadcast, universally, through an agency of their choice, whether national or foreign, described the airwaves or frequencies as public property and said: "There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies"[42].

So also, the earlier observation of the Supreme Court[43] that it is the "duty of the Government to provide complete protection to the natural resources as a trustee of the people at large" came handy in the 2G case. The Court held that:

> "As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the

38 It may be noted that in India there is no comprehensive legislation to ensure this directive principle.

39 See, for instance, *M. C. Mehta* v. *Kamal Nath*, (1997) 1 SCC 388, where the Court held that the public trust doctrine is a part of the law of the land; *Jamshed Hormusji Wadia* v. *Board of Trustees Port of Mumbai*, (2002) 3 SCC 214, wherein the Supreme Court held that the State's actions and the actions of its agencies or instrumentalities must be for the public good, achieving the objects for which they exist and should not be arbitrary or capricious; *Intellectuals Forum, Tirupathi* v. *State of A.P.*, (2006) 3 SCC 549, where the Court examined the jurisprudential aspects regarding the use of public lands or natural resources and *Fomento Resorts and Hotels Ltd.* v. *Minguel Martins*, (2009) 3 SCC 571, wherein the issue related to the use of a part of a public pathway by a hotel. Further, in *Reliance Natural Resources Ltd.* v. *Reliance Industries Ltd.*, (2010) 7 SCC 1, the Court observed that the constitutional mandate is that the natural resources belong to the people of this country.

40 By relying upon Arts. 38, 39, 48, 48A and 51A(g).

41 (1995) 2 SCC 161.

42 See *id.*, para. 78.

43 In *M. C Mehta* v. *Kamal Nath*, *supra*.

State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis-a-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-a-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties"[44].

In coming to a proper conclusion, the Court referred to the decision in *Akhil Bharatiya Upbhokta Congress* v. *State of M.P.*[45], wherein the Court held:

"What needs to be emphasised is that the State and/or its agencies/ instrnmentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/ executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."[46]

The Court also referred to another decision of the Supreme Court in *Sachidanand Pandey* v. *State of West Bengal*[47], wherein it was observed:

"State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles

44 *2G Case*, para. 69.

45 (2011) 5 SCC 29.

46 *Id.*, para. 31, per G.S. Singhvi, J.

47 (1987) 2 SCC 295.

have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

In the present case there was nothing special to treat or justify the allocation of spectrum and licences in a way, deviating from a generally accepted practice. The Court concluded:

> "... the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good"[48].

The Decision on Issue No. 2

The Court observed that, while making recommendations on August 28, 2007, TRAI itself had recognised that spectrum was a scarce commodity. Still, it made recommendation for allocation of 2G spectrum on the basis of then 2001 price by invoking the theory of 'level playing field'[49]. TRAI's recommendations[50] showed that as per its own assessment the existing system of spectrum allocation criteria, pricing methodology and the management system suffered from a number of deficiencies and there was an urgent need to address the issues linked with spectrum efficiency and its management and yet it decided to recommend the allocation of spectrum at the price determined in 2001. The Court observed that:

> "All this was done in the name of growth, affordability, penetration of wireless services in semi urban and rural areas, etc. Unfortunately,

48 *2G Case*, para. 72.

49 For the new entrants.

50 Para. 2.40 of the recommendation dated 28-8-2007, see, *2G Case*, para. 27.

while doing so, TRAI completely overlooked that one of the main objectives of NTP 1999 was that spectrum should be utilised efficiently, economically, rationally and optimally and there should be a transparent process of allocation of frequency spectrum as also the fact that in terms of the decision taken by the Council of Ministers in 2003 to approve the recommendations of the Group of Ministers the DoT and Ministry of Finance were required to discuss and finalize the spectrum pricing formula".

The Court concluded that,

> "... the entire approach adopted by TRAI was lopsided and contrary to the decision taken by the Council of Ministers and its recommendations became a handle for the then Minister of C&IT and the officers of the DoT who virtually gifted away the important national asset at throw away prices by willfully ignoring the concerns raised from various quarters including the Prime Minister, Ministry of Finance and also some of its own officers ... We have no doubt that if the method of auction had been adopted for grant of licence which could be the only rational transparent method for distribution of national wealth, the nation would have been enriched by many thousand crores"[51].

The Supreme Court did not exercise its constitutional jurisdiction to evaluate the plea advanced by the department and found no "merit in the reasoning of TRAI that the consideration of maintaining a level playing field prevented a realistic reassessment of the entry fee".

The Decision on Issue Nos. 3 and 4

The Court reiterated that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. Hence, the Court held that there "is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident"[52]. The Court further observed that the State and its agencies or instrumentalities must always adopt a rational method for disposal

51 *2G Case*, para. 73.

52 *2G Case*, para. 76.

of public property and no attempt should be made to scuttle the claim of worthy applicants.

According to the Court, when it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national or public interest. Further, the Court observed:

> "In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/ public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process"[53].

The judicial exposition of arbitrariness, favoritism and blatant violation of public interest by the Department could be seen in the following observation of the Supreme Court:

> "The exercise undertaken by the officers of the DoT between September, 2007 and March, 2008, under the leadership of the then Minister of C&IT was wholly arbitrary, capricious and contrary to public interest apart from being violative of the doctrine of equality. The material produced before the Court shows that the Minister of C&IT wanted to favour some companies at the cost of the Public Exchequer..."[54].

For this purpose, the Minister took several steps which were highlighted by the Court[55]. According to the Court, the materials before it proved that the Minister of C&IT wanted to favour some companies at the cost of the Public Exchequer. Even assuming that such solid proof was not available with the Court, even then the decision taken by the Court would have been justified on

53 *Ibid.*

54 *2G Case*, para.77.

55 *Ibid.*

the principle that "Caesar's wife must be above suspicion" as the authorities who run the administration must be free from corrupt practices. In a larger sense, even the associates of public figures must not even be suspected of wrong doing or corruption. Further, on the evaluation of the totality of the facts and circumstances that emerged before the Court, it held "that the mechanism evolved by TRAI for allocation of spectrum and the methodology adopted by the then Minister of C&IT and the officers of DoT for grant of UAS Licences may have caused huge loss to the nation"[56].

The Court in this regard did not make any clarification as to the retrospective or prospective operation of the decision. From the records available before the Court it can be seen that the Department was following a policy of 'first come first served' in allocation of the spectrum even earlier. Therefore, as the policy of 'first come first served' was not approved by the Court it might have led to confusion and unsettlement. However, the Court in this case cancelled only 122 licences specified in the Order. It is hoped that as the Court did not make it clear, the operation of the decision is only prospective. The Supreme Court had made it clear earlier in *Golak Nath* case[57] that to avoid unsettlement of the settled legal position, the decision would operate prospectively. Even though this doctrine was applied by the Court in the context of Fundamental Rights vis a vis, the Constitutional amendment, it might also be applicable in the context of Fundamental Rights *per se*.

The Scope of Judicial Review

While making a retrospection about the limited scope of judicial review in such matters and recognising the expertise and competence of TRAI in the country on matters related to telecommunications, the Court expressed a strong opinion that TRAI "cannot make recommendations overlooking the basic constitutional postulates and established principles and make recommendations which would deny people from participating in the distribution of national wealth and benefit a handful of persons"[58].

56 *2G Case*, para. 74.

57 *I. C. Golaknath and others v. State of Punjab and others*, AIR 1967 SC 1643.

58 *2G Case*, para.74.

General approach of the judiciary in policy matters is self restraint and limited intervention. It evaluates the circumstances and decides the course of action. In a matter of policy implementation, the judicial intervention takes place if there is a procedural impropriety. Here a pertinent question arises. Was this spectrum allotment case one where there was impropriety of procedure? In fact, the Court found that "the mechanism evolved by TRAI for allocation of spectrum and the methodology adopted by the then Minister of C&IT and the officers of DoT for grant of UAS Licences may have caused huge loss to the nation," and therefore, "we have no hesitation to record a finding that the recommendations made by TRAI were flawed in many respects and implementation thereof by the DoT resulted in gross violation of the objective of NPT 1999 and the decision taken by the Council of Ministers on 31.10.2003"[59]. Further, one could find that in the instant case, a plain reading of the judgment gives the impression that there was no intervention by the Court with the policy. Referring to the contentions of the respondents, the Court says:

> "... the power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters"[60].

There are two essential principles that are being followed by the Courts in judicial review of administrative action. Firstly, it will not sit in appeal over the ultimate decision of the administrative body. It is concerned about

59 *Ibid.*

60 *2G Case*, para. 79.

the procedure adopted in arriving at such a decision. Was it a just, fair and reasonable procedure that was followed by such authority in arriving at the decision? Were relevant materials considered and irrelevant materials kept out? As far as the final decision is concerned, was it vitiated by *mala fides* or was it so arbitrary that no reasonable person would, in the circumstances, have arrived at such a decision. Secondly, in policy matters, the Court will be slow to interfere. It is accepted that the authority concerned, while taking a decision has to keep in view various factors which may have an impact on the larger interest of the over-all economy of the country, which has to be a supreme consideration[61]. So also, such authorities are often considered by the judiciary to be in a better position to have a clearer over-all picture of the various factors having an important impact on the final decision on the various matters[62]. Further, the Supreme Court in *Ugar Sugar Works Limited* v. *Delhi Administration*[63] made it clear that:

> "... It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional ... In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference, to the judgment of the executive. The Courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State"[64].

As far as the present case is concerned, the Supreme Court made it clear that the policy adopted by the Executive was arbitrary or irrational. The decision making process itself does not appear to be a well deliberated one where matters were considered at different levels. The Department was to seriously consider several complex matters of public importance. The task of resolving these should ideally be left to the Respondents. The Court cannot be expected

61 *Dy. Assistant Iron and Steel Controller* v. *L. Manichand*, AIR 1972 SC 935.

62 *Ibid.*

63 AIR 2001 SC 1447.

64 *Id.*, para. 17, *per* Chief Justice A. S. Anand.

to sit in appeal over the decision of the government to introduce one particular mode of selection of the applicants and to suggest a criterion which is more appropriate than the other. The question does the judicial approach in this case violate the normally accepted judicial practice?

The approach of the Supreme Court in such situations was clearly laid down in *Om Kumar* v. *Union of India*[65]. There the Court made a distinction between the primary[66] and the secondary[67] role of the reviewing Court in matters of abuse of administrative discretion. Referring to the decision in *Ganayutham*[68] where the matter was relating to a punishment awarded by an authority to an employee, the Court observed that it will not interfere unless a punishment awarded by an authority was one which shocked the conscience of the Court. Even then, the Court observed that it would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in this context, the Court observed that in rare situations, it could award an alternative penalty.

The case under review appears to fall into a category which encompasses both primary and secondary reviews. The distribution of scarce natural resources by the State ought to have been done without violating the equality provisions under Article 14 and without any arbitrariness which is a significant element of Article 14. The Court found that the authorities in this case have violated both these aspects of Article 14. Hence, one may find justification in the order of the Court in cancelling the 122 licences issued by the authority. However, even in the light of the observation of the Court in *Om Kumar* that 'in rare situations, the Court could award an alternative' course of action, the direction issued to the government to allocate the spectrum only by a specific process, i.e., by auction does not appear to be very simple. In this connection it is significant to note the observation of Lord Stephen Sedley who, though in a different context, observed: "What earns the Courts far less public approbation, though it is what they do far more often, is their upholding as rational and fair, a variety of governmental initiatives which are almost daily challenged in the

65 2000 (7) SCALE 524, decided on 17-11-2000.

66 Primary review is a situation where an action under Article 14 of the Constitution of India is challenged as discriminatory and the Court would apply the principle of proportionality.

67 Secondary review takes place when an administrative action is challenged for violation of Article 14 as arbitrary in which case the Court will apply the Wednesbury principle.

68 *Union of India* v. *G. Ganayutham*, (1997) 7 SCC 463.

High Court. It is sometimes forgotten by aspiring village Hampdens that the protection of good government is as much the High Court's job as the castigation of misgovernment"[69].

This observation points to the positive role of the Courts in maintaining good government. This is more so in the context of the faith and trust reposed in the Courts by the people of the country. Therefore, the key issue is that the Courts have to respond to the said trust of the people. While attempting to examine and reframe a policy, if at all permissible, a judge is not free to choose a particular policy of his choice for that of the government. Justice Cardozo, in the context of judicial law making observed, "Something of Pascal's spirit of self-reproach must come at moments to the man who finds himself summoned to the duty of shaping the progress of the law"[70]. In the context of judicial examination of policy, it is accepted that although agencies are generally designed with dominant authority over their special policy making area, the Courts retain some function over administrative policy making[71].

As a matter of self restraint, the Courts have been adopting a policy of non-interference in administrative policy matters. Courts have been recognising that their ability to review an administrative policy is extremely limited. Presumably, this is due to the fact that the Courts have conceded the dominant authority over administrative policy making to the agencies. The proper allocation of decision making power to the appropriate authority demands this restraint. When the legislature expressly delegates to an administrative agency the authority to make specific policy determinations, the Courts must give the agency's decision a controlling power. The American Supreme Court, in *Phelps Dodge Corp.* v. *NLRB*[72], recognised that the Courts must not enter the permitted area of discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain

69 Stephen Sedley, *Freedom, Law and Justice*, Sweet & Maxwell, London, 1999, p. 14.

70 Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press, New Heaven, 1921, p. 172.

71 William Eskridge & Philip Frickey (Eds.), *Henry Hart & Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law*, 1994, p. 165, as cited in Charles H. Koch, "Judicial Review of Administrative Policymaking", 44 Wm. & Mary L. Rev. 375 (2002).

72 313 U.S. 177 (1941).

of policy. Any deviation from this policy ought to be made only when the action of the authority or agency is 'arbitrary, capricious, or manifestly contrary to the statute'[73]. The philosophy of the Indian judiciary in this regard is also the same[74]. In *Tata Cellular* v. *Union of India*[75], the Supreme Court laid down, *inter alia*, the following basic principles[76] relating to administrative law:

(1) the modern trend points to judicial restraint in administrative action;

(2) the Court does not sit as a court of appeal over administrative decisions, but merely reviews the manner in which the decisions were made;

(3) the Court does not have the expertise to correct administrative decisions. If a review of the administrative decision is permitted it will be substituting its own decision without the necessary expertise, which itself may be fallible;

(4) a fair-play in the joints is a necessary concomitant for the administrative functioning; and

(5) however, the administrative decision can be tested by application of the Wednesbury principle of reasonableness and must be free from arbitrariness, bias or *mala fides*.

It may be said that the Courts more or less continue to recognise their limited authority over administrative policy making. However, at times and in certain deserving cases this self imposed policy may have to be diluted by the Courts to allow themselves to review administrative policies. The case under review falls into this exceptional category. A few observations of the CAG with respect to the instant case are noteworthy. The CAG stated that "the allocation process

73 See, *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317 (1994), p. 324.

74 Justice Markendey Katju has opined that there are certain administrative matters which are inappropriate for judicial review. One of these is policy decisions of the government or of the executive authority which ordinarily should not be interfered with by the courts unless they are clearly violative of the statute or shockingly arbitrary. See, Markandey Katju, "Administrative Law and Judicial Review of Administrative Action", (2005) 8 SCC (J) 25.

75 (1994) 6 SCC 651.

76 *Id.*, pp. 687-88, para. 94.

did not reflect the correct value of radio spectrum as there was no *auction*[77] and the entire process was flawed, benefiting selected companies"[78]. So also, that the telecoms ministry did not do the requisite due diligence of granting 85 out of the 122 licences to ineligible applicants. The CAG also stated that the ministry did not follow its own guidelines and changed the cut-off date for applications, which gave 'unfair advantage' to some companies over the others. It said that the entire process "lacked transparency and was undertaken in an arbitrary, unfair and inequitable manner" and that several companies deliberately suppressed facts, disclosed incomplete information, submitted fictitious documents and used fraudulent means to get licences, and thereby, access to spectrum[79].

In this connection it may be interesting to note an observation of James Landis, considered to be the oracle of administrative law, that "... the ultimate test of the administrative [institution] is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making"[80].

The Supreme Court in *Narmada Bachao Andolan* case was very clear in its approach when it stated that "in exercise of its enormous powers the Court should not be called upon or undertake governmental duties or functions. The Courts cannot run the Government nor the administration indulges in abuse or non-use of power and get away with it"[81]. However, it must be remembered that policy matters, fiscal or otherwise, are left to the judgment of the executive and the Courts should abstain from creating rights where none exist nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles. Therefore, the Courts do not generally

77 Auction is generally believed as a mechanism to clearly determine the market trends and if spectrum was allocated by auction, market forces would have determined a higher licence fee and the government would have received a much higher value. However, the Indian Telecom Policy did not have a policy for auctioning the spectrum. Obviously, there was a mixing of two things, *viz.*, licence and spectrum, wrongly by the Minister concerned.

78 Anandita Singh Mankotia, "Spectrum scam: How Government lost Rs 60,000 crore", *The Indian Express*, February 2, 2011.

79 *The Indian Express*, "Spectrum Scam: How Government Lost Rs 60,000 crore", February 2, 2011.

80 James M. Landis, *The Administrative Process*, Yale University Press, New Haven, 1938, p. 39.

81 *Narmada Bachao Andolan* v. *Union of India and others*, AIR 2000 SC 3751.

interfere with the policy matters of the executive unless the policy is either against the Constitution or statute or actuated with *mala fides*[82].

After holding the allocation of 2G spectrum by the executive as 'illegal' and 'arbitrary', the Supreme Court quashed the licences granted to the companies on or after January 10, 2008. Further, the Court went on to direct the executive as to how the scarce natural resources are to be allocated to different claimants. It held: "... while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process"[83].

There were reactions from several persons[84] on this direction as undesirable. Critics considered this direction as impermissible judicial activism or judicial overreach. It is to be noted that the Courts are permitted to deviate from the policy of restraints where the executive has acted arbitrarily, capriciously or the action is tainted with *mala fides*. The facts of the case clearly showed the presence of all these and therefore, the Court was justified in giving a direction in the above lines, which is a decision on policy. However, the policy of auction was suggested by the executive itself, though the department concerned did not pay heed to it. The Court went a step further and observed that:

> "...when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters"[85].

82 See, A. S. Anand, "Judicial Review- Judicial Activism – Need for Caution", JILI Vol. 42:2-4, 149, p. 157.

83 *2G Case*, para. 77.

84 For instance, Mr. Somnath Chatterjee commented: "I am not saying anything. It should not enter into the rightness or wrongness of policy decisions. It is for the government, those who are entrusted with the governance of policy decision, it's for them to do it. SC cannot lay down policies". See, <http://ibnlive.in.com/news/2g-somnaths-criticism-disappoints-exse-judge/227566-3.html> (Visited on 12-2-2012). So also, Professor William Wade while appreciating judicial activism in general, gave a note of caution that "it is plain that the judiciary is the least competent to function as a legislative agency" in "Judicial Activism and Constitutional Democracy in India" (Monograph) as cited in *P. Ramachandra Rao* v. *State of Karnataka*, (2002) 4 SCC 578, para. 24.

85 *2G Case*, para. 79.

Very often, the Indian judiciary is criticised for 'judicial overreach'. This 'judicial overreach' may be justified as the direct result of 'legislative and executive underreach'[86]. The judiciary cannot be justified in giving answers rejecting genuine claims of the people on technical grounds like 'no interference on policy matters' or other self imposed restrictions. Such rejections by the Courts will be injurious to national interests. For the people, if the legislature is ignoring them and the executive is behaving in an arbitrary and capricious manner and the judiciary is of no relief to them on technicalities, they may turn hostile to the entire system. By a proper and wise judicial handling of such serious matters of public importance, the judiciary only establishes that it is the 'sentinel on the qui vive'.

Dr. Rajan Varghese*

86 Fali S. Nariman, "The Case of Judicial Activism", The Caravan, Vol. 3, Issue 5, May 1, 2011, available at <http://www.caravanmagazine.in/Story/862/The-Case-of-Judicial-Activism.html> (Visited on 12-2-2012).

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BOOK REVIEW

Matthew J. Kisner, *Spinoza on Human Freedom: Reason, Autonomy and the Good Life*, Cambridge University Press, Cambridge, 2011, pp. xi+274, price US$ 85.

Despite the fact that Beruch De Spinoza, or later Benedict De Spinoza (1632-1677), born in the century known as the Dutch Golden Age, is regarded as one of the most influential philosophers of European enlightenment, received fewer attention later. Of course, Spinoza's works were complex for apparent reasons — obscure metaphysics, rich snarl of questions and incomprehensible arguments. As Charles Jarrett has shown, Spinoza's works underwent many torments in the 18th and 19th centuries. They were beleaguered for being blasphemous, removed from book stores and then banned[1]. However, these 'shortcomings' do not advocate for sidelining his foremost treatise on freedom, metaphysics, knowledge, philosophical psychology, moral philosophy and political philosophy. As the book argues, Spinoza's conception of freedom is a fascinating account of human beings ability to act out of the necessity of one's own nature and human beings attain freedom by governing ourselves according to practical principles. Based on such assumptions, Kisner focuses on the neglected philosophy of Spinoza's philosophy of human freedom and ethics. In short, Kisner explains why freedom is precious for Spinoza and what he suggests for human beings to achieve freedom.

Structurally, the book under review is classified into 11 chapters, with the first several chapters focusing on Spinoza's most influential theories on human freedom. For Spinoza, Kisner shows, freedom is as equivalent as existence and that is what Spinoza meant when he said: "...the true purpose of the state is in fact freedom"[2]. Kisner's book shows that Spinoza's emphasis on human freedom does not promote an absence of governmental interference, but rather,

1 Charles Jarrett, *Spinoza: A Guide for the Perplexed*, Continuum International Publishing Group, New York, 2007, p. 196.

2 Matthew J. Kisner, *Spinoza on Human Freedom: Reason, Autonomy and the Good Life*, Cambridge University Press, Cambridge, 2011, p. 1.

the positive, ethical freedom that comes from becoming more rational and, thus, virtuous citizens[3]. Spinoza's 'highest good', argues Kisner, therefore, aims to "...help us achieve a psychological state of happiness that involves overcoming obstacles to this state, particularly the passions, painful and disruptive passive effects"[4]. While placing Spinoza in the context of his ethics, the book argues that Spinoza's purpose is limited since his theory claims that not all people can be rational. This is the reason that, Kisner shows, Spinoza is more concerned about indicating how to act in order to become free, rather than making everyone free. In Spinoza's philosophy, freedom is a self determined concept achieved through the adequate use of reason which is subject to so many mental presuppositions. This shows that human freedom is limited as human beings are dependent, as finite things, on other things. As well, it is notable that Spinoza presents a complicated theory in terms of freedom. Kisner shows such 'drawback' takes place as Spinoza considers freedom as many sided in his arguments, and this is the reason why he argues that freedom means liberty from external will power and the ability to do otherwise[5].

At some points of his examination, especially, in Chapter 3, Kisner argues that Spinoza's concept of freedom is inherent in his ideas on autonomy and responsibility. Chapter 3 also shows that, in Spinoza's theory, human freedom is intrinsically linked to reason, and that the position of autonomy in human beings can be improved by having knowledge. Kisner argues that as someone trying to make sense of freedom in the 17th century, Spinoza attempts a balanced state between the two most influential conceptions of freedom. It leads to, the book argues, a contradiction in Spinoza's conception of freedom as it is based on self-determination and self-causation within this balanced state. Therefore, in Spinoza's terminology, as Kisner shows, freedom is independence from external determination. On the contrary, Spinoza also argues that freedom means the absence of constraints to pursue one's desire. This means that freedom for Spinoza is not bounded by temporary aspirations, rather, he attempts to mediate between libertarianism and Hobbesian compatibilism. The examination of how Spinoza mediates between these two strands of freedom is followed by arguing the leeway of reason's power to create freedom for human

3 *Id.*, p. 9.
4 *Id.*, p. 2.
5 *Id.*, p. 56.

beings. This argument shows that Kisner is concerned here about Spinoza's ethics and wants to place it in the context of natural law. More clearly, the book raises a question that if Spinoza's freedom can be called as self-determination, how far then natural law is effective when humans are restricted upto a limited degree? Kisner's answer is very problematic as he argues that as the question is philosophical, the answer is interpretive. This is indicative of the fact that Kisner wants to argue that Spinoza is a moderate ethical philosopher contrary to general perception. Kisner shows that Spinoza accepts freedom in ideal terms based on rationalist ethics and as divine self-realisation[6]. At the same time, Spinoza argues that human freedom is limited in the sense that we can only have adequate ideas to a limited degree. Ideas are important for Spinoza, Kisner argues, as human freedom requires self-determination in the form of having adequate ideas. Spinoza also recognises that human reason is as limited as freedom and it too provides little guidance about certain things[7]. Therefore, human beings, limited by particular things, are devoid of anything concrete in terms of ideas and freedom.

In short, the book is successful in raising some relevant questions pertaining to Spinoza's ethics and ideas on human freedom. The book provides an investigation into the philosophical category of freedom as conceived by Spinoza, and Kisner is successful in showing the importance of freedom in Spinoza's theory. It is a book intended for serious academics who are well-read in European philosophy and its history as the book discusses specific topics such as rationality, freedom, will power, Hobbesian theories and libertarianism. The book is very relevant also as a significant work as at some points it brings medieval concepts to the debate. Yet, the book shows that Kisner's attempt to present a different approach towards human freedom in Spinoza is a successful attempt and calls for serious readership.

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6 *Id.*, p. 236.

7 *Id.*, p. 237.

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BOOK REVIEW

Shail Jain and R. K. Jain, *Patents Procedures and Practices*, Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2011, pp.xvi+379, price Rs.425.

In the modern era of knowledge and technology, intellectual property rights have gained wider momentum. Intellectual property emerged as an important tool for a nation's economic growth by slowly replacing the dominance of financial capital and material resources with intellectual capital. This new knowledge - based economic order has necessitated a level playing field for both developing and developed countries in the arena of world trade. A patent is a form of asset which gives its owner the exclusive right over others. However, patents are not granted merely to enable patentee to enjoy a monopoly for the importation of the patented article. They are done to encourage the promotion of the technological innovation and for transfer and dissemination of technology. Apart from this they can also be used for commercial gains which, in turn, results in advancement of the economy of a country. In other words in the present economic trade scenario knowledge, skill set, intellect and natural resources are 'raw materials' for trade between countries.

Due to large market, increasing economic strength, and strong intellectual resources, India plays a pivotal role in business plans of multinational companies. These technological advancements have also, on the other side, given rise to many issues in the field of pharmaceuticals, software, traditional knowledge etc. The Government of India is taking initiatives to maintain a delicate balance between the high level of patent protection sought by the multinational companies and demand by the domestic industry. They are also earnestly trying to address these issues by bringing amendments in the patent statutes. The Indian Patent Act, 1970 has been amended thrice since its inception to make it synchronous with the changing economic world order and bringing it in line with its international commitments. The Patent Act has been amended to ease the procedure for grant of patent and to facilitate the transition of invention from private domain to public domain in the wake of increase in the number of patent applications being submitted in line with international trend. There has been a major improvement in infrastructure for governing of

patent regime in India, with intent of facilitating effective implementation of the provisions and procedures as enacted under the Patent Act.

The book under review, entitled Patents Procedures and Practices is an endeavor to provide a gist of all the procedural linkages with the provisional aspects under the Patent Act along with other various enactments relating to the emerging field like biotechnology, pharmaceuticals, software, agriculture, patents of life forms etc. so as to enable the potential applicants of patent protection to make a prudent choice in formulating their patent strategy. It is authored by Shail Jain, Additional District & Sessions Judge, Delhi and R.K. Jain, Patent Agent. The book lacks forward from any experts in the field. It shows that it is a pioneering effort taken by authors to meet the urgent need for a literature available on the subject to help inventors in articulating the complete specifications which are essential in filing patent application. Keeping this need in mind, this book has lucidly pointed out the procedures that need to be followed by the patentee to acquire patent in India. A brief overview of the different concepts of intellectual property rights has been mentioned. The whole treatise is categorised into 33 chapters. Conventions and Treaties like Paris Convention for Protection of Industrial Property (1883) and Patent Co-operation Treaty have been added separately as Annexure 1 to 4. Working of Patent offices in India and the procedure for filing Patents has been given as a handy reference to the applicant of patent.

Chapter 1 of the book gives the gist of Copyright, Trademark, Industrial Design Right as different types of intellectual property Rights including Patent. Chapter 2 to 9 deals with the object and theory of Patent Grant system, its process, contents of specifications with examples of complete specifications, inventions which cannot be patented, secrecy of certain inventions, anticipation etc. From an academic point of view there is a lack of fruitful discussion relating to the subject. A long list of inventions that cannot be patentable is provided, but the authors fail to acknowledge the source which restrains it. However, point-wise process for granting of patent and the details are very useful for a patentee to know the procedures at a glance.

Chapter 10 to 14 outlines the intricacies after the grant of patent like whether patent can be granted for any improvement or modification of an invention, opposition proceedings, amendment of application and specifications,

restoration of lapsed patent, surrender and revocation of patents. Chapter 15 and 16 deals with the procedure for register of patents, patent office and its establishment. Chapter 17 is titled "Powers of Controller Generally" however on reading the contents it may be suggested that it should have been "Powers of Controller". The matters relating to the Working of Patents, Compulsory licensing and revocation have been discussed in chapter 18. Another confusion a reader can come across in this book is relating to the title given for chapter 19 i.e. "use of inventions for purposes of Government and Acquisition of Inventions by Central Government". While going through it one fails to understand the purpose of making it as a separate chapter with long a title. The issues relating to infringement, transfer of patent, appeals to the Appellate Board and also Penalties for breach of Patent rules and the role of patent agents have been dealt with under chapters 20 to 24. Chapters 25 and 26 discuss the international arrangements and patenting abroad. Apart from the national patent, international application can also be submitted under the Patent Co-operation Treaty which has been dealt in Chapter 27.

Intellectual property rights have emerged as a significant factor in international commerce. It became imperative to recognise the most important emerging issues affecting it since it is more about application of technology rather than the technology itself. These issues have been identified and highlighted by the authors in chapters 28 to 31. Apart from this, another major issue concerning India relates to the agriculture field. India has developed commendable strength in agricultural research. Indian breeders who were working mainly in public research system, have developed a large number of new varieties. In the absence of plant breeder's rights, these varieties would be freely available to others for exploitation. These newly developed varieties could get protected in other countries without any benefit accruing to Indian breeders. The highlights and objects of making legislation to protect the plant varieties, the rights of farmers under "The Protection of Plant Varieties and Farmers Right Act", 2001, have been dealt in chapter 32, it is really commendable research, in brief, done by authors. The last chapter of the book, i.e., Chapter 33 is on Convention on Biological Diversity, 1992. The authors have attached the annexures which includes the important judgments delivered by the Supreme Court and various High Courts including Delhi High Court relating to infringement, invention, licensing, etc. It is suggested that they could have been placed along with

the chapters relevant to the topic concerned so that more authenticity and effectiveness from academic perspective can be experienced by the reader.

If one ignores the minor shortcomings pointed out above, this book is a pioneering work on the subject in the Indian context written in an exquisite style and authenticated with the Patent Act and Rules in the end of the chapters. It is an excelling resource book for potential patent applicants, judges, advocates, patent agents, students and anyone who is interested in acquiring knowledge relating to patenting intellectual resources.

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