AMITY LAW REVIEW

A JOURNAL OF AMITY LAW SCHOOL, DELHI

Vol 8 No. (2) July-December 2012 ISSN 2249-2232

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Cite this volume as 8 (2) ALR 2012

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SCOPE OF ADR IN JUSTICE DELIVERY SYSTEM IN INDIA

K. K. Geetha*

Abstract

The Indian Courts are held in high esteem for the quality of the judgments delivered. But, at the same time, there is a growing criticism about the inability of our courts to effectively deal with the huge backlog of cases. 'Justice delayed is justice denied' and the pendency of cases in the courts is adversely affecting the justice delivery system. The problem of delay in disposing eases is a great challenge to the smooth and effective functioning of the system. The major reasons for the delay in dispensation of justice and accumulation of large number of cases in varions courts are litigation explosion, increased legislative activity, inadequate number of judges, lack of modern infrastructure in courts, unnecessary adjournments, indiscriminate use of writ jurisdiction in the High Courts, lack of monitoring facilities and lack of strategies to deal with new techniques.

To smoothen the justice delivery system, alternative dispute resolution (ADR) mechanisms had to be adopted to render justice to common man who wants his grievances redressed through legal and faster means and is also economical when compared to time consuming and expensive traditional court litigation. The *lok adalats* functioning under the Legal Services Authorities Act, 1987, fast track courts, etc., adopted for speedy and effeetive redressal have its own drawbacks and many of these methods have failed to satisfy the needs of the litigants.

An ADR mechanism which is apparent and responsible for redressal of grievances of the litigants and aimed at imparting justice is required in the current legal system. Mediation is relevant at this juncture. The introduction of ADR by amending section 89 of the CPC has solved this problem to some extent. The Mediation Rules framed by the various High Courts as envisaged under section 89 contains many lacunas. The rule does not contain any regulatory machinery for the mediators. There is no provision for pre-litigation mediation. Moreover, the criminal justice dispensation also suffers

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huge pendency where alternative systems are absent. Therefore, the present criminal justice system, owing to its adversarial nature, is unable to provide fair and expeditious dispensation of justice in criminal cases. ADR is a suitable remedy to mitigate these problems. Introduction of ADR in criminal law would make the delivery of criminal justice more effective. The paper is an attempt to discuss the scope of mediation as an effective justice delivery system in India.

Introduction

The Indian judicial system stands on a strong edifice to impart justice to the needy. But the conventional justice delivery system prevailing in our country suffers from many drawbacks. The problem of delay in disposing cases is a great challenge to the smooth and effective functioning of the system. The growing problem of arrears jeopardise social justice. The main reasons for the delay in dispensation of justice and accumulation of large number of cases in various courts are litigation explosion, increased legislative activity, inadequate number of judges, lack of modern infrastructure in courts, unnecessary adjournments, indiscriminate use of writ jurisdiction in the High Courts, lack of facilities to monitor, track and bunch cases for hearing, lack of strategies to deal with new techniques, etc. As per the figures available as on November 30, 2012, the total number of cases pending before the Supreme Court is 65703 as against 54864 in 2010 and 45887 in 2008. This number, instead of decreasing, has increased and the time frame is just three years. The total pendency of cases is more than 3 crores throughout India[1]. The 120th Law Commission Report, while recommending fivefold increase in judicial strength at all levels of the Indian judiciary from 10.5 to 50 judges per million of population, pointed out how India's judge population stands poor in contrast with several other countries, like, Australia, Canada, England and United States, and stressed the need for fair judge population[2]. Therefore, there is a need for checking overburdening the courts.

Alternate Dispute Resolution (ADR) mechanism will render justice effectively to the common man, who wants his grievances redressed through

[1] See, <http//supremecourtofindia.nic.in/pendingstat.htm> (Viewed on 20-12-2012).

[2] Government of India, *120th Law Commission Report on Manpower Planning in Judiciary: A Blueprint*, available at <http://lawcommissionofindia.nic.in/old_reports/rpt120.pdf> (Viewed on 12-2-2012).

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Introduction

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legal and faster means, and is also economical when compared to the time consuming and expensive traditional court litigation. The major reasons for preferring alternative dispute resolution (ADR) over adjudication by the litigants are the delay in resolving the disputes, uncertainty of outcome, inflexibility in the solution, enormous cost, hurdles in enforcement and hostile atmosphere[3]. Some of the civil legislations have tried to provide speedy remedy for redressal of grievance of the litigants by way of ADR. Arbitration, Conciliation, judicial settlement, mediation, medola, early neutral evaluation and negotiation are the major ADR mechanisms.

Existing Legal Framework

Many of the legislations in India provides for settlement of dispute through ADR mechanisms, like, the Industrial Disputes Act, 1947, the Hindu Marriage Act, 1955, the Family Court's Act, 1984, the Arbitration and Conciliation Act,1996, the Legal Services Authorities Act, 1987, the Civil Procedure Code (Amendment) Act, 1999 and the Gram Nyayalaya Act, 2008.

The concept of conciliation received legislative recognition for the first time in the Industrial Disputes Act, 1947. As per sections 4 and 5 of the Act, conciliators and conciliation boards are constituted and the industrial disputes

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[3] A joint conference of Chief Ministers of the States and Chief Justices of High Courts in 1993 adopted a resolution, which states as the Chief Ministers of the states and Chief Justices were of the opinion that courts were not in a position to bear the entire burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as mediation, arbitration and negotiation. In the successive meetings also the problem of delay in justice and backlog of cases had come up for consideration. The Chief Justices Conference held in 2007 resolved that (a) consistent with the rules framed by the high court, and with such modifications as may be deemed appropriate by it, national plan for mediation, prepared by the National Judicial Academy, be adopted by each High Court; (b) If otherwise feasible, engagement of serving judicial officers as mediators or conciliators, be avoided. A joint Conference of Chief Ministers of the States and Chief Justices of High Courts in 2008 decided to start (1) more mediation centres be set up so as to have at least one such centre in each district and necessary infrastructure and funding be provided to them; (2) State Legal Services Authorities be strengthened and be encouraged to hold more *lok adalats* and mediation camps so as to bring about a peaceful settlement to the disputes. In the Joint Conference of Chief Ministers of the States and Chief Justices of High Courts in 1999, Prime Minister Dr. Manmohan Singh admitted that India has to suffer the world's largest backlog of cases and timelines which generate surprise globally and concern at home. The elimination of this scourge is the greatest challenge at all levels. See also, R. V. Raveendran, "Mediation - Its Importance and Relevance", (2010) 8 SCC 1 (J).

should be referred to them before referring them to the courts. Complete machinery for conciliation proceedings is provided under the Act.

The Hindu Marriage Act, 1955, also provides for mediation in matrimonial disputes. It is the duty of the court to make an endeavour, at the first instance, to bring about reconciliation between the parties before proceeding to grant any relief[4]. Another example is section 9 of the Family Courts Act, 1984, where a duty is cast on the Family Court to make an endeavour to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceedings[5]. If the Family Court feels that there is a reasonable possibility of settlement between the parties, the matter should be referred for mediation[6].

The concept of alternative resolution of dispute was institutionalised by the Legal Services Authorities Act, 1987. The Act deals with the establishment of *lok adalats* at various levels. The *lok adalats* has proved to be very popular in providing for a speedier system of administration of justice. Generally, all courts refer certain disputes which are likely to be settled to the *lok adalats*. Once the settlement is arrived at, it matter is send back to the court concerned to make a binding decree or order. The *lok adalat* has no power to decide matters on merits. In order to overcome this drawback the Act was amended In 2002 and a new Chapter 6A was introduced as Pre litigation Conciliation Settlement for the establishment of permanent *lok adalat* for public utility services. They have been given the power to decide the matters on merit. Unlike mediation, the *lok adalats* are functioning under the complete control of the judiciary. The major criticism against the *lok adalat* is that it has acted as a tool for case management to help the overburdened judiciary rather than as an instrument of justice delivery to the

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[4] The Hindu Marriage Act, 1955, s. 23(2) reads: "Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties".

[5] The Family Courts Act, 1984, s. 9 reads: "Duty of Family Court to make efforts for settlement -(1) In every suit or proceeding, endeavour shall be made by Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit".

[6] The ADR Rules framed under Order 10, CPC (1999 amendment), supplements the rules made under the Family Courts Act (ss. 10, 21-23).

litigants[7]. In *State of Punjab* v. *Jalour Singh*[8], the Supreme Court observed that many sitting or retired judges, participating in the *lok adalat* as members, tend to conduct *lok Adalats* like courts, by hearing parties and imposing their views as to what is just and equitable on the parties. Sometimes, they get carried away and proceed to pass orders on merits, even though there is no consensus or settlement. The court observed that the proper role of *lok adalat* is to discuss the matter with the parties and persuade them to arrive at a settlement and the making of the award is merely an administrative act of incorporating the terms of settlement[9]. The period taken for deciding a matter by the *lok adalat* and the non binding nature of the decision of the *adalat* is almost similar to that taken by the traditional courts, thereby, leaving the issue of delay in deciding the cases unaddressed. Hence, the ADR procedure formulated should be from the point of view of customer satisfaction, which would help in maximising success in the future programmes[10]. An ADR mechanism which is apparent and responsible for redressal of grievances of the litigants and thus, to impart justice is required in the current legal system.

In the Code of Civil Procedure, 1908, there are certain provisions that provide for mediation and conciliation. A duty is cast upon the court to make efforts to assist parties in arriving at a settlement in certain categories of suits or proceedings such as litigation by or against the Government or against public officers in their official capacity and litigation relating matters concerning a family, like suits for matrimonial relief, guardianship and custody, maintenance, adoption and succession[11].

India has for the first time seen a tremendous change in the functioning of ADR mechanism through the enactment of the Arbitration and Conciliation Act, 1996. The Act has made provisions for arbitration and conciliation. Section 30 of the Act deals with settlement during the arbitral proceedings

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[7] S. Muralidhar, Special Address at the International Conference on ADR, Conciliation, Mediation and Case Management, New Delhi, 3-5-2003.

8 (2008) 2 SCC 660.

9 Sreeram Panchu, *Mediation Practice & Law The Path To Successful Dispute Resolution*, Lexis Nexis ButterworthsWadhwa, Gurgoan, 2011, p. 11.

[10] R. V. Raveendran, "Mediation - Its Importance and Relevance", (2010) 8 SCC 1(J).

[11] The Code of Civil Procedure, 1908, O. 27, R. 5B and O. 23A, R. 3.

with the consent of the parties[12]. If the matter is settled, the settlement recorded on agreed terms shall be treated as an award on agreed terms under section 30(2). There are lot of criticisms regarding the excessive judicial interference in the arbitral proceedings and unnecessary delay in deciding tho cases by the arbitrators.

The Code of Civil Procedure, 1908, originally contained provisions for dispute settlement through ADR mechanism under section 89 when an exclusive legislation for arbitration was introduced in 1940. The said section got repealed. The dispute resolution through alternative methods started gaining momentum in India as the pendency of the cases increased out of proportion. The Report of Justice Malimath Committee and 129th Report of the Law Commission of India have paved way to the reintroduction of section 89 in the Code of Civil Procedure as per the CPC Amendment Act, 1999. The Malimath Committee, while making a study on 'Alternative Modes and Forums for Dispute Resolution', endorsed the recommendations made in the 124th and 129th Reports of the Law Commission. The Committee observed that the lacuna in the law arising out of the want of power in the courts to compel the parties to a private litigation to resort to arbitration or mediation requires to be filled up by necessary amendment. The Committee stated that the conferment of such power on the courts would go a long way, resulting in reducing not only the burden of trial courts but also of the revisional and appellate courts, since there would be considerable divergence of work at the base level and the inflow of work from trial courts to the revisional and appellate courts would thereby diminish[13]. Mediation gained momentum in India after the CPC amendment in 1999.

Similarly, the Gram Nyayalaya Act, 2008, provides for the establishment of *Gram Nyayalayas* at the grass roots level for the purpose of providing access to justice to the citizens at their door steps and to ensure that opportunity for

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[12] The Arbitration and Conciliation Act, 1996, s. 30(1) reads: "It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement".
Section 30(2) reads: "If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms".
[13] S. B. Sinha, "Courts and Alternatives", available at < http://delhimediationcentre.gov.in/articles.htm > (Viewed on 20-11-2012).

securing justice are not denied to any citizen for socio-economic reasons and other disabilities and for matters connected therewith or incidental thereto. The *Gram Nyayalayas* are in addition to the regular courts which deal with both civil and criminal matters. The Act provides conciliation for settlement of disputes as per the procedure prescribed by the High Courts[14]. The effectiveness of this Act is not assessable since it is in the initial stage. Though, the Act provides for dispute resolution through conciliation, the success of these methods may be doubted for many reasons, like, reluctance of the parties to opt for these methods due to lack of knowledge and faith in the system, voluntary disclose of the facts before the conciliator, etc.

Mediation

The tradition of dispute resolation through mediation prevailed from time immemorial in India. Mediation as a method of dispute resolution was practiced in villages. Mediation is currently a global phenomenon. It can be defined in common parlance as a process through which disputes can be resolved through the intervention of a neutral third party[15]. It is a private, informal, collaborative, facilitative, future looking, interest based process which brings the parties to a calibrated, multi dimensional, win-win remedy which is more durable because of the parties consent is the only outcome[16]. The mediator has no authority to make any decision that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication[17]. It is also defined as "negotiation carried out with the assistance of a third party. The mediator in contrast with arbitrator or judge, has no power to impose an outcome on disputing parties"[18]. As an ADR mechanism, it has gained momentum only recently in India. The possibility of settlement of dispute is more so as long as the parties are able to understand the nature of the process of mediation and effectively participate in it. The mediator is facilitating to get a win-win solution to their disputes. Most importantly, unlike adjudication mediation

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[14] The Gram Nyayalaya Act, 2008, s. 26.

[15] Hentry J. Brown *et. al.*, *ADR Principle and Procedure*, 2nd Edn., Sweet and Maxwell, London, 1997, p. 15.

[16] Hiram E. Chodosh, "Mediating Mediation in India", available at <http://www. lawcommissionofindia.nic.in/adr conf/chodosh4> (Viewed on 20-11-12).

[17] *Ibid.*

[18] Stephen D. Goldburg, *et. al.*, *Dispute Resolution Mediation, Negotiation and other Processes*, 3rd Edn., Aspine Law & Business, Gaithburg & Newyork, 1999, p. 30.

keeps up the good relationship between the parties since there is no win-loss situation. In adjudication the solution is always win-loss. The relationship between the parties becomes worse and more complex in the event of an appeal by the aggrieved party in the higher courts. But, in mediation all the disputes are being settled and hence, there is no chance for future indifference or strained relationship between the parties. In other words, mediation aims at dissolution of the disputes rather than merely resolving it for the parties. In mediation, the mediator helps the parties to jointly explore and reconcile their differences. The mediator can adopt various strategies to seek information at appropriate stages or ensure parties commitment to the consensus. The mediator is expected to use specialized communication skills to assist the parties in arriving at an optimal solution. Thereby, the mediator plays the role of a facilitator of the parties' positive relationship and that of an evaluator skilled at examining the different aspects of the dispute. Mediation got statutory recognition in India through the amendment of CPC, whereby, section 89 was reintroduced in the code.

Court Annexed Mediation and Section 89 CPC

Court annexed mediation was introduced by section 89, CPC. As per the section, if the parties are ready for settlement, the court will refer the same for arbitration, conciliation, judicial settlement, including, settlement through *lok adalat* or mediation[19].

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[19]The Code of Civil Procedure, 1908, s. 89 reads: "Settlement of disputes outside the court – (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for

(a)Arbitration;
(b)conciliation;
(c) judicial settlement including settlement through Lok Adalat; or
(d)mediation

(2) Where a dispute has been referred.

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 if 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub section (1) of Section 20 of the Legal Services Authorities Act 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all

The constitutional validity of section 89 was challenged before the Supreme Court in *Salem Bar Association, T.N.* v. *Union of India*[20]. The apex court analysed the reason for introduction of section 89 and held that it was imperative to resort to ADR mechanism with a view to reduce pendency of cases in various courts. As far as section 89(2)(d) for mediation is concerned, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. The Supreme Court also appointed a Committee, headed by Justice Jaganadha Rao, a retired Supreme Court Judge, and four other members. The Committee drafted model mediation rules, viz., the Alternative Dispute Resolution Rules and the Civil Procedure Mediation Rules. On the basis of the report, the Supreme Court directed all the High Courts to frame Rules in tune with the model rules. Accordingly, some of the High Courts framed rules for mediation[21]. For giving effect to section 89, CPC, a Mediation and Conciliation Project Committee (MCPC) was constituted under the auspicious of the then Chief Justice of India, Justice R. C. Lahoti, in August, 2005. The MCPC started a pilot project in the District Courts in Delhi under the National Legal Services Authority with the help of trainers provided by a Californian institute[22]. A subcommittee was also constituted with a Supreme Court Judge, a High Court Judge and a Senior Advocate of the Supreme Court as its members. Many other States also introduced the rules. While introducing the Mediation Rules various issues were raised, such as, the stage at which and to whom the courts shall refer the cases for mediation, adequacy of persons trained or experienced to handle complex civil and commercial disputes, monitoring of the cases sent to mediation by the courts, introduction of proper machinery, etc[23].

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other provisions of the Legal Services Authority Act shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

[20] (2003) 1 SCC 49.

[21] For instance, the High Courts of Delhi, Himachal Pradesh, Karnataka, Maharashtra, Gujarat, West Bengal, Tamil Nadu, Kerala, UP, Bihar, etc., have framed rules of mediation.

[22] The Institute for the Study and Development of Legal Systems (ISDLS) agreed that the Institute would bring trained mediators to give training to the judicial officers and initially, these judicial officers will mediate the disputes.

[23] Niranjan J. Bhatt, "Court Annexed Mediation", paper presented at the Fourth Indo-US Legal Forum Meet at US Supreme Court on October 15, 2002.

Section 89, CPC, is concerned with civil cases only. There is no corresponding provision for settlement of dispute through mediation in criminal cases. There is no aniform procedure followed in all the states regarding mediation. However, in none of the rules followed by the States there is provision for pre litigation settlement. In the absence such a provision it will be difficult to check the inflow of litigations to courts which adds to the pendency of cases.

Need for ADR in the Criminal Justice System

The preamble of the Constitution of India enjoins the State to secure social, economic and political justice to all its citizens, making the constitutional mandate for speedy justice Inevitable. The State has to strive for reducing inequalities among groups of people in different areas[24]. The Supreme Court has emphasized the right to speedy trial as a fundamental right in many cases. Speedy trial is the essence of criminal justice and there can be no doubt that the delay in trial by itself constitutes denial of justice[25]. Speedy trial is a reasonably expeditious trial, which is an integral and essential part of fundamental right to life and liberty enshrined in Article 21[26]. Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily[27]. Justice delivery system, therefore, is under an obligation to deliver prompt and inexpensive justice to its consumers without in any manner compromising on the quality of justice or the elements of fairness, equality and impartiality. The Indian Courts are held in high esteem not only by the developing but by the developed countries as well; there is wide-spread praise for the quality of the judgments delivered, and the hard-work put in by the Indian judiciary. But, at the same time, there is growing criticism, about the alleged inability of the courts to effectively deal with and wipe out the huge backlog of cases.

Long delay has the effect of defeating justice in quite a number of cases as a result of which the possibility of acquittal cannot be ruled out due to a variety

[24] Constitution of India, Art. 38(I). Moreover, Art. 39(A) provides "...state shall secure that the operation of the legal system promotes justice...to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".
[25] *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1360.
[26] *Maneka Gandhi* v. *Union of India and Anr.*, AIR 1978 SC 597.
[27] *Abdul Rehman Antulay* v. *R. S. Nayak*, AIR 1988 SC 1531.

of reasons, such as, loss of important evidence, fading of memory of the witnesses, death or non availability of witnesses, etc. The consequences is that a party with even a strong case may lose it, not because of any fault of his own, but because of the tardy judicial process, entailing disenchantment to all those who at one time set high hopes in the courts. The problem of delay and huge pendency creates an impression that the whole system would get crushed under its own weight. We must guard against the system getting discredited and people losing faith in it and taking recourse to extra legal remedies with all the sinister potentialities by introducing feasible alternative dispute resolution mechanism.

The problem of pendency is much more acute in criminal cases, as compared to civil cases. Speedy trial of a criminal case is considered to be an essential feature of the right to a fair trial, but has remained a distant reality. This is because the procedure which does not provide trial and disposal within a reasonable period cannot be said to be just, fair and reasonable. If the accused is acquitted after such long delay one can imagine the unnecessary suffering he was subjected to. Many a time such inordinate delay contributes to acquittal of guilty persons either because the evidence is lost or because of lapse of time, or the witnesses not remembering all the details or their not coming forward to give true evidence due to threats, inducement or sympathy. Whatever may be the reason, it is justice that becomes the casualty.

The Government of India sanctioned fast track courts of Sessions Judges to reduce pendency for a period of 5 years in the year 2000.The term of the fast track courts were extended for a period of 5 more years on the recommendation of the Finance Commission of the Government of India[28]. The functioning of the courts is satisfactory to some extent to reduce pendency. Only serious offences are tried in fast track courts. Rest all cases are pending before the Magistrate courts and the pendency is more in Magistrate courts than in Sessions Courts. A similar scheme is absent in disposing cases expeditiously in the magistrate courts. The fast track courts suffered from some infirmities. Some of the presiding officers are retired

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[28] Government of India, *Steps Required to be Taken for Reduction/Elimination of Arrears and Ensure Speedy Trial within a Reasonable Period*, <http:www.supremecourt.nic.in> (Viewed on 23-12-2011).

Sessions Judges and Additional Sessions Judges. The lack of accountability due to short term appointment, or the appointment of retired officers cause miscarriage of justice. Another major reason is the hurry in disposing cases to comply the monthly target fixed by the High Courts. In such situation judges are compelled to examine large number of witnesses in a day and they may fail to apply proper attention to all the cases.

Therefore, the current criminal justice system, owing to its adversarial nature and age old legislations governing it, is unable to provide fair and expeditious dispensation of justice in criminal cases and now warrants a change. Although, various attempts have been made to amend the Code of Criminal Procedure to smoothen the functioning of the criminal justice system, it has not been successful. Several changes recommended by the Law Commissions also have not worked out. ADR is a suitable remedy to mitigate these problems. But it is to be noted that criminal law nowhere provides recourse to ADR methods, the same has never been suggested. It is pertinent to mention here that in civil cases there exists section 89 of the Code of Civil Procedure, 1908, which provides recourse to ADR techniques where both the parties agree to or where the court feels that a case is fit for recourse to ADR techniques, etc. Certain categories of cases are not suited for ADR under section 89 CPC[29]. There is no such provision for ADR in the Code of Criminal Procedure. Hence, it is pertinent to introduce ADR methodologies in the criminal justice system, which will improve its efficacy and repose the trust of the common man in the criminal justice system.

The very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable[30].

As far as civil disputes are concerned, the legislations provide for ADR mechanism, even though, they are not effective. However, there is not a single legislation that provides ADR mechanism in criminal cases. In today's

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[29] *Afcon Infrastructure Ltd.* v. *Cherian Verkey Construction Co. (P.) Ltd.*, (2010) 8 SCC 24, the Supreme Court exempted cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc., and cases involving prosecution of criminal offences from the application of section 89 CPC.

[30] *State of Gujarat* v. *Natwar Harchanji Thakor*, (2005) Cr. L.J. 2957.

complex society, often, in order to obtain justice it appears that we must reach outside the traditional parameters. Movement in this direction has come from the fast growing realisation of the litigants that court based adjudication is not the ideal form of justice in all situations[31]. When considering the large pendency of cases in various courts in India the pendency of criminal cases is three times more that the civil cases. Persons who are looking to knock the doors of criminal justice, in the absence of a proper remedying system which is fast and economically viable, may conclude that our legal system is slow and does not lead to fair dispensation of justice thereby eroding their trust in the present criminal justice system. India for the dispensation of criminal justice follows the adversarial system of justice which is inherited from the British Colonial Rulers (common law). Though, the inquisitorial system followed in countries like France, Germany and other continental countries is certainly efficient in the sense that the investigation is supervised by the Judicial Magistrate which results in a high rate of conviction but to maintain a balance it felt that, a fair trial and in particular, fairness to the accused, are better protected in the adversarial system. However, some of the good features of the inquisitorial system can be adopted to strengthen the adversarial system and to make it more effective[32].

Settlement of criminal cases through mediation is no longer a new concept and has been already implemented in countries like Australia, United States, Canada, England, Germany, Scandinavia, Eastern Europe, Australia and New Zealand where in by using certain ADR techniques, various criminal cases are being resolved and pendency of cases is being reduced successfully thereby providing an alternate efficient remedy to the traditional trial process[33]. In India also the same system can be introduced to aid the overburdened system. By treating alternate dispute resolution as an integral part of modern legal practice, the court management becomes smooth and the faith of people in the system can be restored. ADR techniques like,

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[31] Tony F. Marshall, *Alternative to Criminal Courts, The Potential for Non Judicial Dispute Settlement*, Gower, London, 1985, p. 1.

[32] Government of India, *Committee on Reforms of Criminal Justice System*, 2003, available at <mha.nic.in/pdfs/criminal justice system.pdf> (Viewed on 20-11-2012).

[33] Anoop Kumar, "Applicability of ADR in Criminal Cases", available at <http://www.mightylaws.in/430/applicability-adr-criminal-cases> (Viewed on 10-1-2012).

mediation, medola, neutral fact finder method, early neutral evaluation, etc., are useful in resolution of criminal disputes. In criminal disputes, the parties cannot be forced to compromise or resolve the matter. When both the parties are willing to compromise, in view of the changing time, in such situations there needs to be a statutory rule for resolution, which is not lengthy or cumbersome. This alternative can be used when time has elapsed or where the court feels that the matter should be referred for mediation it should be done on compulsory basis for early dispensation of cases. The very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable[34]. The Code of Criminal Procedure contains certain provisions for settlement like compounding of offences and plea bargaining.

Compoundable offences

Section 320[35] of the Code of Criminal Procedure deals with compounding of offences. In section 320, there are two tables, where table 1[36] deal with offences which are compoundable without the permission of the court. If parties are ready for settlement of a case they can settle it outside the court and the court record the settlement and acquit the accused[37]. More serious offences which are mentioned in the second table[38] require the permission of the court for settlement. Offences that mainly come under section 320 are bodily injury cases, neighbourhood disputes where injury is caused to the parties, simple theft, etc. Section 320 has been incorporated in the Code of Criminal Procedure to enable the criminal justice system to avoid trial and

[34] *Supra*, n. 18.
[35] The Code of Criminal Procedure, 1973, s. 320 reads: "Compounding of offence: (1) The offences punishable under the Sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table...
(2) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table...".
[36] *Ibid.*
[37] The Code of Criminal Procedure, 1973, s. 320(8) reads: "The composition of an offence under this Section shall have the effect of an acquittal of the accused with whom the offence has been compounded".
[38] *Ibid.*

punishment in certain offences which are not serious and have less public interest[39]. Majority of the cases pending before the varions magistrate courts are compoundable offences. Introducing mediation in compoundable cases will reduce the pendency of cases in these courts. Once the police files the final report under section 173 of the Code of Criminal Procedure, the court registry can identify the cases which are suitable for mediation and can refer the case to the mediator, if the parties are ready for a settlement. Once settlement is arrived, the matter can be send back to the court with the settlement agreement and the court can dispose of the matter expeditiously. The introduction of ADR in compoundable offences will save the time of the court, cost of litigation and reduce pendency of cases.

Plea Bargaining

Plea bargaining is a contractual arrangement between the prosecution and the accused concerning the disposition of a criminal charge. Enforceability of such agreement is subject to the approval of the concerned judge. Plea bargaining is the process whereby the accused, victim and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the accused pleading guilty to a lesser offence or to only one or some of the counts of a multi count indictment in return for a lighter sentence than that possible for the grave charge.

The concept of plea bargaining was introduced in India as per the Criminal Law Amendment Act, 2005. A new chapter XXIA[40] was added in the Code of Criminal Procedure, 1973. Plea bargaining is permissible in criminal cases where the prescribed maximum punishment is below seven years[41]. The provision has no application if offence affects the socio-economic condition of the country or has been committed against a woman or a child below the

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[39] K. N. Chandrasekharan Pillai, *R. V. Kelker's Criminal Procedure Code*, 5th Edn., Eastern Book Co., Lucknow, 2008, pp. 563-566.

[40] The Code of Criminal Procedure, 1973, s. 265A reads: "(1) This chapter shall apply in respect of an accused against whom-(a) the report has been forwarded by the officer in charge of the police station under section 173 alleging there in that an offence appears to have been committed by him other than an offence for which the punishment for death or imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force or (b)...but does not apply where such offence affects the socio economic condition of the country or has been committed against a woman, or a child below the age of fourteen years".

[41] *Ibid.*

age of 14 years[42]. The application[43] for plea bargaining should be accompanied with an affidavit[44] stating that the application is filed by accused voluntarily and has not been previously convicted for the same offence[45] and then notice[46] has to be issued to the prosecutor and the complainant. The accused is examined *in camera*[47] to satisfy that he has filed the application voluntarily. Then the court will provide time to the accused and the complainant to work out a mutually satisfactory disposition[48] of the case, which may include giving to the victim by the accused compensation and other expenses incurred during the case. The involvement of the parties, their lawyers and the investigating officer of the case is essential for arriving at a settlement. Throughout the process, it is the duty of the court to make sure that the whole process is transparent. Where a satisfactory disposition of the case has been worked out the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the court and all other persons who participated in the meeting[49]. Where a satisfactory disposition is worked out the court shall dispose of the case by awarding compensation to the victim, releasing the accused on probation for good conduct[50] or after admonition under section 360, Cr. P.C or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958, or any other law for the time being in force. After hearing, if the court feels that any of the above beneficial provisions are not applicable, the court may sentence the accused to half of such minimum punishment. If the offence committed by the accused is not covered under the above heads, the court may sentence him to one-fourth of the punishment provided or extendable, as the case may be for such offence.

The concept of plea bargaining, though effective, carries with it certain limitations also. Plea bargaining would be entertained only if the accused opts for it voluntarily, but it has no provision for the courts to reject the settlement arrived at if it is contrary to law. The only option available to the

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[42] *Supra*, n. 38.
[43] The Code of Criminal Procedure, 1973, s. 265B.
[44] *Id.*, s. 265B(2).
[45] *Ibid.*
[46] *Id.*, s. 265B(3).
[47] *Id.*, s. 265B(4).
[48] *Id.*, s. 265B(4)(a).
[49] *Id.*, s. 265D.
[50] *Id.*, s. 265E.

party is to approach the High Court under Article 226 or 227 and the Supreme Court under Article 136 of the Constitution of India.

Another major problem is the involvement of police officers in plea bargaining. India, which is well known for custodial torture and pressures exerted by police, there is every possibility of influence by the police on the innocent people to plead guilty to escape from police torture and harassments in prison. The role of victims in plea bargaining process is also not held as a welcome change. It is apprehended that involving victims in plea bargaining would invite corruption.

The plea bargaining provision may also have dramatic side-effects in cases involving public servants accused of human rights abuse. For instance, cases of custodial torture, which is rampant in India, is yet to be made a specific crime, though, they are charged under different provisions of the Indian Penal Code. An Indian police officer accused of torturing a person in custody may be tried for offences such as those punishable under sections 323, 324 or 330 of the Indian Penal Code. These offences are well within the limit prescribed for punishment under the law on plea bargaining. By plea bargaining these offenders may escape with even lighter penalties, despite the fact that their offences may be a gross violation of the human right of the victim.

In order to overcome the draw backs of the plea bargaining, introduction of mediation in is essential. When the accused submits the application stating his willingness to settle the matter, and after sending notice to the victim and the public prosecutor, matter can be send for mediation. A trained mediator can facilitate both the victim and the accused to reach a proper settlement of the dispute. With regard to compensation also the mediator can very well help the victim to get adequate compensation for the injury caused to him by the accused. Once the matter is finalised by the mediator, it can be send to the court for disposal. Introduction of mediation in plea bargaining will save the time of the courts. The court can rely on the statement of the mediator regarding the settlement in the absence of the direct supervision of a judicial officer.

The Negotiable Instruments Act, Section 138

One third of the pending cases in criminal courts are matters relating to section 138 of the Negotiable Instruments Act, 1881. Section 147 of the Act provides for compounding of these cases. Hence, if mediation is introduced in matters relating to section 138, to some extent, the huge pendency can be reduced. Moreover, if there is a pre litigation mediation process is introduced in matters relating to section 138 of the Negotiable Instruments Act, 1881, the inflow of litigation can be controlled.

Conclusion

The quality of justice determines the quality of society and governance. Equal and fair justice is the hallmark of the society and mere delay of dispensation of justice should not hamper the aspirations of the people. The existing laws regarding ADR mechanism is not sufficient to solve this problem. Hence, there is a need to introduce ADR mechanism in all civil cases even in pre litigation stage to resolve the disputes amicably.

Introducing various ADR techniques, like, mediation in criminal dispensation system for less serious offences would resolve many of the problems in delivery of criminal justice. If parties are ready for resolution of their dispute through mediation, the mediator can facilitate to reach a compromise, thereby, the pendency of the case before the courts for long period of time can be mitigated. This also facilitates quick disposal of the cases which results in immediate relief to the parties. ADR cau be used at any stage of a criminal case, i.e., either at the stage of first appearance of the parties before the court, or before trial or even after trial. Introduction of ADR in componndable offences, plea bargaining matters and cases under section 138 of the Negotiable Instrument Act will help to reduce considerably the pendency of cases in various courts. Thus, effective use of mediation is the need of the hour to address some of the problems in the justice delivery system in India.

IMPLEMENTATION OF RIGHT TO EDUCATION AS A CIVIL RIGHT — A CRITICAL ANALYSIS

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Abstract

Education is an important and inevitable for the complete development of the human person and should be made available to everyone without any discrimination. Edncation, being a socio-economic right, demands huge capital for its realisation. Due to the lack of capital, when private players are allowed in the field of education, affordability and access becomes an issue. In order to address the issue of access to education, constitutional amendment was carried out to ensure that all children receives free and compulsory education till the age of 14 year, by placing a socio-economic right among the other civil and political rights. Though the Constitutional Amendment does not impose any burden on the private players, the Right to Education Act, 2009, compels private players to provided free education. The pap[illegible] ttempts to examine the modalities through which the right to education has been implemented and its rational, with the help of the recent Supreme Court Decision on this issue.

Introduction

Education creates an ideal person by providing an insight into the outer world and renovates him as a judicious human being. Though there are differing opinions about the above statement, especially when the current education system does not provide value based education, such criticisms are related with the quality of the education or contents offered through the existing curriculum. Once the students are given an opportunity to get education, then there is a meaning for having a discussion about the quality of the education, and which curriculum suits them the best. But, before having a discussion on the quality of education, the issue of accessibility needs to be addressed. Though, right to education has been widely accepted as part of human rights at the international level through various international instruments, its implementation is closely related with economic aspects, i.e.,

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availability of capital to be invested in this field. It has become a major hurdle for the least developed countries and for some of the developing countries like India which is outsized in population.

In order to give an appropriate legal framework for implementing the right to education, which has been introduced to Part III through a constitutional amendment, the Central Government has come up with the Right of Children to Free and Compulsory Education Act, 2009. This was enactment to provide free as well as compulsory education to children till the age of 14 years even in the private unaided educational institutions.

Main object of the paper is to critically analyse the provisions of the Act that compels the private educational institutions to shoulder the State responsibility to fulfill its constitutional obligation in the light of Supreme Court decision on the constitutionality of the Act.

Right to Education - International Perspective

Right to education have been widely accepted and recognised internationally. There is specific recognition of the right to education in some of the international instruments. At first, this was incorporated in the Universal Declaration of Human Rights (UDHR) 1948[1]. Though UDHR envisages education as a human right, it has been placed or classified as a socio-economic right since capital is required to achieve the said right. Therefore,

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[1] UN Declaration of the Rights of the Child, Art. 26 reads: 'Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory...education shall be directed to the full development of human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among racial or religious groups...'. The right to education has been enshrined in a range of international conventions, including the International Covenant on Economic, Social And Cultural Rights (ICESCR, 1966), The Convention on the Elimination Of All Forms Of Discrimination Against Women (CEDAW, 1979) and more recently, The Convention On The Rights of The Child (CRC, 1989). It has also been incorporated into various regional treaties. Many countries have also made provisions for the right to education in their national constitutions.

While the right to education is universally recognised, the way it is interpreted at the national level differs substantially. This means that although every human being holds the same right regardless of any national law, the ways of securing this right vary greatly from location to location. For example, in some countries the right to education may be legally enforceable through national legislation, while in others it will be important to look to international law and standards".

the same right has been envisaged under Principle 7 of the UN Declaration of the Rights of the Child, 1959[2]. The same has also been emphasised under Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966[3], and Article 28 of the Convention on the Rights of Child, 1989[4].

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[2] Principle 7 reads: "The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents. The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right".

[3] Article 13 reads: "The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

[4] Article 28 reads: "1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: a) Make primary education compulsory and available free to all; b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; c) Make higher education accessible to all on the basis of capacity by every appropriate means; d) Make educational and vocational information and guidance available and accessible to all children; e) Take measures to encourage regular attendance at schools and the reduction of

The above mentioned international documents makes it is clear that right to education for a child at least at the primary as well as at the elementary level should be made free as well as compulsory. As pointed above, due to the enormous capital required in imparting education for all, the implementation of the right has been left to the member countries.

Right to Education under the Indian Constitution

The drafters of the Indian Constitution have borrowed many provisions with minor tinkering work here and there for the purpose of providing a better constitution for "we the people of India". UDHR has been accepted and incorporated into Indian constitution in Part III and Part IV, i.e., Fundamental Rights and Directive Principles of State Policy (DPSP). The civil and political rights have been placed in Part III and the socio economic rights have been put in Part IV. Main aim of the DPSP is to guide the government and it is for the government to decide time to time when and how they will materialise the goals envisaged in Part IV.. As a socio economic right, the right to education was classified in tune with UDHR and placed under Article 45 in Part IV of the Constitution which read as follows: "The State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years".

Though there was an obligation on the Government to realise the free and compulsory education within a short span of time, i.e., within 10 years, it is believed that since the economic condition was not so sound, the importance was placed on promoting industries to improve the nation's economic condition not on education. The government was paying some attention towards the education and the position remained thus till 1980s. Thereafter, education was given attention through the various National Education

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drop-out rates. 2 States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. 3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries".

Policies that were mooted. Number of Schemes was announced by the Government. However, it was quite evident that because of the tremendous increase in the size of the country's population, Government's share on education was inadequate to meet the needs of all. Private participation in higher education was encouraged and it mushroomed and resulted in collection of capitation fee. Access to education thus remained unaffordable. Only few who belong to the elite group could only avail education in private educational institutions.

Indian Supreme Court on Education (Prior to 2009)

At first, collecting capitation fee from the students was challenged in *Mohini Jain Case*[5]. In this case, a student who was admitted through management quota was asked to pay more than 200 times the fee paid by a student admitted through government quota. The petitioner challenged this under Articles 21 and 14 based on the argument that such act amounted to denial of entry into educational institutions which affects the right to life guaranteed under art 21. The Court dealt with the following two legal issues among others:

> (1) Is there a 'right to education' guaranteed to the people of India under the Constitution? If so, does the concept of 'capitation fee' infract the same?
> (2) Whether the charging of capitation fee in consideration of admissions to educational institutions is arbitrary, unfair, and unjust, as such violates the equality clause contained in Article 14 of the Constitution?[6]

While answering the first issue, the Division Bench of the Supreme Court accepted the contentions of the petitioners and held that right to education is a Constitutional and Fundamental Right. It was held:

> "The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide

[5] *Mohini Jain v. State of Karnataka and Ors.*, (1992) 3 SCC 666.
[6] *Id.*, p. 676.

educational facilities at all levels to its citizens. The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity. The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional-mandate to provide educational institutions at all levels for the benefit of the citizens."[7]

Further, on the second issue it was held that charging capitation fee in consideration of admission to educational institutions is a patent denial of a citizen's right to education under the Constitution[8].

Importantly, in this case the Court did not classify education into primary or elementary or secondary or higher education. Therefore, it is clear from the *Mohini Jain case* that all types of education were held as Fundamental Right under Article 21. Though the objective behind the decision is to facilitate the needy to get into education institutions, it is very true that it put much financial burden on the State to provide all types of education. The decision of the case changed the prevailing circumstances in the society and gave a message that education can be afforded by all at any stage. One can also infer from the ratio that education is not a business and students are not consumers to pay whatever the Institutions demand for getting degrees. Very interestingly, through this case, the Supreme Court interpreted Article 21 which is one of the civil and political rights and held that a socio economic right, i.e., right to education is part of civil and political right without realising the implication.

However, the affected parties in the said judgment, i.e., the private self financing colleges those who were prevented from collecting higher amount as fee, challenged the decision in *Unnikrishnan case*[9]. In this case, the Court agreed up to a certain extend on right to education and partially overruled the *Mohini Jain* ratio by holding that right to get free and compulsory education

[7] *Id.*, pp. 679-80.
[8] *Id.*, p. 682.
[9] *J.P. Unni Krishnan* v. *State of Andhra Pradesh*, (1993) 1 SCC 645.

is available till the age of 14 years. However it clarified that beyond 14 years right to education is available but neither free nor compulsory education which is entirely different from right to education. It was held "The right to free education is available only to children until they complete the age of 14 years. Thereafter, the obligation of the State to provide education is subject to the limits of its economic capacity and development".[10] The Unnikrishnan Court further clarified that right to education means "...that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development. By saying so, we are not transferring Article 41 from Part IV to Part III we are merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21."[11]

It is very evident from the above paragraph that the court did not transfer the education from Part IV to Part III unlike what happened in other case like environment, right to water, etc. This is further evident from the following as well. "...it would not be correct to contend that Mohini Jain was wrong in so far as it declared that "the right to education flows directly from right to life"".[12] These decisions threw open several question about various aspects of this right, such as, the content of this right, the level of education that is necessary to make the life meaningful, obligation of the State to provide education to the citizen according to his choice, obligation of the State to provide adequate number of medical colleges, engineering colleges and other educational institutions to satisfy educational needs of the citizens, etc.

The Court in *Unnikrishnan* case held that right to education is different from right to get free and compulsory education. This has been done by making an artificial classification based on the age group below 14 and above 14 years. Due to this classification, it was made clear that higher education is not part of free education which flows from Article 21.

After the *Mohini Jain's* case, most of the States in Indian came up with their own internal regulation for controlling and monitoring the private unaided educational institutions which is very evident from the *Unnikrishnan* case. Such measures were challenged in *Unnikrishnan's* case as unreasonable

[10] *Id.*, p. 181.
[11] *Ibid.*
[12] *Id.*, p. 171.

restrictions violating Article 19(1)(6) was imposed. While addressing the issue, the Court held: "So far as un-aided institutions are concerned, it is obvious that they cannot be compelled to charge the same fee as is charged in Governmental institutions. If they do so voluntarily, it is perfectly welcome but they cannot be compelled to do so, for the simple reason that they have to meet the cost of imparting education from their own resources and the main source, apart from donations/charities, if any, can only be the fees collected from the students."[13]

Therefore, it is possible to argue that State's control over higher education has been taken away by this judgement with respect to collection of fee. This resulted in commercialisation of education. However, *Unnikrishnan* judgement has led to an important cconstitutional amendment and Article 21A has been inserted in Part III of the Constitution.

Article 21A — A New Fundamental Right

After the *Unnikrishnan's* case, the Government decided to amend the Constitution to incorporate right to education as a Fundamental Right. The Ministry of HRD drafted the 83rd Constitutional Amendment Bill, 1997[14], through which the new Article 21A was inserted. According to the draft Bill, the provision stood as follows:

> 21A. Right to education: (1) The State shall provide free and compulsory education to all citizens of the age of six to fourteen years. (2) The Right to Free and Compulsory Education referred to in Clause (1) shall be enforced in such manner as the State may, by law, determine. (3) The State shall not make any law, for free and compulsory education under Clause (2), in relation to the educational

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[13] *Id.*, p. 196.

[14] The 83rd Constitution Amendment Bill was introduced in the Parliament on 28-7-1997, available at <http://webcache.googleusercontent.com/search?q=cache:http://nchi.in/edu/ edu1.php> (Viewed on 22-11-2012).

institutions not maintained by the State or not receiving aid out of State funds[15].

The present Article is entirely different from the above draft provision. When the bill was introduced in the Parliament, it was referred to the Standing Committee for its suggestions. While submitting its report, it made very clear about clause 3 of the proposed amendment which read as state shall not compel the unaided institutions to provide free education. This was the opinion of the MHRD too[16]. The reasons given by the Standing Committee as well as the MHRD were based on *Unnikrishnan* case which states that private unaided institutions have no obligation to provide free education and they cannot be compelled to do so. Therefore, it was unanimously decided that not to have clause 3 in the amendment Bill[17]. Along with, the Law Commission of India also submitted its report[18]. When, the Parliament Committee took a decision not to compel the private unaided institutions for providing free education, the Law Commission emphasised on compelling the private institutions to do the same upto 50%[19]. The Law Commission pinpointed the social obligations of the private educational institutions. It is very interesting as well as important to note that the Chairman of the Law Commission was the judge who delivered the judgment in *Unnikrishnan case* which prohibited the Government from compelling private unaided educational institutions to offer free education[20].

The 83rd Constitutional Amendment Bill could not be passed in the Parliament[21] and therefore, it was again introduced as the 86th Constitutional Amendment Bill, 2001, with an objective to insert Article 21A and to amend

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[15] *Ibid.*, Government of India, *One Hundred Sixty Fifth Report of the Law Commission of India on Free and Compulsory Education for Children*, November, 1998, p. 77, para. 6.6, available at < http://lawcommissionofindia.nic.in/101-169/Report165.pdf > (Viewed on 22-11-2012) and also see, *Society for Un-aided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1, (para. 6 of the dissenting opinion).

[16] *Society for Un-aided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1, p. 46.

[17] *Id.*, p. 46.

[18] Government of India, *One Hundred Sixty Fifth Report of the Law Commission of India on Free and Compulsory Education for Children*, November, 1998.

[19] *Id.*, p. 79.

[20] Justice B. P. Jeevan Reddy, who was one of the judges in Unnikrishnan case, was the Chairman of the 165th Law Commission.

[21] Due to political instability, the 12th Lok Sabha was dissolved. This was the reason why the Bill could not be passed.

Articles 45[22] and 51A[23] for providing or ensuring free and compulsory education to a child below 14 years and the same has been passed by the Parliament in 2002[24]. Through this, Article 21A was inserted which reads as follows: "21A. Right to Education. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine".

Article 21A read along with the brief history behind its constitutional amendment makes it clear that the constitutional amendment was never intended to compel the private unaided institutions in achieving the said object. Therefore, the entire responsibility lies on the State and not on others. It means 'State shall provide' and not by 'anyone else' and others cannot be compelled to do.

In order to implement the new Fundamental Right, the Central Government passed the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter the RTE Act), which has been amended in 2012. Though the intention of the constitutional amendment is clear, section 3 and 12 of the Act compels private educational institutions along with aided and Government schools to provide free education and to reserve 25% of the total seats for the same. However, the schools will be reimbursed the expenditure incurred for providing such 25% reservation. Thus, there is a mandate on the unaided schools to admit the students without collecting fee, the same would be reimbursed by the Government which amounts to cross subsidisation. Even though the fee part has been taken care of by the RTE Act, the unaided institutions are not ready to comply with the legislation. As a result, the constitutionality of the Act has been challenged in the *Society for Un-aided Private Schools of Rajasthan* v. *Union of India*[25]. However, the Court held that the Act is constitutionally valid.

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[22] According to the 86th Constitutional Amendment Act, 2002, Article 45 has been substituted as follows: "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years".

[23] According to the 86th Constitutional Amendment Act, 2002, Article 51(k) has been added which reads as follows: "who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years".

[24] The 86th Constitutional Amendment Act, 2002, can be accessed from <http://indiacode.nic.in/coiweb/amend/amend86.htm> (Viewed on 22/11/2012).

[25] (2012) 6 SCC 1.

In this case, sections 3 and 12 along with some other provisions of the RTE Act was challenged as violative of the Fundamental Rights guaranteed under Articles 19(1)(g), 29 and 30. It was argued by the petitioners that "The principles stated in Part IV of the Constitution and the obligation cast on the State under Article 21A, it was contended, are to be progressively achieved and realized by the State and not by non-state actors and they are only expected to voluntarily support the efforts of the State."[26] Therefore, it is the duty of the State not of the unaided institutions to provide free and compulsory education. The petitioners welcomed the objective of the Act but contented that it should not be done at the cost of "abridging or depriving the fundamental rights guaranteed to the citizens who have established and are administering their institutions without any aid or grant but investing their own capital."[27] In support of their arguments they relied on the *TMA Pai Fundation*[28], *Islamic Academy* [29] and *P. A. Inamdar cases*[30].

However, the Solicitor General, the Attorney General and other counsels for the respondents rejected the contentions and argued that reasonable restrictions can be placed on Article 19(1)(g). Therefore, it was contemplated that the Act is constitutionally valid. While, the CJI, S. H. Kapadia, delivered the jndgment on behalf of the majority, Justice K. S. Radhakrishnan gave a dissenting opinion. The contribution made by the Supreme Court in commercialising higher education through its judgments in *TMA Pai Fundation, Islamic Academy* and *P. A. Inamdar cases* is well known. However, interestingly, while delivering the majority judgment, some of the decisions given by larger benches have been ignored by the majority and the same have been rightly quoted and highlighted in the dissenting opinion.

According to the majority, *TMA Pai Fundation, Islamic Academy* and *P. A. Inamdar cases* are entirely different from the case in haud because those cases are relating to higher education and dealing with school education. In addition, it was held that those cases dealt with institutions and not with rights of the child. Moreover, it was highlighted that, the Government can put

[26] *Id.*, p. 55.
[27] *Ibid.*
[28] *T. M. A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481.
[29] *Islamic Academy of Education & Anr.* v. *State of Karnataka & Ors.*, (2003) 6 SCC 697.
[30] *P. A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537.

reasonable restrictions. Based on the above reasons, it was held that the Act is constitutionally valid except one provision of the Act[31].

Though there are a number of issues arising out of this case, the present discussion is limited to one issue, i.e., whether the right to education could be enforced even against private unaided institutions in the absence of a constitutional mandate.

Right to education is a socio-economic right which cannot be handled like civil and political rights. However, the same will not be suitable for socio-economic rights. The reason is that unless and until the State is willing to implement such rights, no one can claim such rights and even could not be enforced before any court of law. Therefore, it is always appropriate to have an express provision for doing so, like Article 21. Suppose if an express provision is there, even then the question remains as to whether private educational institutions can be forced to share the burden of the State. As discussed, the history of Constitutional Amendment with respect to Article 21A, clarifies that the Article never intended to fix the responsibility on the private educational institutions. Therefore, it is not appropriate to come up with a legislation which mandates all the stakeholders, including, the private unaided schools, to give 25% reservation in total seats for poor students at free of cost. One can argue that though the private institutions are compelled to provide 25% free reservation seats, the expenditure thus incurred by them would be reimbursed by the Government which amounts to cross subsidisation. Cross subsidisation has been held as an infringement of the fundamental rights of the self financing educational institutions[32].

According to the majority, *TMA Pai Foundation* and *P.A. Inamdar* are related to higher education. When the petitioners advanced their arguments based on *P.A. Inamdar case* that there can be no reservation in the unaided institutions, the Court rejected the same and pointed out that the 93rd Constitutional Amendment to Article 15[33] has abrogated that particular issue

[31] *Supra* n. 16, p. 30.

[32] It was held in *TMA Pai Foundation Case* that: "we agree with the conclusion of the learned Chief Justice that the scheme (Cross-Subsidization) cannot be considered to be a reasonable restriction and requires reconsideration and that the regulations must be minimum".

[33] The 93rd Constitutional Amendment Act, inserted a new clause (5) to Article 15 which reads as follows: "Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any

of reservation. Therefore, based on this Constitutional Amendment the Court held that there is no hurdle to have any reservation in the private un-aided institutions for the admission of students. Here the issue is about elementary education. If the petitioners are barred from invoking help from *P.A. Inamdar case,* for the reason that the case is related to higher education, the Court is also barred from invoking help from the Constitutional Amendment. The Constitutional Amendment was made to correct the problem created by the *P.A Inamdar case*. When you say the ease is connected with higher education, then the solution provided is also connected with higher education and not elementary education.

Assuming that the majority opinion is right on the above issue, Article 15(5) enables to have reservation only in the non minority educational institntions. No one can compel the minority edueational institutions to provide free and compnlsory education. Then the result is the Act can be made applicable only to the non minority educational and aided schools and not to the minority unaided schools. Moreover, as per the amendment, the reservation is only for the socially and educationally backward classes and for Scheduled Castes and Scheduled Tribes and not for economically backward classes. But, the entire legislation is focused on the economic factor and not based on the social and educational backwardness. Thus, a student belonging to an upper cast but economically backward cannot get admission in a private unaided school under this legislation. Thus, the entire purpose of the legislation is defeated. The decision has thus contributed to more conceptual confusion that existed in this field.

As rightly pointed out in the dissenting opinion, it is for the legislature to come up with a clear vision abont implementation of the right to education[34]. This issue ean be answered only by the legislature not by the judiciary. Therefore, there is a need for having an express constitutional provision which can cast an obligation on the private unaided educational institutions for offering free education, seat sharing, etc.

socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30".

[34] *Supra* n. 16, p. 49.

Conclusion and Suggestions

The above discussion leads to the following conclusion:

1. Since the right to education is a socio-economic right, it should be treated differently from Fundamental Rights that are civil and political rights.

2. Since it is a Socio-Economic right, the State has the sole responsibility in its implementation.
3. As per the literal interpretation Article 21A and from the background of the amendment, it is very clear that the State shall provide it not by anyone else.

4. Unless and until it is clarified in the constitutional provision as to who would be responsible in sharing the burden of implementing this socio-economic right, the sole responsibility lies with the State.

The purpose of the Act as well as the concern of the judges who gave the majority opinion is appreciated. It is also a fact that in a country like India, Government cannot alone fulfil all the needs of the people, especially, in the field of education, as huge capital is needed for the purpose. Therefore, it is wise as well as advisable to demand or compel all the educational institutions, including, unaided institutions, to provide free and compulsory education with 50% reimbursement and not 100% as provided in the Act. However, that should be done only by having a constitutional provision which should compel the private unaided institutions to share the burden along with the Government.

The entire confusion has been created only by the Supreme Court, especially with respect to higher education, by offering numerous interpretations to Articles 19(1)(g), 29 and 30[35]. By ignoring the precedents, the Apex Court decided the present case and held that the Act is constitutionally valid. It clearly shows that the Supreme Court has

[35] See, *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, *Islamic Academy of Education & Anr.* v. *State of Karnataka & Ors.*, (2003) 6 SCC 697, *P. A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537.

undermined the interpretations offered relating to the above mentioned Articles in the light of unaided educational institutions. In this context it is believed that the judgement in discussion can be noted as 'per incuriam'.

However, one should agree on the point that the reason behind the judgement is appreciable, even the dissenting opinion also supports the view. When majority ignored the well known precedents and their logical interpretation with respect to unaided educational institutions, dissenting opinion highlighted the prevailing problems in the light of said precedents. It is time for the Indian judiciary to rethink their over enthusiasm about educational institutions and their management at all level. Judiciary itself is responsible for the confusions caused in the context of educational institutions and their management. Therefore, the solution could not be derived from the Court and it is for the Parliament to decide and settle the issue not only in the primary and elementary education but also about higher education as well.

THE SECOND OPTIONAL PROTOCOL TO THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND HUMAN TRAFFICKING

Shouvik Kumar Guha*

Abstract

This article offers an insight into the Second Optional Protocol to the United Nations Convention against Transnational Organized Crime, which focuses on migrant smuggling. The article contrasts the close concepts of migrant smuggling and human trafficking, highlighting the essential differences and the inherent failure of the Protocols to deal with the expansive grey areas on the topics. To bring forth an enticing discussion, the author has provided a general introduction to the topic, to be followed by an analysis of the concept of human trafficking and migrant smuggling. The concept of migration, its different forms and its linkage with human trafficking and migration smuggling have also been dealt with. The different facets of the Second Optional Protocol have then been reviewed in an analytical and comparative frame and the various overlapping issues have been outlined, including the essential differences between trafficking and smuggling and the inherent failure of the optional protocols to address the same. The article finally emphasises regional solutions as better means to tackle these forms of transnational crimes and concludes with a critical overview at the Indian scenario characterized by the lack of proper legislation to deal with progress hindering crimes like trafficking and migrant smuggling.

Introduction

The term 'human trafficking', in the international context, has evolved to mean contemporary slavery and forced or bonded labour, which often includes commercial sex trade, tourist industry, child soldiers, factory workers and other forms of bondage[1]. The phrase 'human trafficking' is in some form a misnomer as human trafficking simply indicates a process that often leads to slavery, instead of being slavery itself as it is often interpreted in modern times[2]. The two phenomena of 'human trafficking' and 'human smuggling' are often perceived as meaning the same, because both have their

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[1] Claude d'Estrée, "Human Rights and Human Trafficking", available at <http://www.du.edu/korbel/ hrhw/researchdigest/trafficking/Introduction.pdf> (Viewed on 29-6-2012).

[2] *Ibid.*

roots in irregular migration and involve people being moved clandestinely[3]. However, human trafficking and smuggling are essentially different from each other, mostly when one refers to organizational dynamics, the relationship of perpetrators with victims, as well as their voluntary and involuntary natures of the processes, along with issues of trust and exploitation[4]. The differences between these two processes and the relevant legislations regarding them are the focus of the article.

The modern day understanding of these terms have their basis in the United Nations Protocols[5] that were supplements to the Convention against Transnational Organized Crime, 2000[6]. These Protocols attempted the first real distinction between human trafficking and human smuggling, and lay down a structure to elaborate on the general definition of these terms[7]. However, in spite of the fundamental differences being highlighted, the Protocols fail to elaborate on the further distinctions between these two terms[8]. The focus of this article is to bring to light these differences and suggest remedies for the same.

The Different Categories of Migration

The human trafficking process has its basis in the vulnerability of the victim and can be majorly divided into three sub-processes, each of which can be considered to be an element of human trafficking; first, movement, second, deception or coercion, and third, exploitation or slavery like practice[9]. The

[3] See, Carolyn Burke, "Smuggling versus Trafficking: Do the U.N. Protocols have it right?", available at <http://www.du.edu/korbel/hrhw/researchdigest/trafficking/UNProtocols.pdf> (Viewed on 29-6-2012). Also see, John Salt, "Trafficking and Human Smuggling: An European Perspective", *Internal Migration*, 2000/1 31(2000), available at <http://lastradainternational.org/lsidocs/538%20pdf.pdf> (Viewed on 29-6-2012).

[4] *Ibid.*

[5] The two Protocols are the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (hereinafter, the First Optional Protocol or the Trafficking Protocol) and the Protocol against the Smuggling of Migrants by Land, Sea and Air (hereinafter, the Second Optional Protocol or the Smuggling Protocol).

[6] See, *supra* n. 3.

[7] *Ibid.* See also, Kristina Touzenis, "Trafficking in Human Beings: Human Rights and Trans-national Criminal Law, Developments in Law and Practices", 3 *UNESCO Migration Studies* 28 (2010), available at <http://unesdoc.unesco.org/images/0018/001883/188397e.pdf> (Viewed on 29-6-2012); ICHRP, "Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence", *International Council on Human Rights Policy* 13 (2010), available at <http://www.ichrp.org/files/reports/56/122_report_en.pdf> (Viewed on 29-6-2012).

[8] *Ibid.*

[9] Md. Shahidul Haque, "Ambiguities and Confusions in the Migration- Trafficking Nexus: A Development Challenge", available at <http://www.iom.org.bd/publications/2.pdf> (Viewed on 29-6-2012).

first element is the source of this article. Movement or migration of people from one place to another is a core element of human trafficking, a progress hindering phenomenon in the modern world. However, several issues exist due to overlapping definitions of migration, migrant smuggling and human trafficking. However, before delving further into the topic, it is important to elaborate on the background and the method in which these three concepts are carried out. In this regard, the different types of migration and also its relationship with human trafficking and migrant smuggling need to be analysed.

A. *Voluntary Migration and its Involuntary Counterpart*

'Involuntary' or 'forced' migration implies that people are compelled to move out of their place of living, without their consent, usually due to fear of persecution or events threatening their lives or safety[10]. Such fear may be in the form of large-scale human rights violations, repression, conflict, military aggression, natural and man-made disasters[11]. The people who, due to the above reasons, are forced to cross international borders in search of refuge are called refugees, and those forced to move to another place within the state-borders are called internally displaced people (IDPs)[12]. On the other hand, 'voluntary' migration refers to a situation in which people migrate from one place to another in search of better livelihood or for other reasons, with complete consent to the procedure[13].

B. *The Nuances of Migration and Human Trafficking*

In general, as we have seen above, migration is a general concept encompassing a wide variety of movement, and trafficking is a sub-category of migration. Migration is a process of movement of people from one place to another, which can also extend to movement from one country to another in case of international migration. The reasons behind migration can be diverse, but is usually legal[14]. Regular migration therefore extends to those covered under the definition of 'migrants' and 'migrant workers'[15]. A

[10] *Id.*, p. 3.
[11] *Ibid.*
[12] Susan Martin, "Forced Migration, the Refugee Regime and the Responsibility to Protect", 2 *Global Responsibility to Protect* 38, 39 (2010), available at <http://www12. georgetown. edu/sfs/isim/Publications/SusanPubs/Susan%20GlobalR2P.pdf> (Viewed on 29-6-2012).
[13] *Supra* n. 9, p. 3.
[14] *Id.*, p. 4.
[15] *Ibid.*

'migrant worker' is referred to as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national"[16]. Therefore, in case of both migrants and migrant workers, there is a voluntary consent to move. On the other hand, trafficking in persons is a subset of migration, in which people move with consent, but the movement is under a situation of deceit, coercion, threat, or debt bondage, which in eventual course involves exploitation and violation of human rights[17].

It is indeed difficult to effectively differentiate between regular migration and trafficking, as both of them have the same or similar destinations[18]. Movement or mobility is a common element of trafficking as well as regular migration, but it is the presence or absence of deceit, coercion, exploitation, or abuse which should be considered while determining the former[19]. An overlapping grey area between the two processes can be seen here. People who voluntarily choose to migrate may be deceived about the kind of work they are later expected to do[20]. In this case, the process started as migration, but later transformed into trafficking. In another case, a person may willingly migrate for employment but may be trafficked on from the initial employment site[21]. The initial process was not trafficking. Hence, while trafficking normally involves migration, migration does not always involve trafficking[22].

C. *Smuggling and Trafficking in Migrants*

Smuggling in migrants is a phenomenon which occurs when a person desires

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[16] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, Art. 2(3)(a).

[17] The First Optional Protocol, Art. 3 (a), clearly provides: "trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, either by the threat or use of abduction, force, fraud, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, with the aim of submitting them to any form of exploitation ...".
Hereinafter the Trafficking Protocol. Also see, *supra* n. 9, p. 5.

[18] *Supra* n. 9, p. 5.

[19] *Ibid.* Also see, Asian-African Legal Consultative Organization, "The Legal Protection of Migrant Workers", AALCO/50/COLOMBO/2011/SD/S5, available at <http://www. aalco.int /Briefs2011/MigrantWorkers2011.pdf> (Viewed on 29-6-2012).

[20] Catrin Evans and Pankaja Bhattarai, "A Comparative Analysis of Anti-Trafficking Intervention Approaches in Nepal", available at <http:// asiafoundation.org/resources / pdfs/nepaltraffickingmodels.pdf> (Viewed on 29-6-2012).

[21] *Ibid.*

[22] *Ibid.*

to cross a border in an irregular manner, with the help of a third party to facilitate his or her crossing, and a financial or other material payment is made to that third entity[23]. The critical factor separating migration from migrant smuggling is that there is another separate entity involved who receives financial or other material payment for assisting the victim to cross over the border. There is no question regarding consent as both the processes presumes consent of the individual and there is no coercion involved.

Trafficking, on the other hand, occurs when a migrant is engaged without consent and/or moved, across borders, and the perpetrators obtain economic or other profit by means of deception, coercion and/or other forms of exploitation, during any part of this process, under conditions that violate the fundamental human rights of migrants[24]. On the other hand, smuggling occurs when there is only illegal facilitation of border crossing[25].

The Second Optional Protocol

The UN Convention against Transnational Organized Crime and its two Protocols seek to distinguish between trafficking and smuggling, whereas, in reality these distinctions are often blurred. A more nuanced approach is needed to ensure protection for all those at risk. The following sections analyse the relevant details of the Smuggling Protocol in context of trafficking and attempt to compare the two Protocols.

A. The Rising Trend of International Migration

The crime of the smuggling of human beings across international borders, which started as a small scale cross border activity in some countries, has ballooned into a global multi-million dollar enterprise[26]. Though accumulating exact records on human smuggling statistics is difficult and

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[23] The Second Optional Protocol, Art. 3(a), clearly provides: "Smuggling of migrants shall mean the procurement of the illegal entry into or illegal residence of a person in (a) (any) State Party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit". Hereinafter, the Smuggling of Migrants Protocol. Also see, *supra* n. 9, p. 6.

[24] *Supra* n. 9.

[25] *Ibid.*

[26] Jacqueline Bhabha and Monette Zard, "Smuggled or trafficked?", available at <http://www.fmreview.org/FMRpdfs/FMR25/FMR25full.pdf> (Viewed on 29-6-2012).

often unreliable, it can be estimated that around 800,000 people are smuggled across borders every year[27].

The spread of smuggling needs to be understood in the context of globalisation and greatly increased migration[28]. There are prospects of better livelihood, extreme poverty, economic, political and social unrest, as well as, regular conflicts which inspire migration, which is further facilitated by the prevalence of global media and transportation networks[29]. In most developing countries, the job opportunities are unable to keep pace with the volume of demand, which results in people trying to migrate to countries where prospects appear to be more promising[30]. Two trends are a direct consequence of this - first, pressure on the asylum system as the last few legal methods of migration[31], and second, rise in migrant smuggling and illegal cross-border migration.

B. A Theoretical Insight into the Status of Migrant Smuggling Victims

Laws have to be made for migrants or migrant smuggling victims keeping in

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[27] *Ibid.* Also see, Francis T. Miko, *Trafficking in Women and Children: The U.S. and International Response*, CRS Report for Congress, 26-3-2004, available at <http://fpc.state.gov/documents/organization/31990.pdf> (Viewed on 29-6-2012); U.S. Department of State, *Trafficking in Persons Report*, 2003, available at <http://www.state.gov/g/tip/rls/tiprpt/2003> (Viewed on 29-6-2012). These figures do not include the large number of victims who are trafficked within borders.

[28] *Ibid.* See also, ICHRP, "Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence", *International Council on Human Rights Policy* 13 (2010), available at <http://www.ichrp.org/files/reports/56/122_report_en.pdf> (Viewed on 29-6-2012).

[29] *Ibid.* See also, National Prosecuting Authority of South Africa, *Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa*, available at <http://www.hsrc.ac.za/Document-3562.phtml> (Viewed on 12-9-2011); Girish Mishra, "Human Smuggling and Trafficking in Era of Globalization", available at <http://www.zcommunications.org/human-smuggling-and-trafficking-in-era-of-globalization-by-girish-mishra> (Viewed on 29-6-2012).

[30] See, Girish Mishra, "Human Smuggling and Trafficking in Era of Globalization", available at<http://www.zcommunications.org/human-smuggling-and-trafficking-in-era-of-globalization-by-girish-mishra> (Viewed on 29-6-2012). He takes the example of India and says that jobs in India are decreasing because of 1) increase in the flow of foreign direct investment in retail trade, along with large Indian business which results in small shopkeepers and hawkers are becoming jobless; 2) agriculture has ceased to give jobs and sustenance to people dependent on for ages; 3) Handicrafts and small industries have been declining; 4) population increase has led to the entry of more people in the working age group; 5) The spread of education has resulted in the formation of a veritable army of the educated unemployed who want better and more paying job opportunities. Migration has been further assisted by improvements in and expansion of information and communication technologies in recent times and has encouraged the desire for international migration.

[31] *Supra* n. 26.

mind the way they are viewed at. In this respect, three theories have been advocated, which determines how the policy is framed with respect to such victims. The first theory views the migrant as a defenceless victim, who needs to be offered immediate protection, and the policies made for such people should be based on human rights and refugee law, and ensure their protection[32]. The second theory proposes migrants as industrious workers, who make a dual contribution through their labour services in the destination country, as well as economic growth in their home country, where remittances are sent back[33]. Policies based on this theory keep in mind theories for amnesty, regularisation of immigration status and more generally 'migration management'[34]. The third, which is of importance to this article, is the theory which says that the migrant is viewed as a security threat to the State[35]. Criminal law forms the basis for this theory, and law enforcement measures are prescribed to address irregular migration, which is mainly controlled by strengthening border controls and criminalising the facilitators. Using this theory, the States have entered into the UN Convention against Transnational Organized Crime (TNC) as well as its two Protocols on Trafficking and Smuggling[36]. Since the focus of this article is the Second Optional Protocol, a detailed analysis of the same is undertaken below.

C. *The Second Optional Protocol: Objectives and Framework*

Three clear goals are set out by the Smuggling of Migrants Protocol: i) Preventing and combating the smuggling of migrants; ii) Protecting the rights of smuggled migrants; and iii) Promoting cooperation among States parties to those ends[37]. Keeping this in mind we shall proceed with the analysis of the Protocol.

Article 3 of the Smuggling of Migrants Protocol defines the offence of smuggling of migrants as procuring the 'illegal entry' of a person into a State

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[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] See, ICHRP, "Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence", *International Council on Human Rights Policy* 13 (2010), available at <http://www.ichrp.org/files/reports/56/122_report_en.pdf> (Viewed on 29-6-2012).
[37] The Smuggling of Migrants Protocol, Art. 2.

of which that person is not a national or a permanent resident for the purpose of financial or material gain[38].

Pursuant to Article 6 of the Protocol, the State parties are required to criminalise all kinds of smuggling of migrants[39], enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by illegal means[40], producing, procuring, providing or possessing fraudulent travel or identity documents when committed for the purpose of enabling smuggling of migrants[41], organising or directing any of the aforesaid offences[42], attempting to commit any of the above offences, subject to the basic concepts of the State party's legal system[43], or, participating as an accomplice in any of the above offences, subject to the basic concepts of the State party's legal system[44].

It is important to recall that migrants shall not become liable to criminal prosecution under the Smuggling of Migrants Protocol for the fact of having been the object of conduct set forth in Article 6 of the Protocol[45]. It is, therefore, to be understood that all offence provisions developed to give effect to the Protocol should aim to target the smugglers of migrants, and not the people being smuggled[46].

The Smuggling of Migrants Protocol requires States parties to adopt legislative and other measures to establish as aggravating circumstances to the offences of smuggling of migrants, circumstances that endanger or are likely to endanger the lives or safety of the migrants concerned and inhuman

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[38] *Id.*, Art. 3.

[39] *Id.*, Art. 6, para. 1(a). Also see, UNODC, *Toolkit to Combat Smuggling of Migrants*, United Nations Office on Drugs and Crime 5 (2010), available at <http://www.unodc.org/documents/human-trafficking/Toolkit_Smuggling_of_Migrants/10-50885_Tool5_ebook.pdf> (Viewed on 29-6-2012). Hereinafter, *Toolkit*.

[40] The Smuggling of Migrants Protocol, Art. 6, para. 1(c). See also, *Toolkit*, p. 14.

[41] The Smuggling of Migrants Protocol, Art. 6, para 1(b). Also see, *Toolkit*, p. 14.

[42] *Id.*, Art. 6, para. 2(c). Also see, *Toolkit*, at p. 14.

[43] *Id.*, Art. 6, para. 2(a). Also see, *Toolkit*, at p. 14.

[44] *Id.*, Art. 6, para 2(b). Also see, *Toolkit*, at p. 14.

[45] *Id.*, Art. 5. Also see, *Toolkit*, at p. 11.

[46] *Ibid.* See also, the Smuggling of Migrants Protocol, Art. 2. However, it should also be noted that refugees often have to rely on smugglers to flee persecution, serious human rights violations or conflict. They should not be criminalised for making use of smugglers or for their illegal entry. See, Convention Relating to the Status of Refugees, Art. 31 and the Smuggling of Migrants Protocol, Art. 19, which provides for a saving clause.

or degrading treatment, including for exploitation of migrants[47]. The Protocol also implies nothing to undermine the human rights of migrants[48].

With respect to cooperation and assistance[49], a State party is required to cooperate to the fullest extent possible to prevent the smuggling of migrants by sea[50], to exchange information with other relevant States regarding the smuggling of migrants, consistent with domestic legal systems[51], to comply with any request by the State party that submitted such information that places restrictions on its use[52], to provide or strengthen specialised training to combat smuggling of migrants through cooperation with other States[53]. The Protocol further emphasises on States entering into bilateral or regional agreements in order to increase the ambit and purpose of the Protocol[54].

Apart from the above, the States parties are required to strengthen border controls to the extent possible[55], and to consider strengthening cooperation among border control agencies, *inter alia*, by the establishment of direct channels of communication[56]. States parties are also required to ensure the integrity and security of their travel documents[57].

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[47] The Smuggling of Migrants Protocol, Art 6, paras. 3(a) and (b). Also see, *Toolkit*, at p. 24.
[48] *Id.*, Art. 19.
[49] The spirit of cooperation and assistance can be derived from Article 1 of the United Nations Convention against Transnational Organized Crime which states that the purpose of the Convention is to promote cooperation and to prevent and combat transnational organised crime more effectively. See also, Smuggling of Migrants Protocol, Art. 2.
[50] The Smuggling of Migrants Protocol, Art. 7 states: "States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea". Under Article 8, the methods to implement this cooperation and assistance are laid down. The State has to render assistance to a State party in suppressing the use of a vessel flying its State flag (Art. 8, para. 1), to inform the flag State if it has boarded its vessel (Art. 8, para. 3), to respond expeditiously to a request to determine whether a vessel is entitled to claim its registry (Art. 8, para. 4), to respond expeditiously to a request for authorization to board, search and take other measures with respect to a vessel flying its flag (Art. 8, para. 4) and, to designate an authority to assist or respond to requests for assistance concerning such vessels (Art. 8, para. 6).
[51] *Id.*, Art. 10, para 1. Also see, *Toolkit*, p. 64.
[52] *Id.*, Art. 10, para 2.
[53] *Id.*, Art. 14, paras. 1 and 2. Paragraph 2 provides that States should cooperate with other States parties and competent international organisations and non-governmental organisations to ensure adequate training to prevent and eradicate smuggling of migrants. Also see, *Toolkit*, p. 57.
[54] *Id.*, Art. 17 reads: "States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at: (a) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or (b) Enhancing the provisions of this Protocol among themselves".
[55] *Id.*, Art. 11, para 1.
[56] *Id.*, Art. 11, para 6. Also see, *Toolkit*, p. 48.
[57] *Id.*, Art. 12. Under Article 13, they are also required, at the request of another State party, to verify within a reasonable time the legitimacy and validity of documents purported to have been issued by them.

Finally, the Protocol requires each State party to promote or strengthen development programmes that combat the root socio-economic causes of the smuggling of migrants[58], and to provide or strengthen public information campaigns on the criminal nature and dangers of the smuggling of migrants[59].

D. *Comparing the Optional Protocols: Similarities and Dissimilarities*

Though not in detail, the two Optional Protocols distinguish between those who are smuggled and those who are trafficked. A comparison of the two protocols is attempted below.

1. Distinguishing Definitions

Trafficking is defined as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation…"[60]. Though exploitation is undefined but the Protocol specifies that it includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[61] It is important to know here that in all cases of trafficking, as envisaged by the Trafficking Protocol, consent of the victim is irrelevant. On the other hand, under the Smuggling Protocol 'smuggling of migrants' has been defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the

[58] *Id.*, Art. 15, para 3. Also see, *Toolkit*, p. 37.
[59] *Id.*, Art. 15, paras. 1 and 2.
[60] *Id.*, Art. 3(a).
[61] *Ibid.* The article provides: "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

illegal entry of a person into a State Party of which the person is not a national or a permanent resident"[62]. Smuggling refers to consensual transactions where the smuggler and the migrant agree to circumvent immigration control for mutually advantageous reasons, in contrast to trafficking where the consent of the victim is immaterial[63]. It is worth noting here that the smuggling relationship technically ends with the crossing of the border, whereas, trafficking continues till exploitation continues, which may be well after the victim has crossed the borders. The two critical ingredients in smuggling are therefore illegal border crossing by the smuggled person and receipt of a material benefit by the smuggler, which may or may not be present in the case of trafficking.

2. Voluntary and Involuntary Crimes: The Trust Factor

A predominant factor in smuggling and trafficking distinctions is the voluntary or involuntary nature of the crimes. From its definitions, it can be interpreted that smuggling involves a voluntary parameter, where there is a contractual relationship between the smuggler and migrant to illegally transport the migrant for an exchange of profit[64]. Unlike trafficking, the relationship between the migrant and the smuggler ends upon completion of the transaction[65]. There is a level of trust between the smuggler and the migrant, without which the migrant will not enter into the above agreement[66].

The process of trafficking is, however, more involuntary, where the initial established trust disappears almost immediately and the trafficker and the victim only enter an arrangement by means of coercion, force, or exploitation[67]. There is no symbolism of a mutual contractual relationship, and the entire process is forced, or wrapped in deceit. Though the UN Protocols provide basic definitions, they fail to mention the importance of the element of trust in their definitions, which is integral in differentiating these

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[62] *Ibid.*

[63] *Supra* n. 26. See also, Naela Gabr, "Trafficking and Smuggling in Persons", available at <www.mfa.gov.eg/Arabic/Ministry/TraffickingimPersons/inter/Documents/aa.doc.doc> (Viewed on 29-6-2012).

[64] Carolyn Burke, "Smuggling versus Trafficking: Do the U.N. Protocols have it right?", available at <http://www.du.edu/korbel/hrhw/researchdigest/trafficking/UNProtocols.pdf> (Viewed on 29-6-2012).

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.*

two processes, as these processed have different level of involvement of trust, giving basis for its voluntary or involuntary nature[68].

3. Dichotomy

The definitions show that both these UN Protocols have been based around a central dichotomy — between coerced and consenting illegal migrants, between victims and agents, between innocence and guilt[69]. This brings forth two different roots for policy framing and development of laws. On the one hand, the protection needs of 'non-consenting, innocent and deserving' trafficking victims have to be considered[70], while on the other, the position of smuggled migrants has also to be considered, who are said to be culpable and complicit actors[71]. The two categories are well demarcated, whereby, the smuggled migrants are considered to be less deserving of protection compared to trafficking victims, because of their initial consent or will to migrate intentionally. Often differentiation is based on the ground that women and children are more likely to be considered as trafficked whilst men are more likely to be considered as smuggled. Such a distinction is evident from the name of the Trafficking Protocol[72].

4. Nature of Protection and Shelter Available

The two Protocols thus differ in several key respects. However, most importantly, they differ in the kind of protections they afford to their victims. Whilst the Trafficking Protocol provides for a broad range of protective measures, the Smuggling Protocol contains rather minimal reference to the protection needs of smuggled persons[73]. The only instances of protection to victims mentioned under the Smuggling Protocol is when it emphasises that the States are required to ensure the safety of persons that are on board vessels that are searched[74] and they must respect pre-existing non-derogable obligations under international law[75], such as, the right to life and the right

[68] *Id*, p. 106.
[69] *Supra* n. 25.
[70] *Ibid.*
[71] *Ibid.*
[72] It is worth re-emphasising here that the full name of the Trafficking Protocol is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, laying ground for the author's suggestion that trafficking victims are concentrated on being mainly women and children.
[73] *Supra* n. 26.
[74] The Smuggling of Migrants Protocol, Art. 9(1)(a).
[75] *Id.*, Art. 16 (1).

not to be subjected to torture, or to cruel, inhuman or degrading treatment[76]. On the other hand, the Trafficking Protocol clearly lays down provisions with respect to medical[77], psychological or social recovery[78], or temporary legal residency[79], none of which find mention in the Smuggling Protocol.

Also, though under the Smuggling of Migrants Protocol, there is a requirement for the States to provide protection, such a provision is listed in ambiguous terms. It says states the State should "take appropriate measures to afford migrants appropriate protection"[80] against any form of violence from smugglers and in case their lives or safety are endangered[81]. Such a provision can be easily be interpreted otherwise, as there is no overhead body prescribed to determine what constitutes 'appropriate' protection. Additionally, the Protocol clearly lays down the fact that the States can detain smuggled migrants, albeit it leaves provisions for diplomatic or consular access[82].

E. Criminalisation

It is imperative to remember that the Smuggling of Migrants Protocol in no way criminalises the migrants themselves for having been smuggled, by virtue of Article 5 of the Protocol, which reads: "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol."[83] In other words, a person cannot be charged with the crime of smuggling solely on the grounds of having been smuggled. However, this does not mean that such persons cannot be prosecuted for having smuggled others, or for the commission of any other offences, which includes illegal crossing of the border and having non-legal documents, which may well be prosecuted by a State. It is worth remembering that illegal entry may be a crime in some countries, but it is not recognised as a form of organised crime and is hence beyond the scope of the Convention and its Protocols. The procurement of the illegal entry or illegal residence of migrants by an organised criminal group (which, according to the definition used, commits crimes in order to

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[76] *Id.*, Arts. 16(2) and 16(3).
[77] The Trafficking Protocol, Art. 6(3)(c).
[78] *Ibid.*
[79] The Trafficking Protocol, Art. 6(3)(a).
[80] The Smuggling of Migrants Protocol, Art. 16(2).
[81] *Id.*, Art. 16, para. (3).
[82] *Id.*, Art. 16, para. (5).
[83] *Id.*, Art. 5.

obtain financial or other material benefit), on the other hand, has been recognised as a serious form of transnational organised crime and is, therefore, the primary focus of the Protocol.

It is to be noted here that the Protocol seeks to deal with smuggling of migrants *per se* and not migration in general. Thus, it is migrant smuggling the criminalisation of which falls under the purview of the Protocol. The drafters of the Protocol have not taken any stance with respect to the status of illegal migrants; whether they should be charged with any offences remains unclear. Article 5 simply provides that nothing in the Protocol itself can be implied to mean criminalisation of migrants or of conduct of migrants. Criminalisation under the Protocol only extends to members or associates of organised criminal groups.

At the same time, the Protocol limits the existing rights of each State party to take "measures against persons whose conduct constitutes an offence under its domestic law."[84] Such a provision makes the statement under Article 5 even more dubious and makes it clear that States can indeed take action against offenders of domestic law, in spite of the Protocol offering security to such migrants.

The Trafficking Protocol, on the other hand, very clearly lays down the law regarding non-criminalisation of victims, and reiterates in Article 7, where it is said that receiving States must "adopt legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases"[85] and also give "appropriate consideration to humanitarian and compassionate factors."[86] Such clear language allows easier compliance and secures the victims and prevents them from being further exploited.

The above analysis clarifies that though the UN Protocols to combat trafficking and migrant smuggling have made definite inroads into broaching the topics, they have failed to tackle it in depth, and have in effect created more loopholes in the process. The ambiguous wording and the inability to tackle overlapping issues can leave law-enforcement officers as well as victims of these processes in a state of indecisiveness and exploitation

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[84] *Id.*, Art. 6(4).
[85] The Trafficking Protocol, Art. 7, para. 1.
[86] *Id.*, Art. 7, para. 2.

respectively. Also, a victim who is classified as a victim of trafficking is assured of much more protection under the legal framework. On the other hand, ambiguity and the slice of intention or consent in the victims of migrant smuggling leave them without a lot of hope under a framework which claims to protect the right of smuggled migrants[87].

Trafficking and Migrant Smuggling: Inherent Ambiguity, Overlapping Practises and Problems in Classification

The above discussion reveals that there is much to be gained from being classified as trafficked, and much to lose from being considered smuggled. Obviously, there are certainly 'pure' cases of trafficking and smuggling, however, the majority of migration strategies and circumstances defy easy categorisation into smuggling or trafficking.

A. Confusion Regarding Category during Multiple Stages of Journey

Trafficking and smuggling are such overlapping phenomena that at the point of departure and at multiple stages of the journey, it may well be unclear as to which is in effect. Migrants, without legal documentation, appear to consent in some way to an initial proposition to travel. However, *en route* or on arrival in the destination country circumstances might change and the migrant can become a victim of smuggling[88]. The States tend to favour looking at consent at the point of departure as an indication of the migrant's 'true intentions'[89]. In contrast, the focus should be on the circumstances the migrant faces in the destination country. The important question that can be raised here is when should the determination as to the category be made and by what authority.

B. What amounts to 'Consent' and 'Coercion'

Under the two Protocols, it is clear that the distinction between smuggled and trafficked migrants can be considered a tussle between what constitutes 'consent' and 'coercion'. The distinction between these is, however, complex. Destitution, extreme poverty, or prolonged family separation, can

[87] *Id.*, Art. 2.
[88] *Supra* n. 26.
[89] *Ibid.*

lead one to enter into a smuggling agreement[90]. But, can this amount to coercion? The Trafficking Protocol defines 'coercion' to include not only simple brute force but also "abuse of power or of a position of vulnerability."[91] Such language also makes it increasingly difficult to interpret the opinion of the drafters. Whether extreme poverty, destitution, lack of education, displacement from family can form coercive circumstances as they clearly induce a position of vulnerability is still open to discussion[92]. There are no precedents for the same, and the term 'position of vulnerability' can be interpreted broadly. Such an interpretation will lay down the foundation of what constitutes the coercive circumstances leading to trafficking.

C. *Exploitation*

The UN Protocols clearly fail in an important aspect. They fail to recognise that exploitation may occur within smuggling as well as trafficking. Though the Trafficking Protocol manages to address the exploitative nature of trafficking, the Smuggling Protocol fundamentally falls short in recognizing the probable use exploitation to increase profits, in the form of blackmail or force.[93] The Smuggling Protocol fails to recognize that even victims of migrant smuggling are highly vulnerable to exploitation[94]. No matter how different trafficking might be from smuggling, massive grey area envelopes both the phenomena, making it extremely easy to move from smuggling to trafficking, a situation the Protocols fail to address.

D. *Cases of 'Mutually Advantageous Exploitation'*

Potential migrants may pay, or agree to pay, large amounts of money to organisers[95]. As shown above, there exists a close relationship between migrant smuggling and human trafficking. The charging of large fees for people smuggling services may result in a virtual 'debt bondage' between the

[90] *Ibid.*
[91] The Trafficking Protocol, Art. 3(a).
[92] *Supra* n. 26.
[93] *Supra* n. 64, p. 106.
[94] *Ibid.*
[95] Such people pay a lot of money for an unsecure voyage. For instance, in 1992, 180 people died when a boat sank on route from Mogadishu to Yemen, where the passengers were travelling under extreme conditions. See, "Refugee Boat sinks off Yemen's Coast", *New York Times*, 1-4-1998, available at <http://www.nytimes.com/1998/04/01/world/refugee-boat-sinks-off-yemen-s-coast.html?src=pm> (Viewed on 29-6-2012).

migrant and the organisers[96]. There is also evidence that individuals involved in smuggling may use extreme violence as a form of control and secure payment from the migrants and their families[97].

From the above situations, it is difficult to interpret the line between smuggling and trafficking. While, in smuggling, the victims have asked for assistance by smugglers on their own accord, knowing the illegality accompanying, however, they cannot be left behind to be victimised or exploited, simply because they had initial consent. The exorbitant fees, and the coercion along with it, often forces such victims to give up all their remuneration, and often work in extreme and hazardous conditions. Though these people have consented to smuggling, they are indeed victims of trafficking. In such cases, imposing a strict regime against migrants may prove to be difficult and unjust[98].

E. Compliance

One major distinction of the Trafficking Protocol is that it maintains that persons do not have the right to choose to be trafficked, or for their children to be trafficked. This distinction helps to clarify the line between smuggling and trafficking. Another aspect of the Trafficking Protocol is that a person does not have to be directly forced or threatened into being trafficked. If a person can prove that he or she had no alternative means other than to comply, then it falls within the provisions of Trafficking Protocol. These

[96] For instance, the International Organisation for Migration (IOM) has noted cases of undocumented Chinese immigrants in the United States who work in restaurants linked to organised crime and spend their nights locked up in prison-like dormitories, after handing over all of their day's earnings. See, P. Kwong, "Wake of the Golden Venture China's Human Traffickers", *The Nation*, October 17, 1994, 422-25, in International Organisation for Migration, *Overview of International Migration, International Organisation for Migration*, Geneva, 1995, p. 100.

[97] The Chinese migrants in New York are reportedly "... repeatedly punished and tortured by debt collectors who do not hesitate to use cruel and unusual measures to force their captives' families and relatives to deliver the smuggling fees as soon as possible". See, K. Chin, "Safe House or Hell House? Experiences of Newly Arrived Undocumented Chinese", in P. Smith (Ed.), Human Smuggling: Chinese Migrant Trafficking and the Challenge to America's Immigration Tradition, Centre for Strategic and International Studies, Washington D.C., 1997, pp. 169-95.

[98] It has been reinforced by scholars worldwide that in case of women the divide between smuggling and trafficking is much nearer. Anne Gallagher, "The Role of National Institutions in Advancing the Human Rights of Women A Case Study on Trafficking in the Asia Pacific Region", available at <http://www.asiapacificforum.net/about/annual-meetings/4th-philippines-1999/dowloads/thematic-issues/women_traffic.pdf> (Viewed on 29-6-2012). Gallagher speaks of the consistent violation of rights of women even in cases of migrant smuggling. This, according to her, increases their vulnerability to exploitation.

aspects of the Trafficking Protocol allow for a broader definition of human trafficking, making compliance more straightforward.

F. Organised Crime Structures

Trafficking uses highly organised crime structures, which makes it a clear case of transnational crime. On the other hand, smuggling operates on an individual level or within loosely structured networks[99]. There is no hierarchal system and usually no sub-levels or form of rigid control, which are major features of a transnational crime like trafficking[100]. Smuggling is mostly carried out by independent actors and maintains a circulatory element of business feeders[101].

All of the above situations show the inherent grey area existing between migrant smuggling and human trafficking. These situations show that the lack of protection provided to smuggled migrants, on the basis of initial consent, may prove to be victimising them effectively, as in most cases exploitation is the end result. The distinction between this and human trafficking is slim, and almost unaccounted for. There is an inherent ambiguity in understanding the slim differences between the two phenomena, and it is furthered by problems in classification. The overlap often makes exploited migrants exposed to further victimisation and hardly any protection before the law.

The Regional Solution: Enforcement of International Law and the Indian Perspective

The overlapping issues in the two close concepts of human trafficking and migrant smuggling lead to several obstacles when it comes to enforcing the international law relating to the subject. These obstacles make it difficult to impose such a legal regime governing both phenomena simultaneously without clear differentiation. On the diametrically opposite end of this argument lies the further argument that if indeed both these phenomena are dealt with completely different regimes, there might be immense problems in implementation due to the overlapping issues.

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[99] *Supra* n. 64.
[100] *Ibid.*
[101] *Ibid.*

A. *Enforcement of International Law: The Regional Solution*

From the above discussion it is clear that trafficking may occur at any destination, the home of the victim, as well as the final or subsequent destination, if the victim ventures into smuggling which later has the capability to change into trafficking[102]. For this reason, anti- trafficking interventions should cover both these locations.

Implementation of the Optional Protocols with respect to human trafficking and migrant smuggling can be highly efficient if incorporated into regional and domestic legislation[103]. The mandate for such regional instruments can be found in the Protocols itself, as such decentralisation ushers quicker response and simple methods of collaboratively tackling these progress hindering phenomena, while adjusting and synchronising with the local laws. A few examples of such regional instruments are the United States Victims of Trafficking and Violence Protection Act, 2000, the Council of Europe Convention on Action against Trafficking in Human Beings, 2008, the European Convention for the Protection of Human Right and Fundamental Freedoms, 1950, and the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT), 2005, which includes China, Laos, Thailand, Cambodia, Myanmar, and Vietnam[104].

Other important regional migration instruments in Asia include the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 2007[105], the Bangkok Declaration on Irregular or Undocumented Migration, 1999[106], the Paris Declaration on Migration and Development,

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[102] Kristina Touzenis, "Trafficking in Human Beings: Human Rights and Trans-National Criminal Law, Developments in Law and Practices", 3 *Unesco Migration Studies* 25, available at <http://unesdoc.unesco.org/images/0018/001883/188397e.pdf> (Viewed on 29-6-2012).

[103] Lindsey King, "International Law and Human Trafficking", available at <http://www.du.edu/korbel/hrhw/researchdigest/trafficking/InternationalLaw.pdf> (Viewed on 29-6-2012).

[104] *Ibid.*

[105] Association of Southeast Asian Nations (ASEAN), 2007. Signatories to the ASEAN Declaration are Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. The ASEAN Declaration sets out obligations for both sending and receiving States and aims to strengthen the cooperation between them.

[106] International Symposium on Migration, *Towards Regional Cooperation on Irregular/Undocumented Migration*, 1999. This Declaration, made by ministers and governmental representatives of Asian and Pacific countries, calls for cooperation, information

2008[107], etc. Added to this is the signing of the SAARC Convention on Trafficking[108]. To implement the SAARC Convention, countries in South Asia have tried to bring forth comprehensive legislation on the topic. The Government of India, for instance, has redrafted the Immoral Traffic Prevention Act, 1956, in keeping with the concept of non-victimisation of victims and criminalisation of perpetrators[109]. The Government of Nepal has proposed a new Human Trafficking Control Bill, 2007, to reform its old legislation[110]. The Government of Sri Lanka has dealt effectively with exploitation of children *vide* the National Child Protection Agency established in 1998[111]. The Government of Bangladesh has set up an inter-ministerial task force in order to combat trafficking and smuggling[112].

In addition, the ratification of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, 1990, would establish common standards for the humane treatment of migrant workers in their countries, which could reduce the vulnerability of many of these workers to trafficking.

B. The Indian Perspective

India is one of the source, destination as well as transit country for victims of human trafficking, forced labour and migrant smuggling. India, a country with one of the highest rates of human trafficking and migrant smuggling in the world, has ratified the UN Convention against Transnational Organized Crime and its supplementary Protocols as late as May, 2011, nearly 11 years

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exchange, humane treatment of victims of trafficking and stronger criminalisation of trafficking in persons.

[107] Second Euro-African Ministerial Conference on Migration and Development, 2008.

[108] According to the 2002 SAARC (South Asian Association for Regional Cooperation) Convention on Preventing and Combating Trafficking in Women and Children, "Trafficking is the illegal moving and selling of human beings across and within countries and continents in exchange for monetary and/or other compensation." While the Convention focuses on trafficking for sex work, there are many other reasons for human trafficking in South Asia: forced marriage, forced labour, domestic service, organized begging, camel jockeying, circus work, illicit adoption, pornography production and organ trafficking for the transplant market.

[109] Hereinafter, the ITPA. See, Nandita Baruah, "Trafficking in Women and Children in South Asia: A Regional Perspective", available at <http://www. empowerpoor. org/ downloads/ Trafficking%20in%20South%20Asia.pdf > (Viewed on 29-6-2012).

[110] *Id.*, p.7.

[111] *Ibid.*

[112] *Ibid.*

after the signing of the Convention[113]. The ratifying of this Convention signifies that India will have to have a comprehensive legal framework for tackling trafficking as well as migrant smuggling.

As the Convention provides for rigorous training, India now has to find ways to train law enforcement officers to book victims of trafficking under laws under which they are not categorised as victims[114]. Till now, most victims of trafficking are booked under the ITPA and are treated as offenders, as they are required to pay a fine in order to be released. Often, such victims have no money, and they re-enter the exploitation loop[115]. Further, the ratifying of the Convention allows India to enter into negotiations with other countries, like, Pakistan and Bangladesh, in order to jointly tackle these issues[116].

The laws in India intended to prosecute perpetrators are mainly the Bonded Labour System (Abolition) Act, 1976, the Child Labour (Prohibition and Regulation) Act, 1986, the Juvenile Justice (Care and Protection of Children) Act, 2000, and the ITPA[117]. While the first three have a maximum sentence of a modest three years, the ITPA can give a maximum sentence of seven years to life for sex offenders. Apart from this, sections 366(A) and 372 of the IPC is also used to criminalise perpetrators. The ITPA has a controversial section 8, which is often used to criminalise sex trafficking victims, a strict bar under the International Protocol.

The Ministry of Labour and Employment has rescued and rehabilitated more than 750 bonded labourers[118]. The Ministry of Women and Child Development (MWCD) has implemented the *'Ujjawala'* Scheme, which is a

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[113] Aditi Tandon, "India ratifies UN protocol against human trafficking", *Tribune*, New Delhi, 19-5-2011, available at <http://www.tribuneindia.com/2011/20110520/nation.htm> (Viewed on 29-6-2012).

[114] US Office to Monitor and Combat Traffic in Persons, *Trafficking in Persons Report, 2011*, US Department of State, available at <http://www.state.gov/g/tip/rls/tiprpt/2011/164232.htm> (Viewed on 29-6-2012). Hereinafter, *Trafficking Report*. The Ministry of Home Affairs' launched the Government's 'Comprehensive Scheme for Strengthening Law Enforcement Response in India', which seeks to improve India's overall law enforcement response to all forms of trafficking, including, bonded labour, and established at least 87 new Anti Human Trafficking Units (AHTUs).

[115] *Supra* n. 113.

[116] *Ibid.*

[117] US Office to Monitor and Combat Traffic in Persons, *Trafficking in Persons Report, 2011*, US Department of State, available at <http://www.state.gov/g/tip/rls/tiprpt/2011/164232.htm> (Viewed on 29-6-2012).

[118] *Ibid.*

comprehensive scheme for prevention of trafficking and rescue, rehabilitation and re-integration of victims[119].

However, aberrations remain, and victims continue to be charged under section 8 of the ITPA or section 294, IPC. Foreign migrants are often detained due to lack of documentation, under the Foreigners' Act, 1946. These kinds of anomalies result in further victimisation of the victim, and failure to achieve the objects of the Protocol. Also the lack of proper laws with respect to migrant smuggling in India, provide for a large loophole in the legal framework, considering the millions of people illegally being smuggled across borders.

Conclusion

Migration is a risky process, which can lead to immense problems to both the migrant as well as the law enforcement agencies. The closely related concepts of migrant smuggling and human trafficking create a haze of victims who cannot be classified on the face and strictly put under one heading. A broader, encompassing view is required giving priority to exploitation in any sense accompanied by mobility from one place to another. Such a view is lacking in the UN Protocols, which seem to offer more protection, security and favour victims of human trafficking to migrant smuggling.

Exploitation can occur in any stage of movement, and can be a part of a process which was initially only smuggling or trafficking, or an overlap of both. Legislation and international conventions should focus on treating this evident exploitation as the primary source of evidence while criminalising the perpetrators. Victimising the victim further intensifies the abhorrence of this crime, and must be curbed and victims of both processes must be offered proper protection and rehabilitation as soon as possible. The mere reason of underlying consent to smuggling should not deter the law enforcement agencies from taking the victims being exploited and work towards their protection and rehabilitation.

Regional agreements and inter country solutions can prove to be highly effective in curbing such phenomena, which adversely affect all nations, be it

[119] *Ibid.*

source, transit or destination and reinforce the priority of human rights in the eyes of the world community. At a domestic level, laws must be developed in accordance with the international framework, and with strict focus on criminalizing the perpetrators and protecting the victims.

The inherent difficulties in distinguishing the two phenomena, however, do not suggest that the international framework is not workable. The policy makers need to keep in mind the priority of vulnerability and exploitation, and come up with a process which combines criminalisation of perpetrators and protection of victims, irrespective of the process of mobility of the victim. The grey area will not disappear by distinguishing definitions, but by a human rights approach which focuses on protection for all migrants. The policy makers need to be aware of this and form legislations that uphold such an approach, and accord the victims their deserved protection.

THE SPS AGREEMENT AND HARMONISATION — A CHALLENGE

Sumedha Upadhyay*

Abstract

The Agreement on Application of Sanitary and Phytosanitary Measures (the SPS Agreement) came into force for human, animal and plant protection. The preamble of the Agreement requires the member countries to base their SPS measures on international guidelines and recommendations formulated by the International Organisations. While SPS is binding on members it also provides discretion to member countries to act within their own parameters by allowing them to adopt stricter measures than those laid down by the International Organisations provided they are supported by scientific evidence and they are not arbitrary, unjustified or more trade restrictive than necessary. This provision has been an important contributor to discussions within and outside the WTO on whether they have led to the increase in barriers to international trade as some countries have adopted stricter standards on products, whereas, others were not in consensus.

The international standards set up by the three sister organizations, Codex, OIE and IPPC, under the agreement, issue international standards for the member countries to consider while they formulate their own SPS measures, but the only value that has remained of these standards is merely recommendatory and members specially developed nations always find an escape path by relying upon scientific evidence construction of which is not a very baffling task for them unlike the developing nations for whom to produce strong scientific evidence would be a hard fought situation.

The delusional status of 'Private Standards' whether they are covered under the hood of the SPS Agreement is another much debated argument within the WTO. Additionally, with the increased health awareness while the developed nations like the EU are adopting higher standards but are the developing nations at par with these rocketing health standards and whether the SPS Agreement provides a solution for reconciling these differences is a faded scenario.

While the dispute settlement mechanism exists to deal with unfair restrictions on trade flows, member countries may want to look at setting up a technical

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body within the WTO which can be approached to take an independent opinion on the necessity of higher standards when they begin to impede free flow of trade. The Agreement has not failed its purpose; it is indeed the grundnorm for regulating international food trade. However, while on one hand the members are raising their standards the SPS has not moved on from what it was when it was adopted. Hence to meet the needs of the current environment the SPS needs to be reviewed for better harmonisation.

Introduction

International trade in food is as old as nations. Ever since nations existed, they have exchanged food and other agricultural products. In earlier times, the trade system that existed for exchange of goods was the barter system. Slowly barter system gave way to economic trade between merchants from all across the nations and trade in agricultural products provided clear economic benefits. Thus, food and other products became cheaper, and the choice of products available expanded gradually. Agriculture remained a cornerstone of many economies, especially, in developing countries like India. Developing countries used their agricultural production as a means of earning revenue for their countries.

A fundamental requirement was that imported as well as domestic agricultural products should be safe, and not pose risks to human, animal and plant health[1]. To ensure food safety, and to avoid the introduction of diseases and pests through trade, countries imposed regulations to protect human and animal health (sanitary measures) and plant health (phytosanitary measures). Unlike most manufactured products, agricultural output requires additional care. In the case of agricultural products, apart from the productivity and quality considerations at the production level, there are some necessary precautions that need to be taken when the product is stored and transported. Absence of such cautious measures would have adverse effects on the quality of the product, resulting in increased wastage and decreased market value. Further, this holds true for both raw and processed food products. Thus, it is in the self interest of the producers as well as the exporters to ensure that certain hygienic and other safety conditions are met. With an increase in the levels of health-safety awareness among the citizens of both developing and

[1] The GATT Agreement, Art. XX(b).

developed countries, this practice becomes imperative for the suppliers of these products[2].

The GATT, since its inception, emphasised on national food safety, animal and plant health. It contained an exception in Article XX(b)[3] which stated that countries could adopt measures to protect human, plant and animal health as long as they did not justifiably discriminate between the countries or were not designed to be a disguised trade restriction. General Exceptions from GATT rules, such as, National Treatment[4] and Most Favored Nations[5] concepts were allowed for measures necessary to protect human, animal or plant life or health[6].

These general exceptions were explained very briefly under Article XX and were often used as disguised trade barriers by many member countries especially the developed nations as they would often set very high health standards on imported food products and then take recourse to Article XX(b) as an escape clause[7]. This gradually lead to debates amongst the members about the unjustified use of Article XX(b) by countries to protect their domestic food industry, thereby, preventing market access for many developing and other nations. A need arose for formulating a comprehensive international instrument governing health protection measures being imposed by countries on imported products. The main purpose behind this idea was to harmonize the various health measures being imposed by different countries in order to bring in some cohesion in the field of international food trade law.

It was finally the Uruguay Round which gave prominence to areas which were never touched before in any of the rounds --- food quality and food

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[2] Kajli Bakshi, "SPS Agreement under the WTO: The Indian Experience", J. K. Mittal and K. D. Raju (Eds.), *World Trade Organization and India: A Critical Study of its First Decade*, New Era Publication, New Delhi, 2005, pp. 57-74.

[3] Art. XX(b) reads: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human, animal or plant life or health;".

[4] Non-discriminatory trade policy commitment which, under GATT (now WTO) rules, implies that a government cannot treat foreign exporting good any less favorably that its own locally manufactured goods which are similar in nature.

[5] Term means that the country which is the recipient of this treatment must, receive equal trade advantages as the "most favored nation" by the country granting such treatment (Trade advantages include low tariffs or high import quotas) not less advantageously than any other country with MFN status by the promising country.

[6] See, Art. XX(b).

[7] *Brazil — Measures Affecting the Import of Retreaded Tyres*, WT/DS332/R.

safety[8]. And ultimately the Agreement on Sanitary and Phytosanitary Measures (hereinafter referred to as the SPS Agreement) came into force with the establishment of WTO on 1st January 1995. The SPS Agreement was entered into with the objectives of ensuring provision of safe goods to the consumers of a country and at the same time to ensure that protection measures of human, animal and plant health were not being used as a pretext to protect domestic producers[9].

Meaning of Sanitary and Phytosanitary Measures[10]

For the purposes of the SPS Agreement, sanitary and phytosanitary measures are defined as any measures applied:

- to protect human or animal life from risks arising from additives, contaminants, toxins or disease-causing organisms in their food;
- to protect human life from plant- or animal-carried diseases;
- to protect animal or plant life from pests, diseases, or disease-causing organisms;
- to prevent or limit other damage to a country from the entry, establishment or spread of pests.
- Protect the health of fish and wild fauna, as well as of forests and wild flora.

SPS measures can take many forms. Examples of SPS measures include the following:

- requiring animals and animal products to come from disease-free areas;
- inspection of products for microbiological contaminants;
- mandating a specific fumigation treatment for products; and
- Setting maximum allowable levels of pesticide residues in food.

The SPS Agreement: Its Scope and Features

The SPS Agreement establishes international rules on how to apply sanitary and phytosanitary measures. It acknowledges a country's right to protect itself from risks to human, animal health and plant life and it confirms the

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[8] See, United Nations, *Food Quality, Safety and International Trade,* available at <http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/presspack_english.pdf> (Viewed on 25-3-2012).

[9] The SPS Agreement, preamble.

[10] *Id.*, Annex A, para. 1.

need to constrain countries from using such measures as excuses to create unnecessary barriers to trade. In short the purpose of the agreement is to enable the legitimate protection of life and health while not give rise to illegitimate protectionism. Protectionism in this regard is defined as trade barriers beyond what is required to meet a country's desired protection levels[11]. The approach that has been adopted to address these two problems together is to base the SPS measures on science. In this way only those measures which aim at protecting the human, animal and plant health will be allowed and those that are not related to life and health issues at all or excessively strict are ruled out[12].

The regulations of SPS Agreement can be divided into four cases[13]:

1. The areas in which international standards already exist, the agreement encourage international harmonisation based on international standards. This does not mean that absolutely identical standards be adopted worldwide but they should have some basic relationship to the same reference points.
2. In areas where no international standards exist, measures for individual member countries are permitted if they are based on risk assessment techniques and non discriminatory.
3. If a country does not find that the protection levels provided by an international standard are high enough, it may implement strict measures. This right is yet again conditional on formal risk assessment and that the measures are non discriminatory.
4. Lastly, when not enough scientific evidence is available for a proper risk assessment, temporary measures are allowed on the condition that they must be reviewed after a certain time and the implementing country must seek additional evidence.

In order to achieve its objectives the SPS Agreement aims at 'harmonisation' which is very clearly laid down in the preamble: "Desiring to further the use of harmonised sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the

[11] Imteyaz Hasan, "Indian Standards Setting Institutions and Technical Barriers to Trade", Manoj Shankar Gupta, *WTO and Indian Economy*, *Serials* Publications, 2007, pp. 434-454.
[12] *Ibid.*
[13] *Ibid.*

relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health".

Members may adopt SPS measures which result in higher levels of health protection or measures for health concerns for which international standards do not exist provided that they are scientifically justified[14]. Members also need to undergo risk assessment[15] procedures[16] in order to support the various SPS measures adopted by them. In case sufficient scientific evidence is not available with respect to a measure which is being adopted by a member country, the agreement allows them to adopt the measure provisionally provided that they will renew it within a reasonable period of time[17].

The SPS Agreement works on three main principles of harmonisation[18], transparency[19] and equivalence[20]. The principle of harmonisation is well founded in the preamble of the Agreement itself. It basically requires the member countries to base their standards on the international guidelines and recommendations by the three sister organisations, thereby, achieving harmonisation while adopting health measures[21]. The principle of equivalence applies when different measures achieve the same level of protection. The Agreement recognises the principle of equivalence under Article 4.1. Sometimes, the importing country is obligated to accept as

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[14] The SPS Agreement, Art. 3.3 reads: "Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5".

[15] The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs (Annex A to SPS Agreement).

[16] The SPS Agreement, Art. 5.1 reads: "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations".

[17] *Id.*, Art. 5.7.

[18] *Ibid.*

[19] The SPS Agreement, Art. 7.

[20] *Id.*, Art. 4.1.

[21] *Id.*, Annex A, para. 2.

equivalent the SPS measure of the exporting country which might be different from the importer's measure but maybe similar in essence if the exporting member proves it to the importing member that their level achieves the same level of protection as that of the importing country. Transparency requires that there should be adequate transparency and publication with respect to the measures adopted by the member countries. Members should aim at establishing enquiry points to entertain any requests made by another member country. Further, every member should issue notifications of the measures adopted by them and any changes made in such measures at a later stage[22]. Some of the important features of the SPS Agreement are discussed below.

Scientific Risk Assessment[23]

The SPS agreement in Article 5.1 requires that the SPS measures be based on an assessment of the risks to human, animal or plant life or health. It does not necessarily require that the importing country itself must do the risk assessment. They must be able to demonstrate that its measure is based on risk assessment. Members are to take into account the risk assessment techniques developed by the three sister organisations. Further, Article 5.2 explains what kinds of information shall be taken into account when undertaking a risk assessment:

- available scientific evidence;
- relevant processes and production methods;
- relevant inspection, sampling and testing protocols;
- prevalence of specific diseases or pests;
- existence of pest- or disease-free areas;
- relevant ecological and environmental conditions; and
- quarantine or other treatment.

Article 5.3 identifies the economic factors which shall be taken into account when undertaking a risk assessment for animal or plant health, which are:

- The potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease;
- The costs of control or eradication in the territory of the importing Member; and

[22] *Id.*, Annex B.

[23] See, <http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm> (Viewed on 14-4-2012).

- The relative cost-effectiveness of alternative approaches to limiting risks.

However, Article 5.7 provides an exception to Article 5.5 and 5.6 by permitting to adopt provisional measures when there is an insufficiency of scientific evidence with respect to a particular health measure. In such cases the measures can be adopted on the basis of the available information but provided that it will be reviewed within a reasonable period of time. What is the "reasonable period of time" has not been provided in the agreement. Provisional measures could be taken for example as an emergency response to a sudden outbreak of an animal disease suspected of being linked to imports. Another example is the case of new food processing techinques where sufficient evidence regarding safety does not yet exist[24].

Consistency

The consistency feature under Article 5.5 requires that the countries must be consistent while applying their health measures in different situations. For example, if a Member restricts the importation of one animal product because of disease risks, yet allows the importation of other animal products presenting identical or similar risks, there would be a concern that the objective may be protectionism (protection from competition), and not health protection.

Transparency

The agreement requires that there should be adequate transparency and publication with respect to the measures adopted by the member countries. Members should aim at establishing enquiry points[25] to entertain any requests made by another member country. Further, every member should issue notifications of the measures adopted by them and any changes made in such measures at a later stage[26].

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[24] See, <http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c2s8p1_e.htm> (Viewed on 31-1-2012).

[25] The SPS Agreement, Annex B, Enquiry Points reads: "Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding all existing proposed SPS measures, control and inspection procedures, production and quarantine treatment, food additive approval procedures, risk assessment procedures, determination of appropriate level of protection and membership of international and regional SPS organizations".

[26] *Id.*, Art. 7.

Aid to Developing Countries

Under Article 9 the member countries have a responsibility to facilitate technical assistance to other countries specially the developing countries that are economically weak. And under Article 10 while imposing any SPS measures they should also take into consideration the needs of the developing countries and the least developed countries in terms of providing them with longer transition periods.

Equivalence

As discussed above, the principal of equivalence is one of the most important features of the agreement. This principle applies when different measures achieve the same level of protection. Article 4 of the agreement recognises the principle of equivalence. Sometimes the importing country is obligated to accept as equivalent the SPS measure of the exporting country which might be different from the importer's measure but may be similar in essence if the exporting member proves it to the importing member that their level achieves the same level of protection as that of the importing country. In order to facilitate equivalence, the exporting members must allow reasonable access to the importing member for the purpose of inspection, testing and other procedures.

There are instances where equivalence agreement has been reached by countries, for instance, between EC and New Zealand[27]. In 1994, the Scientific Veterinary Committee (Animal Health) of the European Commission (EC) published a document considering the heat treatment of milk originating from foot and mouth disease (FMD) affected areas. The publication recommended specific heat treatments that could be applied to potentially infected milk to destroy the FMD virus.

The recommendations were subsequently incorporated into the EC legislation. The EC accepted imports of dairy products from countries that had experienced outbreaks of FMD, provided the milk had been subjected to one of the specified heat treatments. New Zealand operated a policy of only accepting dairy products from countries that had been free from FMD for at least 12 months.

[27] See, <http://www. wto.org/english/tratop e/sps_e/sps_ agreement_cbt e/c2s9p1 e.htm# example> (Viewed on 30-3-2012).

During negotiations on a New Zealand/EC veterinary agreement in 1996, it was agreed that New Zealand would undertake a risk analysis of dairy products and that the EC would provide information to support their position on accepting dairy products from countries with FMD. New Zealand completed the risk analysis in early 1998 and adopted a similar position to the EC. As a result, New Zealand was able to recognize the relevant EC legislation as being equivalent to New Zealand standards.

Interestingly, the World Organisation for Animal Health (OIE) also considered the same information and subsequently adopted the heat treatments recommended by the EC as part of the OIE International Animal Health Code.

Implementation/ Dispute Settlement

The Agreement under Article 12 establishes the formulation of a Committee on SPS measures to provide for a forum of consultations on food safety or animal and plant health measures which affect trade and aim at ensuring implementation of the Agreement. The SPS Committee, like other WTO committees, is open to all WTO Member countries. The Committee maintains close contact with the three sister organisations with the objective of securing the best technical and scientific advice for the administration of the agreement[28].

There is no separate body to look into the diputes arising with respect to the nature of SPS measures adopted. Article 11 of the Agreement provides that the rules of Dispute Settlement Understanding shall apply to the consultation and settlement of disputes under the Agreement uncles otherwise expressly provided. They are decided upon by the panels at first instance and in case there are any appeals they are preferred to the Appellate Body. The Panel may also call for the establishment of an advisory of group of scientific experts or even consult the international organisations at the request of any of the parties[29].

[28] See, The SPS Agreement, Art. 12.3.

[29] *Id.*, Art. 11.1.

SPS Measures not based on International Standards

According to Article 3 and Article 5 of the SPS Agreement, Members are permitted to adopt SPS measures which are more stringent than the relevant international standards or adopt SPS measures when international standards do not exist, provided the measures are:

- based on scientific risk assessment;
- consistently applied; and
- not more trade restrictive than necessary.

The application of Article 3 and 5 was well founded in the famous *EC Hormones*[30] case in which the EC banned the imports of beef from Canada and USA which was administered with growth hormones on the ground that it was necessary for food safety. The WTO panel held that EC violated Article 3 on harmonisation. Although international standards existed for five out of six hormones in question, the EC ban was not based on these standards and required a higher level of protection which was not justified by a risk assessment under Article 3.3. It further violated Article 5.1 as the scientific evidence provided by EC for five out of six hormones had no rational relationship with the ban on the beef import.

A similar scenario was witnessed in the *Australian Salmon case*[31]. Australia imposed a ban on the import of chilled or frozen salmon in order to protect its domestic salmon population from a number of diseases. Canada claimed that the salmon imported for human consumption was unlikely to introduction of any diseases. The panel held that the import ban was violative of Article 5.5 as it was not based on any risk assessment. Australia carried out risk assessment only for ocean caught pacific salmon and the panel found no rational relationship between the measure and the risk assessment. There was no risk assessment carried out for other kinds of salmons. Thus Australia's measure violated Articles 5.5 and 5.6 by imposing a measure which is more trade restrictive than necessary.

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[30] *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R.

[31] *Australia — Measures Affecting Importation of Salmon*, WT/DS18.

SPS and International Standards

The SPS Agreement encourages the member countries to adopt measures which are in conformity with the international standards. These international standards are set by the following international bodies:

1. The Codex Alimentarius Commission (food safety)[32],
2. International Office of Epizootics (animal safety)[33], and
3. International Plant Protection Convention (plant protection)[34].

The standards are developed by leading scientists and government experts on health protection. The member countries are allowed to fix standards higher or lower to these international standards. And if the standards are higher than the international standards then it has to be supported by scientific evidence[35] expressing that the available international standards are not enough to deal with food, animal and plant safety in the country imposing such a standard. This leverage under the Agreement has led to the countries (mostly developed) adopting higher standards most of the time which are easily justified by them by providing scientific evidence. Thus, most of the times, the international standards play the role of merely a recommendation or referral standards.

While SPS is a legally binding document on the member countries, the international standards set by Codex, IPPC or OIE do not have a binding force. There is no legal obligation upon the member countries to apply Codex guidelines, standards and recommendations. They are considered to be voluntary in nature. The general principles of Codex lay down "the publication of Codex is intended to guide and promote the elaboration and establishment of definition and requirements of food to assist in their harmonisation and in doing so, facilitate international trade[36]." Hence, this implies international standards are merely reference standards for member countries to keep in mind while they are drafting their own human, animal and plant health standards.

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[32] Codex Alimentarius Commission is a collection of food standards, guidelines and recommendations.

[33] It is recognised as a reference organization by the World Trade Organization (WTO) for animal health and animal products.

[34] It is a multilateral treaty which focuses on international cooperation in controlling plants, plant products and plant health.

35 The SPS Agreement, Art. 5.

[36] See, < http://www.fao.org/DOCREP/005/Y2200E/y2200e05.htm> (Viewed on 1-3-2012).

In other words, there is no harmonisation of SPS measures across the world, and the purpose with which the agreement came into force is undermined to a great extent. Besides the problem of lack of cohesion between international standards and the high SPS measures the other problem of international food trade is the obstruction caused due to the higher standards adopted by the developed nations, which is discussed in detail as below.

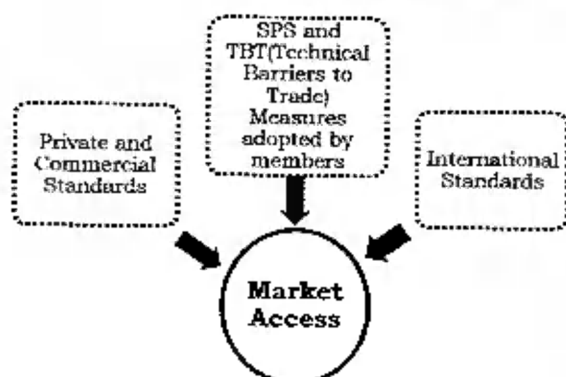
Changing Scenario of SPS Measures: Trouble for Developing Nations

The sanitary and phytosanitary measures adopted by a particular member country do not always remain constant. A country has to modify its health protection measures from time to time in order to conform to the changing needs of its citizens. With the changing living standards, widespread education and increasing awareness, purchasing capacity, development, technology advancement, increase in production, etc., the demands of the citizens also change and in order to meet these demands the governments have to modify their health measures. For instance, after the break outs of many diseases, such as, mad cow, influenza, etc., in the European countries, the governments realised the need to raise the standards of food quality and safety. Apart from these factors, another contributing factor was the introduction of GMO in food products and the doubts attached to its authenticity and safety. Citizens started demanding high food safety requirements and hence, in order to cater to the interests of the citizens the government raised many of its standards from what they were earlier. The standards now demanded a whole lot of not only processing, certification and production but also transport and storage requirements. As the awareness increased, the level of standards also increased across the world. Not only are these standards stricter in nature, they also pose a problem of harmonisation of standards as every country has a different standard. Thus, an exporter of food products has to face the difficulty of facing a new standard every time he tries to enter the market. Other than the prevalent international standards and the higher standards adopted individually by any country, there are also private and commercial standards that exist mostly in Europe and USA. They are developed by private companies or organisations, which are usually big retailers and business actors, which contractually impose compliance with their standards to their suppliers. For instance, GLOBAL GAP[37](Good

[37] EurepGAP is a private sector body that sets voluntary standards for farm management practice created in the late 90's by several European supermarket chains and their major suppliers.

Agricultural Practices) is one of the most popularly private standard around the world. The trade barriers encountered by countries while entering a market if represented in the below figure.

Barriers Encountered while Entering Markets in Other Countries



However while the developed nations were trying to protect their citizens from any kind of diseases arising from imported contaminated food by raising their SPS measures, the developing countries were facing the problem of complying with these standards. Due to lack of the scientific and technical knowledge, resources, advanced equipment, trained personnel, this posed a challenge for many agriculture oriented countries including India. Such measures, while on one hand were being modified to come in terms with the present demands of citizens in the developed nations, were also posing as a major trade barrier for countries like ours which were largely dependent upon their agricultural output.

For instance, EU after facing big health scares such as the mad cow disease and recently, the e-coli outbreak has reviewed some existing standards[38]. It is a major importer of fisheries from across the world and Uganda is one of its biggest exporters. But when there was a cholera outbreak in Uganda, EU banned all its imports and raised the SPS measures irrespective of the fact that it had been an importer of fisheries from Uganda. This is a pointer to the fact that countries take health concerns very seriously and even long term import markets can face the heat if they do not meet the standards of importing countries[39].

[38] Promoting its system based audits approach, see, <http://trade. ec.europa.eu/ doclib/docs/ 2011/ september/tradoc_148212.pdf> (Viewed on 11-11-2012).

[39] A paper presented at the UNCTAD sponsored workshop on Standards and Trade, Kampala, Uganda, 13-9-2001.

Developing countries have for long maiutained that these standards cau be and are being used as trade barriers against them. This practice has an adverse impact on their exports. The most common complaint is that the standards are set very high, and often unreasonably[40]. Compliance with the standards of developed nations would require advanced means of technology, which may require large scale investment on installation of uew machinery which is usually not available domestically aud hence, might have to be imported adding excessive cost burden on the countries. It is in fact coutended that the standards are strategically kept at high levels so that exports from the developing countries can be banued. For example, many countries have very strict restrictious for presence of Alfatoxins[41] in spices. Afriean countries are estimated to have suffered a loss of 670 million US Dollars in agricultural exports because of the higher EU standard for aflatoxin as compared to the Codex standard[42]. Exporting the rejected product back to the exporting country also adds another pressure of unnecessary expenditure since they have to bear the cost of transporting the entire containment of the rejected food product back home.

The capacity to comply with SPS measures depends on country's level of development and organization of production. The lower the level of development, the lower is the capacity for the compliance. The LDCs suffer from both these factors, nor do they have high levels of development neither do they possess the kind of production facilities that are required. For instauce, the total cost of compliance of tropical fruits amounts to 7% of the total cost of the exports of Mozambique. Snch small time exporters, like Mozambique, are not able to bear this cost and hence, they lose a lot of trade[43].

Other than this, Codex has issued a guideline for all the food processing companies to install Hazard Analysis Critical Control Points (hereinafter

[40] *Supra* n. 2.

[41] Alfatoxins are naturally occurring toxins that are metabolic byproducts of fungi, *Aspergillus flavus*, and *Aspergillus parasiticus*, which grow on many food crops under favorable conditions. It may have adverse impact on animal and human health with acute toxicological effects on such as liver damage and cancer.

[42] Mehdi Shafaeddin, "SPS Measures Causing High Costs and Losses to Developing Nations", available at <www2.unine.ch/files/content/sites/irene/files/.../sha_spsmeasure.pdf> (Viewed on 30-03-2012).

[43] *Ibid.*

referred to as HACCP[44]). This has added yet another expense for the developing and least developed nations as it is a mandatory requirement in USA and EU both. The EC put a ban on imports of fish from Gujarat because it did not adopt a HACCP system[45]. However, multinational companies, like Nestle, have already planned to implement HACCP for coffee growing and processing[46].

Furthermore, these standards are often developed in a non transparent manner in other words many of the SPS measures are adopted without the participation of the developing nations in the standard setting process as a result of which the developing nations do not even get time to respond to them[47]. There is no reasonable time period allowed between publishing of the standards and bringing them into force[48]. This is when there is a specific provision for providing special and differential treatment to developing and least developed nations. Article 10 of the Agreement mentions that where some time is required for such developing countries to introduce and comply with the standards, longer time frames should be allowed for compliance[49]. And yet the escape route through Article 3.3[50] is taken as a defence by these developed nations, thereby, hindering the international trade of many developing and least developed nations which rely upon their agricultural exports to a great extent for their national income.

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[44] HACCP includes analysis of hazards, identification of critical control points, formulation of preventive measures, monitoring procedures, corrective actions, procedures to verify that the system is working properly, record keeping and documentation.

[45] *Supra* n.42 .

[46] Satish Deodhar, "WTO Agreements and Food Safety", Anwarul Hoda (Ed.), *WTO Agreement and Indian Agriculture,* Social Science Press, Delhi, 2002, p. 142.

[47] WTO Document, WT/GC/W/202.

[48] Pritam Banerjee, "SPS - TBT Measures: Harmonization and Diversification?", Dipankar Sen Gupta *et. al.* (Eds.), *Beyond the Transition Phase of WTO, An Indian Perspective on Emerging Issues,* Academic Foundation, New Delhi, 2006.

[49] Art. 10 reads: "Special and Differential Treatment- 1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.

2 Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.

3 With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.

4 Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations".

[50] *Supra* n. 8.

Indian Scenario

India, not only being a developing nation but most of all being an agrarian economy, also faces big challenges while trying to comply with not just international standards but the standards being imposed by developed nations such as USA and EU countries. India has made several submissions to the SPS Committee from time and again questioning transpareney of the SPS Agreement and proposing that adequate time be provided for other members to raise concerned objections. It also submitted that the notification procedures do not provide sufficient information to enable members to get acquainted with them[51]. Usually a very brief description is provided instead of a detailed description. Another concern that was raised by India was that even though the SPS Agreement lays great emphasis on international standards, it does not define in precise terms when a standard should be considered as au international standard. ludia proposed in its submission to the SPS Committee in September 1998, that since diverse conditions prevail in the developed and developing countries, it may be more appropriate to harmonise standards of a particular region where similar eonditions prevail[52].

At the Third WTO Ministerial Conference in Seattle, India submitted a proposal to the General Council regarding SPS measures[53]. India submitted that SPS measures by developed nations create obstacles in two ways. Firstly, because the SPS measures are often developed iu a non-transparent mauner and developing countries invariably do not get adequate opportunity to respond to the proposed measures. Secondly, the Agreement provides that in order to ensure that the adoption of a new SPS regulation does not cause barriers to trade there should be a reasonable interval between its publication and its entry into force (Article 10). It further provides that "longer time-frames for compliance" be provided for developing countries. The basic purpose of these provisions is to provide sufficient time to producers in developiug countries to adopt their products to the requirements of uew regulations. In practice, compliance of these provisions by countries introducing new measures has been largely non-existent. Though the SPS Agreement provides that countries base their SPS measures on international standards, guidelines and recommendations, the participation of developing countries in the international standardization activities has been limited and

[51] *Supra* n. 58.
[52] *Supra* n. 44.
[53] *Supra* n. 59.

ineffective[54]. A number of international standards are thus being developed without the participation of developing countries. As a result, standards are often being adopted without taking into account the problems and constraints that developing countries face[55].

Another important proposal was that the definition of an international standard, guideline and recommendation (paragraph 3 of Annex A) needs to be revised so that a differentiation is introduced between mandatory international standards and a voluntary international guideline/recommendation[56].

Some of the areas where India faced trouble in exporting its food products to other members are mentioned below:

1. Fisheries: a lot of times the imports of fisheries are rejected due to poor hygiene conditions of our ports where the fish arrives. The fishing boats have a very dirty appearance when they arrive on the port. When fish and shrimp are unloaded they are dumped in a pile in an unorganized manner. There is no separation of fish from the general walking areas. Though many of the processing centers complied with Codex standards but not all processing centers did. Most of the hygiene related issues arose at the primary produce level due to lack of awareness, education, infrastructure, machinery, trained personnel, etc[57].

2. Mango Pulp: In India most of our primary production takes place in small scale unorganised sector. EU demands that each mango farmer must keep records of the use of its mangoes in processing mango pulp. The rationale provided by EU behind this is that in case a consignment of mangoes is found to be contaminated or harmful, the farmer can be traced. However, if the pulp processor observes strict quality checks at every point there will be no need to keep such records. In such a case

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[54] Ministry of Commerce, "India and the WTO", available at <http://commerce.nic.in/wto oct.htm#back2> (Viewed on 4-4-2012).
[55] *Ibid.*
[56] Preparations for the 1999 Ministerial Conference, JOB(99)/4797/Rev.3.
[57] Sukhpal Singh, "New Barriers to Trade under WTO: Implications of TBT and SPS Measures for India's Agro – Food Industry and Agro Exports", G. K. Chaddha, *WTO and Indian Economy*, Deep and Deep Publications, Delhi, 2001.

then the pulp processor and exporter will be liable for standard compliance[58].

3. Milk Products: The EU standards for milk products requires cheeks originated from the level of primary production and also lays down conditions of animal maintenauce and the type of feed to be given, etc. Under Indian circumstauees, a dairy farm may just have one or two drought animals and the milk is collected from a number of small holdings and then sent to the processing unit. Thus, it is tough to monitor each and every animal from which the milk is coming. Furthermore, the standards formulated by EU are much stricter in nature than even those established by OIE (International Animal Health Code) for animals. The International Animal Health Code does not specially provide for conditions relating to milk and milk products originating from regions infected with sheep pox, goat pox, blue tongue, etc. But the EU standards lay down that the animals must belong to areas which were free from any form of Foot and Mouth Diseases[59].

4. Aflatoxins in Peanuts: In 1999 EU imposed some uew tolerance limits for the presence of randomly from a 30 kg sample. If in any of the three tests the limit was found beyond the prescribed limit then the entire lot was rejected. This revised standard was a lot stricter than even those imposed by Codex. FAO experts have concluded that is such a measure is imposed, the aflatoxin in peanuts and a uew testing procedure constituting three tests on material drawn risk probability of eating a contaminated nut for every EU citizen will be one nut in every 27 years, which is far below the possibility of any health risk. Such stringent standards are unnecessary, more trade restrictive than required and without any rationale behind them[60].

The above are just some of the examples where Iudia and other developing countries face trouble in complying with the day by day stricter standards that are being adopted by the developed nations.

While the developed countries are moving far ahead in the arena of international food trade, India has also witnessed a complete shift in the food

[58] *Supra* n. 29.
[59] *Ibid.*
[60] *Supra* n. 52, p. 65.

consumption trends of individuals from what they were few decades ago. India, since earlier times, has remained an agrarian economy with 60% of its population surviving on agriculture as their livelihood. Earlier, people only had a demand for bare minimum products for survival and there was no concept of frozen, canned or readymade food products. However, slowly with the advent of globalization and privatization during the 90s and more and more number of MNCs coming in, people were introduced to imported and better quality products. This has led to an increase in international trade and India's level of development, which resulted in a shift from consumption of primary products to luxury and high quality products. Also, with India becoming a member of WTO it had to make its food safety standards in line with Codex[61].

The Indian food basket has expanded from mere primary dairy products to a whole new variety of processed, frozen, ready to eat, pre cooked, microwave food products, along with exotic fruits and vegetables. Thus, food habits have changed over a period of time and India is striving to bring its food security legislations in line with present needs.

The Food Safety and Standards Act, 2006, was passed consolidating all the previous food safety regulation acts, such as, the Livestock Importation Act, 1898, the Prevention of Food Adulteration Act, 1954, the Milk and Milk Products Order, 1992, the Fruit Products Order, 1955, etc. It aims to provide a singe reference point for all kinds of food safety and standards in India[62].
Apart from consolidating the laws relating to food safety, the Act was enacted to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto[63].

The definition of 'food' provided in the Act is also very wide[64]: "Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent

[61] Frost and Sullivan, "The Changing face of Indian Food Legislation", available at <http://www.frost.com/prod/servlet/market-insight-top.pag?docid=208038160> (Viewed on 4-4-2012).
[62] *Ibid.*
[63] The Food Safety and Standards Act, 2006, preamble.
[64] *Id.*, s. 2(j).

defined in clause (zk)[65], genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances".

The Food Safety and Standards Act, 2006, includes within its scope baked products, snacks and sweets, instant mixes, confectionary products, frozen fish, processed cereal goods, edible oils, and canned fish products. The above mentioned food items were never in demand during the 50s and 60s; it is with development that the need arose and for which the government had to modify its food products' safety regulations to provide the citizens with better quality, high in nutrient value and enlarged variety of products. This point out that India is moving ahead with time and trying to bring its food legislations in line with the present needs of the citizens.

Hence, with such rapid changes taking place at national and international level in the field of food products, it is also incumbent on the part of developing countries also to try to achieve higher levels of food security and on the part of developed nations to provide some reasonable time period for compliance. Developing countries should try to upgrade their technology and enhance their capacities to comply with the standards. This would help in achieving better market access internationally and also provide profitable trading opportunities. This way they will never be looked down upon by the developed world in terms of hygiene and health concerns and will be treated more at par with the developed nations. But another argument forwarded is that developed nations will never stop themselves from imposing higher standards even when developing countries raise their levels because they will always aim at protecting their domestic markets. Ultimately the exporting country will not gain anything even if it upgrades its technology[66].

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[65] "Primary food" means an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman;

[66] *Supra* n. 1.

Conclusion

The Agreement on application of Sanitary and Phytosanitary Measures came into force for human, animal and plant protection. The preamble of the Agreement requires the member countries to base their SPS measures on international guidelines and recommendations formulated by the International Organizations, such as, Codex, OIE and IPPC. While SPS is binding on members it also provides discretion to member countries to act within their own parameters by allowing them to adopt stricter measures than those laid down by the international organizations provided they are supported by scientific evidence and they are not arbitrary, unjustified or more trade restrictive than necessary. This provision has been an important contributor to discussions within and outside the WTO on whether they have lead to the increase in barriers to international trade as some countries have adopted stricter standards on products which other countries consider as not necessary. While the dispute settlement mechanism exists to deal with unfair restrictions on trade flows, member countries may want to look at setting up a technical body within the WTO which can be approached to take an independent opinion on the necessity of higher standards when they begin to impede free flow of trade.

The international standards set up by Codex, OIE and IPPC are recommendatory in nature. Members have to at the very least comply with the international standards, however, their measures maybe stricter or less strict provided they are based on strong scientific evidence which is indicative of the fact that the international standards set up by these recognised bodies are not sufficient enough to protect their human, animal and plant health. Hence, these international bodies have no binding force upon the countries, they are free to impose any level of sanitary and phytosanitary protection. Additionally, there are some grey areas which need to be addressed. For instance, the Article providing for adoption of provisional measures the "reasonable period" has not been defined. Regarding the definition of "international standard", it was proposed by India to the General Council at the third WTO Ministerial Conference that the definition needs to be revised in order to bring out a differentiation between mandatory and voluntary international standards. Also, the international standards need to be updated to bring them in line with the present needs and times. Currently, there are no international standards dealing with Genetically Modified Products (GMOs), and the debate attached to the

authenticity and safety of GM food products highlights the importance of regulations in this regard.

As for the developing nations, if they want to survive in the highly competitive world of international food trade then they need to update themselves. And this would not only benefit those countries who are importing from such developing nations but also the domestic markets of these developing countries. India as a developing nation does not have to update its processing systems to meet the hygiene requirements of Europe or USA, it has to think in a way that the benefit will ultimately trickle down to its consumers who have an equal right to consume food which is rich in nutrients and free from any contaminants. Thus, the approach should not be an export oriented approach but an approach from the point of view of raising health standards within the country itself which will automatically help them improve their position in the eyes of the developed world thereby resulting in a better market access.

In order to achieve this objective the developing countries, including India, have to bring in some domestic reforms. They have to focus on training their personnel in post harvest quality management practices and food processing activities. Setting up of farm schools maybe on the lines of other higher education institutes should be given priority, where essentials of hygiene, food handling practices, good agricultural practices and processing are taught as certificate courses. Furthermore, such training should be made mandatory for all those involved in pre farm gate activities and post farm gate activities[67]. Currently, the majority of personnel that is involved in the supply chain are uneducated or those who are not professionally trained in this field. Improving the quality of technology and food processing machinery would equip them to deal with high standards imposed by other developed countries. Another important reform of great significance is increasing the awareness and imparting education to citizens from school levels regarding human, animal and plant health. Majority of people as of today have not even heard of the terms 'sanitary and phytosanitary'. Thus, spreading awareness regarding health measures and letting people know about such multilateral agreements, just like any other important national legislation, would play a significant role in uplifting the health sector. In EU the main reason behind the rising standards is development, awareness and education. Only when people are aware of such concerns do they raise demands and the same has to

[67] *Supra* n. 43.

be done in developing countries. Once people in countries like India, Bangladesh and African countries are aware of such health concerns they would also accelerate the demand for higher health standards. This would in turn result in the developed countries treating them at par in terms of human, animal and plant health. Therefore, bringing about such domestic reforms would churn out some substantial results in the field of agriculture.

At the international level there is an urgent necessity to make the WTO system more transparent for better harmonisation. Concept of "like products" needs to be given the due importance even in case of SPS measures, like the Most Favoured Nations and National Treatment cases. If an imported product is processed, produced and manufactured in different conditions than those required by the importing country, however, they achieve the same level of hygiene then they should be given like treatment and allowed to enter the market. This would help in harmonisation of standards to a considerable extent.

Better and effective participation of the developing countries in the standard setting process is an area which needs to be given ample weightage. There is a serious need of linking farmers with processing and exporting agencies so that the quality of food products can be ensured from raw material production stage till the final stage of delivery[68]. The WTO might also want to involve farmer groups in standard making process so that they know what level of hygiene is expected out of them.

The SPS Agreement has not failed to achieve its purpose. It has succeeded in providing a strong platform for trade in agricultural and marine products amongst member nations. The Agreement forms the bedrock of international food trade. It is the grundnorm from which the international organisations derive validity while setting up international standards. These basic principles have to be followed by member nations in all circumstances. It has helped to some extent in harmonising the standards set by different countries. But what is lacking is that while food laws are dynamic in nature the SPS has still not been modified to come in line with these dynamic food security regulations. With the changing times, advancement of technology and increase in awareness amongst the masses, food safety norms have also changed. Members are becoming more and more concerned about the

[68] *Supra* n. 50.

protection of the health of their citizens and hence they have raised their levels of food standards.

While on one hand the members are raising their standards the SPS has not moved on from what it was when it was adopted. Hence, to meet the needs of the current environment the SPS needs to be reviewed. For this purpose an independent body within the WTO may be set up which reviews the SPS Agreement from time to time in order to keep it relevant to the changing needs of the countries. In case there are differing standards with respect to a particular food product then a mean or an average of all the standards set by members with respect to that product can be taken which can form the base minimum standard to be followed by the nations. This way the SPS can keep up with the changing needs of the nations.

To say that the SPS is a dead letter or a useless lumber would not be correct because if SPS is declared as insignificant then there is no other Agreement which would deal with international trade in food and replace it. To declare a law as faulty is very easy but to make another law in place of it which meets all the requirements would be an altogether tedious task. Hence, what is required is to review the already established law, harmonise it and bring it in line with the changing needs.

GENDER JUSTICE, LABOUR LAWS AND POLICIES IN INDIA

Neelam Tyagi*

Abstract

Stemming from the patriarchal social structure and division of labour, quoted studies and reports suggests that the labour market segmentation has proliferated and continued the wage and income inequalities across men and women despite pro-women welfare labour legislations in India. Women still face overall discrimination with respect to recruitment, hours of work, leave, health and safety primarily due to non-implementation of welfare legislation in its true spirit.

In this article, special focus is given to the work conditions of the women in an unorganised or informal sector, were majority of women workforce is employed. This work sector is marked by the absence of almost all the labour rights, job insecurities and insecurity with meagre remunerations. Placed in such miserable position, women in unorganised are constantly exploited as they fall outside the scope of all the major welfare laws and have little or no State protection.

However, the Judiciary, through its various landmark judgements is doing commendable job in changing this scenario with the objective of bringing gender equality, justice and rights to women in the employment sector but still a lot need to be done for uplifting the status of women workers and for creating conducive work conditions for them.

The paper attempts to evaluate the various dimensions of Indian labour market and gender inequalities. Starting from the background of tracing the motivating factors, international and national mandates behind evolution of labour legislation that aims to secure social and economic justice for workers, it tries to bring into focus as to how and to what extent the welfare provisions framed for the women workers in India are effective.

Introduction

Every economic system from time immemorial has required and utilised the

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work of women. The evolution of the agricultural economy resulted in the division of labour between the sexes and assigning to men the more difficult task and women the less tiring chores of the hearth and the home. It was only after the advent of industrial revolution that this orderly scheme of women's work and women role was upset and women left their hearth and homes to work for wages[1].

Speaking of the modern times, a working woman has become a normal feature of our modern society and India is no exception to that. The purely domestic life has been transformed into one of useful outdoor activities necessitated to supplement the family[2]. The transition of work to more productive lives, the change from home to factory, resulted in the interface of women as wage earners and raised her economic and social status[3].

International and Constitutional Mandates to Secure Gender Justice for Women

International Mandates

Labour Laws in every part of the globe are influenced by important human rights conventions and standards that have emerged from the UDHR adopted in 1948 by the United Nations[4]. Some of the important conventions are the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979, that directs states to take all measures to eliminate discrimination against women in the field of employment and to ensure maternity leave with pay, without loss of employment[5]. The International

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[1] V.V. Giri, *Labour Problems in Indian Industry*, 3rd Edn. , Asia Publishing House, Bombay, 1972, p. 406.

[2] Tribhuvan Jyotsana, *Law Relating to Women in India*, P. R. Ambika, Poona, 1965, p. 64.

[3] *Supra* n. 1.

[4] These are usually a combination of certain rights like, Right to Work; to Free Choice of Employment; to Just and Favourable Conditions of Work and to Protection against Unemployment (Article 23); Right to Life; Liberty and security of a Person (Article 3); Right against Slavery and Servitude (Article 4); Right to Freedom; Peaceful Assembly and Association (Article 20); Right to Social Security (Article 22); Right to Rest, Leisure Period, Holiday with Pay and Limitation on Working Hours (Article 24); and Right to Standard of Living adequate for the health and well being (Article 25). It also enshrines the "equal rights of men and women" and addresses both equality and equity issues thereby setting in motion the universal thinking that human rights are supreme and ought to be preserved at all costs.

Covenant on Economic, Social and Cultural Rights (ICESCR),1966, that recognises the right of everyone to the enjoyment of just and favourable conditions of work, fair wages, equal remuneration for work of equal value without distinction of any kind and above all that the work conditions of women should not be inferior to those enjoyed by men[6].

International Labour Organization (ILO) which came into existence in 1919, sets up the International Labour Standards in the form of Conventions which create legally binding obligations on the countries that ratify them in its conventions[7] that aims at gender equality provides for social security measures[8]. Again the UN Millennium Development Goals (MDGs), 2000, that will be complete by 2015 in its goal number three targets to promote gender equality and empowerment of women throughout the world.

Constitution and Labour Philosophy

Glanville Austin describes the Indian constitution "as first and foremost a social document"[9], as majority of its provisions are directed towards promoting the goals of social revolution and establishing the conditions necessary for its achievement. This is amply clear from the preamble and Fundamental Rights under the Indian constitution as they aim at providing equality[10], prohibits discrimination on grounds of religion, race, caste and sex[11] and permits the State to make special provision, i.e., allow 'protective discrimination' in favour of women and children[12], by providing equality of opportunity to all citizens without discrimination on the basis of religion, race, caste and sex[13]. Also right to demonstrations and right to form unions[14],

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[5] See, CEDAW, Art. 11.
[6] See, ICESCR, Art. 7.
[7] India is signatory to the following four conventions, viz., Forced Labour Convention (No. 29), 1930, Abolition of Forced Labour Convention (No.105),1957, Equal Remuneration Convention (No.100), 1951, Discrimination (Employment Occupation) Convention (No.111), 1958.
[8] See, Conventions No: 100, 111, 156 and183 of ILO.
[9] V. R. Krishna Iyer, *Social Justice – Sunset or Dawn*, 2nd Edn., Eastern Book Company, Lucknow, 1993 , p. V.
[10] Art. 14.
[11] Art. 15(1).
[12] Art. 15(3).
[13] Art. 16.
[14] Art. 19.

right to livelihood[15] and prohibition on traffic and forced labour[16]are the highest goals in the capacity of a welfare state.

Apatt from the above rights, the Constitution casts a duty on the State[17] to secure adequate means of livelihood to men and women with equal pay for equal work and health and strength of workers[18]. It makes provisions for securing just and humane conditions of work and for maternity relief[19] apart from securing living wages, decent standard of life and full enjoyment of leisure, social and cultural opportunities for all workers[20] and to renounce practices derogatory to the dignity of women[21]. Pertaining to matters of labour and employment laws, the Constitution in Entry numbers 55, 61 and 65 in Union List and Entry 22, 23, 24 and 36 of Concurrent List[22] give power to both Parliament and State Legislature to legislate[23]. Thus, the Constitutional spirit place emphasis on the concept of gender justice, equality and social justice.

Welfare Legislation and Provisions Concerning Women

Indian industrial jurisprudence, like its industrial development, is the product of post independence era[24] whose primary concern is to ensure the contentment of the workers and to enhance their productivity[25]. With respect to gender justice these welfare legislations focus on reducing inequality of any sort in order to promote a fair, non discriminatory and safe environment for women by providing Social Security[26]. The major labour legislation in India can be classified under the following heads:

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[15] Art. 21.
[16] Art. 23.
[17] Directive Principles of State Policy.
[18] See, Art. 39 (a), (d) and (e).
[19] Art. 42.
[20] Art. 43.
[21] Art. 51 (A)(e).
[22] Seventh Schedule of the Constitution of India.
[23] P. M. Bakshi, *The Constitution of India*, 8th Edn., Universal Law Publishing Co., Delhi, 2005, p. 364.
[24] Gulab Gupta, *Our Industrial Jurisprudence*, The Central India Law Institute, Jabalpur, 1987, p. 10.
[25] V. R. Krishna Iyer, *Social Justice and Labour Jurisprudence*, Sage Publications India Pvt. Ltd., Delhi, 2007, p. 53.
[26] According to ILO, social security is the security that the society furnishes through appropriate organisations against certain risks to which its members are exposed. These risks

(a) Labour laws enacted by the Central Government, where the Central Government has the sole responsibility for enforcement; they are 12 in number,

(b) Labour laws enacted by the Central Government and enforced both by the Central and the State Governments; they are 16 in number,

(c) Labour laws enacted by the Central Government and enforced by the State Governments; they are 15 in number, and

(d) Labour laws enacted and enforced by the various State Governments which apply to respective States[27].

Among these the important labour laws providing social security and gender justice for women are:

1. The Equal Remuneration Act, 1976: The Act abolished the disparity in wage structure which had vitiated the labour scene for long. It has placed women at equal footing with men, thereby, giving boost to their social standing and employment potential. The Act was enacted even before the western countries enacted pay equalisation statute[28]. It provides for the payment of equal remuneration[29] to men and women workers for the same work or for work of similar nature in an extensive range of employment including the informal sector[30]. It forbids employers from gender based discrimination against women during recruitment, condition of service subsequent to recruitment, such as, promotion, training or transfer[31] and prescribes penalties for omission on the part of employer or doing any act contrary to the Act[32]. It gives power to Women's organisations to file cases in the labour court on behalf of workers[33]. It is worth noting here that

are essentially contingencies against which the individual of small means cannot effectively provide by his own ability or foresight alone or even in private consultation with fellows combinations.

[27] Government of India, *Report of the Working Group on Labour Laws and Other Labour Regulations*, Planning Commission, New Delhi, 2006.

[28] Canada enacted the Ontario Pay Equity Act only in 1987, see, G. Rajasekharan Nair, *Gender Justice under Indian Criminal Justice System*, Eastern Law House, New Delhi, 2011, p. 237.

[29] It includes basic salary and other benefits, such as bonus and allowance.

[30] The Equal Remuneration Act, 1976, s. 4.

[31] *Id.*, s. 5.

[32] *Id.*, s. 10.

[33] In other laws this power is only with the Government.

entitlement under the provisions of the ERA is totally independent of any settlement between the employer and the employee because once the requirement of the Act is satisfied, the deserving has to be paid the same wage or salary[34].

2. The Maternity Benefit Act, 1961: The Act is a boon for women workers as it ensures certain maternity benefits to women workers. It regulates the employment of women for certain period before and after the child birth and to provide maternity and other benefits for 12 weeks[35]. It provides for medical bonus, in case of miscarriage for a period of six weeks and in case of an illness arising out of pregnancy, delivery, premature births or miscarriage respectively at the rate of maternity benefit for a maximum period of one month[36]. Other guarantees under the Act are nursing breaks[37], which makes dismissal unlawful if absence is on account of pregnancy[38] and provides punishment[39] for flouting the Act.

3. The Employee's State Insurance Act, 1948: Applicable to non-seasonal factories using power and employing 10 or more employees, the Act provides for maternity benefits and other benefits for miscarriage and sickness.

4. The Mines Act, 1952, The Factories Act, 1948, The Beedi and Cigar Workers (Condition of Employment) Act, 1966, The Plantation Labour Act, 1951: All these Acts while regulating the work conditions of the women workers ensures that the life of women labourers is not endangered. For this, they prohibits certain types of work, regulates working hours, provides facilities like urinals and penalties for contravention, makes provision of crèches for the benefit of women workers in the industrial premises[40].

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[34] *Irene Fernandez* v. *M/s Neo Pharma (Pvt.) Ltd. & Anr.*, 1997 (1) MHLJ 710.
[35] The Maternity Benefit Act, ss. 4 and 5.
[36] *Id.*, ss. 8, 9 and 10.
[37] *Id.*, s. 11.
[38] *Id.*, s. 12.
[39] *Id.*,s. 21.
[40] See the above Acts for details.

5. The Minimum Wages Act, 1948: This act provides for a minimum limit of wages in certain employments to be fixed by the Central Government which the employer must pay in order to prevent exploitation of the workers and ensures their subsistence without starvation[41].

6. The Domestic Workers Welfare and Social Security Act, 2010 and Regulation of Employment Agencies Act, 2007: Since the domestic workers who are usually women and children fall outside the labour legislations and are thus unable to access their rights they have become contemporary slaves. Many of them are trafficked and exploited by the placement agencies, which operates openly without any form of restrictions and regulations. Both the above legislation aims to provide a comprehensive Central Legislation specifically designed to regulate the working conditions of domestic workers in terms of working hours, delays in non payment of wages and physical and sexual abuse[42].

7. The Unorganised Sector Workers' Social Security Act, 2008[43]: Drafted by the Ministry of Labour and Employment, this comprehensive legislation aims to ensure the welfare of workers in the unorganised sector. The Act provides for social security and welfare of unorganised workers and for other matters connected therewith or incidental thereto[44]. In India, the National Commission on Labour endorsed the ILO definition of social security as envisaging that the members of a community shall be protected by collective action against social risks causing undue hardship and privation to individual whose prime source can seldom be adequate to meet them[45]. As per the provisions of the Act, a National Social Security Board has been constituted for recommending formulation of social security schemes, viz., life and disability cover, health and

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[41] The 15th Session of the Indian Labour Conference held on 11th and 12th of July 1957 at New Delhi adopted a resolution on the fixation of minimum wages.
[42] Draft prepared by NCW Statement of Objects and Reasons.
[43] Though passed in 2008, this Act is yet to come into force[43].
[44] The Unorganised Sector Workers' Social Security Act, 2008, preamble.
[45] S. C. Srivastava, *Social Security and Labour Laws*, Eastern Book Company, Lucknow, 1985, p. 7.

maternity benefits, old age protection and any other benefit as may be determined by the Government for unorganised workers[46].

But the Act is criticised on various grounds:

a. The first and foremost is that the Act does not define the meaning of terms like 'social security', 'self employed worker', 'family', 'District Administration' and 'wage worker'.
b. The Act is primarily focussing on the welfare schemes as provided in Schedule I which are generally available to all those who fall below the poverty line.
c. Asking for minimal contribution under section 10(4) is a strenuous condition, the non-payment of which will disentitle him to all the benefits under that scheme.
d. It is questionable as to how a solitary board will be able to manage the issues faced all over India.
e. The Act does not clearly indicate the extent of funds that must be earmarked for providing social security and welfare.
f. The Act has totally ignored the agriculture sector.

The only silver lining or saving grace is section 10(3) that provides for issuance of smart card carrying unique identification number to every unorganised worker that and will be portable.

In this context it is important to consider the Draft Recommendations of the Working Group of the National Advisory Council on the Act that emerged from two national level consultations (one in New Delhi and the other in Hyderabad). The Working Group examined the status of workers in the unorganised sector and the challenges in the implementation of the Act. Some of the key recommendations proposed by NAC are:

A. To make the Act inclusive of all sectors.
B. To define a minimum social security package for all sectors.
C. It recommended implementation architecture for the Act and its financial implications.

[46] The Unorganised Sector Workers' Social Security Act, 2008, s. 3.

D. To define and notify a minimum social security package and a combined life-cum-disability insurance scheme and pension plan that is appropriate and affordable to workers in the unorganised sector[47].

8. National Rural Employment Guarantee Act, 2005: The Act provides employment for 100 days to manual unskilled labour. Priority is given to women in the allocation of work (at least one third of the labour force should be women) with equal wages for both men and women. Various gender related objectives such as provision of hygienic work environment, childcare facilities at the work-site, distance of work-place not exceeding two miles from home, maternity protection, maximum permissible weight of load and other welfare measure are emphasised[48].

Thus, the above laws, framed with a view to protect women from exploitation, extends to the following areas - equal pay for equal work, maternity protection, prohibition on night work, maximum permissible weight of load that can be lifted by women workers, crèche facilities for them, prohibits unhealthy employment, non-discrimination against women in employment and occupation and other welfare measure[49].

Other Initiatives

Apart from the above pro-women welfare labour legislations, there are many other agencies that are engaged in promoting the welfare of women in the employment sector. The Women Labour Cell, set up in 1975, pay special attention to the problems of women labourers by providing useful inputs on women workforce for effective formulation of programmes and policies in consultation with related agencies, *viz.*, the National Commission for Women, the Ministry of Women and Child Development, the National Labour Institute, etc. The Indian Institute of Workers Education, Mumbai,

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[47] Government of India, *Unorganised Workers' Social Security Act (UWSSA) 2008, Recommendations of the Working Group of the National Advisory Council*, available at <http://nac.nic.in/pdf/ssa.pdf> (Viewed on 6-12-12).

[48] Government of India, *Socio-Economic Empowerment of Women under NREGA*, available at <http://knowledge.nrega.net/910/2NREGA_NFIW Pdf> (Viewed on 6-7-2012).

[49] Nomita Aggarwal, *Women and Law in India*, 1st Edn., New Century Publications, Delhi, 2002, pp. 146-49.

has established a separate cell on 'Women and Child Labour' and has evolved advance training programmes for women activists. The Employment Exchange takes special care to cater to job needs of women registered with them[50]. Ministries are actively involved in creating awareness among women workers through seminars and workshops with respect to their legal rights in co-operation with non-governmental organisations. It provides free legal aid to working women apart from running its Grant-in-aid Scheme for their welfare like Support to Training and Employment Programme (STEP), Rajiv Gandhi Scheme for Empowerment of Adolescent Girls (RGSEAG), Swawlamban, Short Stay Homes for Women and Girls (SSH)[51]. There are specific authorities which are established to regularly monitor the situation, enforcement and implementation of the welfare provisions[52]. Role of some of the non-governmental organisations, like, SEWA and CWDS is also worth appreciating.

Judicial Responses to Labour Rights of Women

Though the above mentioned labour legislation had undoubtedly contributed immensely to the growth of labour jurisprudence in India, in practice, they are fraught with myriad problems, uncertainties and legislative gaps in realising the guarantees under the above Acts primarily due to lack of strict observance of all the welfare provisions aimed at gender justice. Of course, the active role of Judiciary in enforcing and strengthening the constitutional goals is commendable. Judges have tried to interpret the law to keep pace with the changes in the global scenario and progress in labour laws. Through its landmark judicial pronouncements it has tried to break the age old myths about the women workers and has tried to bring justice and equality for them.

Equality

In *Bombay Labour Union* v. *International Franchise*[53], the Supreme Court held that there is no evidence that married women were more likely to be

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[50] During Jan-Dec 2004, placed 24,502 women in various employments.
[51] National Institute of Public Cooperation and Child Development, *Statistics on Women in India 2010*, available at <http://nipccd.nic.in/reports/ehndbk10.pdf> (Viewed on 8-10-2012).
[52] Under the Equal Remuneration Act various social welfare organisations have been recognised for the purpose of filing complaints in courts against employers for violation of the provisions of the Act, like, the Centre for Women Development Studies, New Delhi, the Institute of Social Studies Trust, New Delhi, etc.
[53] 1966 (2) SCR 493.

absent than unmarried women and held that such practice are unconstitutional. In *Anuj Garg* v. *Hotel Association of India*[54], the Supreme Court pointed that restricting a women from profession purely on grounds of gender would be unconstitutional. For achieving the objective of gender equality in *Government of AP* v. *P. B. Vijay*[55], it was held that making special provision for women employment under the State is an integral part of Article 15(3).

Time and again the Supreme Court has struck the provisions that are impediments to gender equality like in *C. B. Muthamma* v. *Union of India*[56], the gender inequality in service rules was struck down as violative of fundamental right of women employees to equal treatment in matters of public employment. Similarly, in *Air India* v. *Nargesh Mirza*[57], the rules which stipulated termination of service of an air hostess on her first pregnancy was held as arbitrary and abhorrent to the notions of a civilised society. In case of *Maya Devi* v. *State of Maharashtra*[58], emphasising the importance of economic independence for women, and for not creating conditions that discourage such independence the Supreme Court struck down the requirement that married women to obtain their husbands consent before applying for public employment. *Omana Oomen and others* v. *F.A.C.T. Ltd.*[59], it was held that non-absorption of female trainees as technicians entirely on the basis of sex is violative of Article 14 and 15 of the Constitution.

Equal Remuneration Act

In *Surinder Singh & Anr.* v. *Engineer-in-Chief, CPWD & Others*[60], it was held that the State is committed to Article 39 of the Directive Principles of State Policy that enshrines the principle of equal pay for equal work. *In the Cooperative Store Ltd. (Super Bazar)* v. *Bimla Devi and others*[61], the Delhi HC held that only the designation which was the determining factor for

[54] (2008) 3 SCC 1.
[55] AIR 1995 SC 1645.
[56] (1979) 4 SCC 260.
[57] AIR 1981 SC 1829.
[58] 1988 (1) SLR 743.
[59] 1991 (2) LLJ 541.
[60] (1986) 1 SCC 639.
[61] Available at <http://www.indiankanoon.org/doc/920827/> (Viewed on 12-12-2012).

fixing different pay scales was not permissible both under the constitutional scheme as well as under the provisions of the Act. Unequal pay is not only a violation of the provisions of the Equal Remuneration Act, 1976, but also of Article 14 of the Constitution. Also in the case of *Sita Devi & Others* v. *State of Haryana & Others*[62], it was held that the doctrine of 'equal pay for equal work' is recognised by as a facet of the equality clause contained in Article 14 of the Constitution. In *Kamani Metals & Alloys Ltd.* v. *Their workmen*[63], the Court observed that fixation of a wage structure should balauce the demands of social justice which reqnires that the workmen shonld receive their proper share of the national income which they help to produce with a view to improving their standard of living, and the depletion which every increase in wages makes in the profits. In *Ms. Mackinnon Mackenzie and Co. Ltd.* v. *Audrey D'Costa and another*[64], held that employer is bound to pay the same remuneration to both the Stenographers, male as well as female, irrespective of the place where they were working unless it is shown that the women are not fit to do the work of male stenographers.

Maternity Benefit Act

In *B. Shah* v. *Presiding Officer, Labour Court, Coimbatore*[65], it was held that the Maternity Benefit Act provided for the benefit of a woman so that she can play her productive and reproductive roles efficiently. Under it 100% wages were to be provided for all days of leave as well as benefits such as Sundays and rest days as wages. In *Ram Bahadur Thakur (P) Ltd.* v. *Chief Inspector of Plantations*[66], rejecting the contention of the employer it was held that the Maternity Benefit Act will have to be given interpretation which will advance the purpose of the Act. In *Punjab National Bank by Chairman and Another* v. *Astamija Dash*[67], it was held that uuder this Act, a woman can avail leave during the period of six weeks from the day immediately following the day of her delivery, miscarriage, or medical termination of pregnancy. In yet another landmark judgement in *Municipal Corporation of Delhi* v. *Female Workers (Muster Roll)*[68], it was held that the Act is

[62] (1996) 10 SCC 1.
[63] 1967 II LLJ 55.
[64] AIR 1987 SC 1281.
[65] AIR 1978 SC 12.
[66] 1982 (2) LLJ 20.
[67] 2008 III L.L.J. 584 (SC).
[68] (2000) 3 SCC 224.

applicable not only to regular employees but also to casual employees and daily wage employees.

Safety at Workplace

In *Vishaka & Others* v. *State of Rajasthan & Others*[69], several propositions of law guaranteeing gender equality, right to work with human dignity and the safeguards against sexual harassment were laid down by the Supreme Court. A number of initiatives have been taken to give effect to these guidelines but the largest obstacle to successful implementation of the Supreme Court judgement on sexual harassment lies not in employers ignorance or discrimination, but in the fact that the victims still reel under the barriers of speaking out openly[70]. In *Apparel Export Promotion Council* v. *A.K. Chopra*[71], reiterating *Vishaka's* ruling the Supreme Court observed that international instruments such as CEDAW and the Beijing Declaration cast obligations on the State to take appropriate measures to prevent gender inequalities and protect the honour and dignity of women. It is only in some exceptional cases and keeping in mind the safety of women that reasonable restrictions can be imposed on women workers[72].

Plight of Women Workers

Status of Women in Employment Sector

The Indian labour market can be broadly divided into three categories, *viz.*, (i) organised sector; (ii) urban informal (i.e. unorganised) sector; and (iii) rural labour (i.e. labour engaged mostly in agriculture). Out of the total 46.5 crores workforce in India, around 2.8 crores is engaged in the organised sector and the remaining 43.7 crores are engaged in the unorganised sector[73].

Women usually take up employment due to numerous reasons that could range from economic necessity, independence, need for power or prestige or

[69] (1997) 6 SCC 241.
[70] Tom Pannentaum and Keya Jayaram, *Combating Sexual Harassment at the Workplace - A Handbook for Women Employers and NGO's by Indian Center for Human Rights and Law*, Combat Law Publication Private Limited, Oxford Printers, Mumbai, 2005, p. 103.
[71] (1999) 1 SCC 759.
[72] *Raghuban Saudagar Singh* v. *State of Punjab*, AIR 1972 P&H 117.
[73] 2009-2010, NSSO figures.

simply under her economic compulsions[74]. Constituting, 48.1% of the population of India women have with the advent of industrialization and modernization, assumed greater responsibilities, both at home and in the world of work reflected in her increasing work participation rate that was 19.7% in 1981 rose to 25.7% in 2001[75]. However, this participation is still low as compared to male work participation rate, which was 52.6% in 1981 and 51.9 % in 2001[76]. This disparity among men and women is attributable to several restrictions and concerns related to women in terms of her family responsibilities, safety at workplace, long working hours, prohibition of night work of women[77]. Also the Human Development Index Report of 2007 states that much of the work that women do is invisible in national counting despite its obvious productive and social worth due to the fact that they are involved in informal or unorganised sector, agriculture and household activities where the data is deficient.

Dilemma of Women in Unorganised Sector

As quoted above many laws were enacted to affirm and promote principles of equality and equity for women and to take care of their special needs. Inspite of these, the rights of women remain largely ineffective or have failed in securing rights for them. This is due to the fact that almost all the above legislation are applicable to only a limited number of establishments. They do not bind the establishments, often classified as the unorganised or informal sector, and do not satisfy the pre-requisite conditions mentioned in the respective Acts. For example, the Maternity Benefit Act and the Factories Act apply only to establishment which employ minimum 10 persons and not to others. So, a large number of establishments in the unorganised sectors remain outside all the major regulation and the employees in this sector are thus totally unprotected[78]. Apart from being exploited as workers, the women

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[74] Dharma Vir and Kamlesh Mahajan, "Changing Status and Emerging Problems" in Dharma Vir *et. al.* (Eds.), *Contemporary Indian Women Collected Work*, Vol. 6 , New Head Publishers , Delhi, 1996, p. 76.

[75] *Ibid.*

[76] India's 2001 Census.

[77] Recently thedeputy commissioner of one state said that women need to seek permission from the labour department to work beyond the stipulated time thereby banning them from late-night jobs, as rightly pointed that the administration seems to be viewing women as the problem. See, "Don't work after 8pm, Gurgaon tells women", Times of India, Delhi, 14-3-2012.

[78] Alok Bhasin, *Labour Laws - A Primer*, 1st Edn. , Eastern Book Company, Lucknow, 2011, p. 148.

in unorganised sector face widespread sexual abuse. They work without a break in service but are never made permanent. They have no entitlement to maternity leave and other medical benefits. The low earning of these women cannot meet their daily needs. They live under unhygienic environment which makes them prone to dangerous diseases. The protective laws are not practically and strictly implemented for their welfare[79]. Apart from the non-implementation of the Acts, women have also had to struggle within unions against patriarchal assumptions and sexist attitudes. The trade unions lack sensitivity towards them and they usually sweep the specific problems of women workers under the carpet leading to poor bargaining power *vis-à-vis* their employers[80].

Status of Implementation of Labour Laws for Women

Gender inequalities, throughout the world, are among the most pervasive and subtle form of inequalities. They concern each and every member of the society. Even in the 21st century we are still unable to boast of a society where there is a total gender equality or gender equity[81]. Inclusive development cannot be attained unless women participate equally in the development process. India, in general, faces huge gender inequality, which has a direct bearing on human development[82].

As mentioned above, studies reveal that the major Acts for women are not implemented in its true spirit. As per the Global Gender Gap Report, 2009, by the World Economic Forum, women earn only 66% of men's salary for equal work. The practice of paying women lower wages for equal or similar work persist. Reports of such discrimiuation in government supported development activities, such as, road and canal construction, are constantly received from rural non-governmental organisations. The Acts have not established any institutional procedure by which such evaluation that if the

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[79] *Report of the Second National Commission on Labour 2002*, Academic Foundation, New Delhi, 2003, p.112.
[80] Gothoskar, Sujata (Ed.), *Struggles of Women at Work*, Vikas, New Delhi, 1998, p. 102.
[81] A. S. Anand, "Justice for Women Empowerment through Law", Manish Gandhi (Ed.), *Justice for Women Concern and Expressions*, 2nd Edn., Universal Law Publishing Co. Pvt. Ltd., Delhi, 2004, p. 25.
[82] Government of India, *India Human Development Report 2011 Towards Social Inclusion*, Oxford University Press, New Delhi, p. 31.

work of women and man is of similar nature could be made[83]. Employers rather re-classify the jobs done by women to show that it is not a 'work of similar nature'[84]. So the practice of 'equal work but unequal pay' is still widespread in India.

In the case of the Maternity Benefit Act, reports suggest that many employers do not hire married women or dismiss them before pregnancy. The provision of amenities, such as, crèches and sanitation for women labourers employed in factories is not available[85]. Further, the good intentions seem to have backfired since employers often refuse to employ married women in order to avoid paying maternity benefits. Very low percentage of women workers claims maternity benefits as they are unaware of these legislative provisions.

Reports on the implementation of the Minimum Wages Act also give ample evidences that women are overworked, they are mistreated and wages are not paid in time. The findings of the National Commission in 1999-2000 showed that the proportion of female casual workers receiving less than the required minimum was 95%, as against 74% in the case of males. The women workers themselves have reported that the deductions are done arbitrarily by the employer[86]. The prime reason for this scenario is the fact that the proportions of women workers who are aware of the welfare schemes are quite small[87]. NREGA, that can play a substantial role in economically empowering women[88], also suffers on account of low levels of awareness and lack of worksite facilities[89].

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[83] Christian, Mihir Desal and Colin Gonsalvis, *Women and the Law*, Pauls Press, Bombay, 1999, p. 702.
[84] Nivedita Menon, *Themes in Politics Gender and Policies in India*, Oxford University Press, New Delhi, 1999, p. 225.
[85] Government of India, *Report on the Working of the Maternity Benefit Act, 1961 during the Year 2008*, available at <http://labourbureau.nic.in/Report_MB_Act_2008.pdf > (Viewed on 13-12-2012).
[86] Rohini Hensman, *The impact of Globalisation on Employment in India and Responses from the Formal and Informal Sectors*, available at <http://www.uva-aias.net/uploaded_files/publications/WP90-Klaveren,Tijdens,Hughie-Williams,Ramos-India.pdf> (Viewed on 15-10-2012).
[87] Government of India, *Report on the Working of Minimum Wages Act, 1948 for the year 2010*, available at <http://labourbureau.nic.in/REP_MW_2010.pdf> (Viewed on 14-6-2012).
[88] Government figures indicate an impressive participation of women in the NREGA that is above 33 per cent in 15 states, see, *supra*, n. 48.
[89] *Supra*, n. 48.

National Commission for Enterprises in the Unorganised Sector (NCEUS), 2004, and New Pension Scheme (NPS), 2009, for the benefits of unorganised sectors are some of the initiatives to improve this scenario. But majority of studies and reports substantially indicates that the current system of labour laws and policies has various lacunae resulting in women workers subordination, underpayment and harassment that many a times forces them to change their jobs. The positive discrimination for maternity benefit, prohibition on night works, lifting heavy loads has rather detrimentally impacted women's employment opportunities. Lack of economic dependence thereby leaves them under the clutches of numerous evils like discriminations, oppressions, and violence within the family and at the work places.

Conclusion

After independence number of laws were enacted as it was thought that grant of such rights would serve the objective of correcting the wrongs done to women and empower them. But, capitalism that makes the most shameless criterion of physical weakness, emotional instability and low intellectuality of women has till date kept the female labour in a subsidiary status; marginalised from productive functions[90]. Strong patriarchal mentality and unfavourable social environment has restricted the achievement of the desired goals. In the absence of credible enforcement mechanisms India labour legislation has limited effectiveness. Women are at the bottom of the ladder in terms of employment, earning and status[91].

Even ILO has confirmed that gender equality remains an important issue within global labour market. The Global Employment Trends, 2009, also points towards inequalities in wage in employment sectors with challenge of reconciling employment and family responsibilities, concentrated in the informal economy. While the women welfare laws are supposedly meant to protect the interests of women workers, in actuality they have gone against the interest of women workers, for e.g., maternity benefits are seen as an added expenditure by employer.

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[90] Sebasti L. Raj and Arundhati Roy Choudhary, *Contemporary Social Movement in India: Achievement and Hurdles*, Indian Social Institute, Delhi, 1998, p. 37.
[91] S. Mohan, "Social Justice in India", AIR 1995 SC 97 (J).

In this period of economic liberalisation and globalisation, the quality of women's employment will depend upon several factors, foremost being that all the women welfare labour legislation should be made applicable to all the sectors in all the States, i.e., to organised or unorganised, rural or urban or agriculture. An umbrella legislation covering all aspects of labour laws without overlapping can be enacted. There should be proper monitoring and stringent penalties for non-compliance. The court proceedings for workers must be simple and not cumbersome. Thrust should be on women's education, awareness, full participation and voice in decision making.

The causes leading to wage differential and denial of employment need to be relooked. To conclude the best solution to tackle the menace or discrimination against women workers is rightly provided by Krishna Iyer J. that "The problem is now to redesign the instruments, re-educate the operators and recondition the climate through a new legal culture administrative law, of parliamentary processes and socially sensitive judicial process so that social justice for the millions may be actualised"[92].

[92] *Supra*, n. 9.

CASE COMMENT

Right to Health upheld in India: Analysis of *Natco* v. *Bayer*

Although the Indian Constitution does not explicitly recognize the right to health[1] as a Fundamental Right, the Indian Supreme Court has interpreted the same using the all pervasive Article 21 protecting the right to life[2]. By broadening the substantive scope of interpretation of the right to life the Supreme Court has created uniquely hospitable litigation culture for pursuing legal claims to the right to health[3]. In the international context as well, India has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1979, which is the foundational treaty agreement recognising an individual's right to health[4].

Intellectual Property Rights (IPR) skeptics have repeatedly pointed out that stringent Intellectual Property (IP) protection in pharmaceutical patents would impede the production and distribution of essential drugs to the masses[5]. Stringent IP protection laws would imply giving a free reign to powerful drug companies to hamper access to affordable healthcare for the majority of ailing population. This can be understood by the implications a strict IP regime would have on access to medicines, especially, in a developing country like india. Healthcare is essentially a private expenditure and in the absence of devices such as Compulsory Licensing (CL), there would be no reason for the State to interfere to ensure access to patented drugs. The business acumen dictates that the cost of Research and Development are recovered through their reflection in the sale price of the drugs. There are, however, some inherent safeguards within the TRIPs that allow for IP protection law and give importance to the protection of IPR

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[1] Right to health, defined under General Comment No. 14, includes availability, accessibility, acceptability and quality of medicines. Availability of medicines includes availability of the same at reasonable price, in adequate quantity at relevant time. See, Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to Highest Attainable Standard of Health*, UN Doc. E/C 12/2000/4, 11-8-2000.

[2] See, *Paschim Banga Khet Mazdoor Samiti* v. *State of West Bengal and Anr.*, AIR 1996 SC 2426 (holding that the right to life requires the State to provide timely medical treatment to preserve human life).

[3] Sheetal B. Shah, "Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India", 32 *VAND.J. TRNSANAT'L L.* 435, 463 (1999).

[4] International Covenant on Economic, Social and Cultural Rights, Art. 12, 16-12-1966, 993 U.N.T.S. 3 (entered into force 3-1-1976). India acceded on 10-4-1979.

[5] Timothy Bazzle, "Pharmacy of the Developing World: Reconciling Intellectual Property Rights in India with the Right to Health: TRIPs, India's Patent System and Essential Medicines", 42 *GEO. J. INT'L.* 785.

while balancing social conditions of a State and thus give the State, the freedom to discretionally use IPR so as to not impede public health[6].

Short Matrix of the Case

The issue of Compulsory Licensing becomes all the more important when we understand the implications of the judgment rendered in the Nexavar case before the Controller of Patents[7]. M/s. Bayer Corporation, a giant innovator multinational company based in USA, invented a drug called SORAFENIB (Carboxy Substituted Diphenyl Ureas) which is used in the treatment of liver and kidney cancer. The brand name is 'NEXAVAR' patented in US in 1999 and in India in 2008. NEXAVAR is a life extending drug for 4-5 years for liver and kidney cancer patients. This patent has survived a post-grant opposition by Cipla and the sale of generic variant of NEXAVAR is a matter of infringement litigation before the Delhi High Court between Bayer and Cipla.

Natco, an Indian pharmaceutical company, filed the compulsory licence application, after the voluntary license application for selling the drug was rejected by Bayer on 6-12-2010. Natco received marketing approval for its manufacturing and marketing SORAFENIB in the tablet from in April 2011. Consequently, compulsory licence application was filed with the Office of Controller of Patents to sell the drugs. At the time of the dispute, dosage of the drug costs around Rs. 2.8 lakh per month. While, Cipla started marketing its generic drug at Rs. 27,960 and Natco was ready to lower down the cost to Rs. 8,880/-, as was mentioned in the application. Further, it was found that the drug was available only in the metro cities which effectively excluded almost 95% of the rural population afflicted with kidney or liver cancer.

Contentions of the Parties

The main contentions from the part of the applicant, Natco were as follows:

1. Nexavar is unaffordable to the public for being priced at Rs 2, 80,428/- per month.
2. The supply of the medicine by Bayer is not adequate considering the number of patients and supply of bottle of drugs on last for years. Bayer has imported only around 200 bottles of Nexavar where the

[6] TRIPs, Arts. 7 and 8.
[7] *Supra* n. 8.

demand is 23,000/- bottles per month. Bayer also rejected the application for voluntary license by Natco to fill this gap.

3. Bayer has failed to manufacture the medicine in India though the patent was granted in 2008.
4. Natco also applied only for marketing of the drugs only in the territory of India and undertook to provide medicine at Rs. 8,880/- per patient per month.

Bayer's contentions were defensive in nature and argued that the reasonable requirements of the public are met by the company through import of medicine. Further, they also stated that the presence of generic version of the drug was also produced by the Cipla Ltd. to deal with availability issue. This contention was highly criticized for the reason that for the same reason there is an infringement case filed by Bayer against Cipla. The dual standard of Bayer in two different litigations shows its floating standard in this issne.

The Decision in the Case

The Controller of Patents, through his well reasoned Order, granted Natco the license to manufacture the drug on the conditions which Natco had voluntarily agreed upon, such as:

1. Providing the drugs at a monthly cost of Rs. 8,800
2. Providing a certain number of drugs free of cost
3. Giving a quarterly percentage of profit to Bayer as royalty (6%)
4. Ensuring greater reach of medicines

There are other conditions to the granting of the compulsory licensing which include that Natco would not export the drug to any other country, and that the license is not transferable.

Analysis of the Decision through Human Rights Lens

"A slight imbalance may fetch highly undesirable results"[8]

John Locke developed the notion of private property rights analysing the quotation from Psalms, "God has given the earth to the children of men"[9].

[8] *Natco* v. *Bayer,* Order dtd., 9-3-2012, para. 2, available at <http://www. ipindia.nic.in /ipo New/compulsory_License_12032012.pdf> (Viewed on 6-1-2012).

According to him, God who had given the world to men in common had also given the reason to make use of it to the best advantage of life and convenience, but also emphasises that the fruits of nature belong to mankind as it is naturally produced. According to Locke, though there is a right bestowed on one's creation, it is not absolute. Locke puts an optimality criterion and states that there should be "enough and as good left for others". What is enough and good for the entire humanity in case of 'right to health as human right' is a significant question. Accessibility and availability is definitely a part of optimality. Rightly imbibing it, the Order of the Controller in *Natco* v. *Bayer* states, "whenever the rights conferred upon a patentee, the right also carries accompanying obligations towards the public at large"[10]. The right to health is basic human right[11] which can be ensured largely through protecting the access and utilisation of necessary medicines.

Right to own property or freedom to prevent others from accessing the property in Marx's words none other than "beurgeois freedom"[12]. There is no wonder that the State facilitates such freedom as it nowadays promotes monopoly capitalist interest rather than the interest of the common man. IPRs to multinationals restrict access to results of research and development for mankind which is indeed essential for the survival of ailing population. The regulation of monopoly is required for health security which reminds us about the optimal use of intellectual property rights. Michael Parelman argues that stronger intellectual property rights will reinforce class differences, undermine science and technology, speed up the corporatization of the university, inundate society in legal disputes, and reduce personal freedoms[13]. Worldwide, the rich have become richer to an unimaginable extent in recent years.

The order starts with a note of explaining the private v. public 'win-win situation' embedded in IPR framework. The innovator gets his exclusive right to earn maximum revenue during the protection period of twenty years and the public benefits access to the invention on the expiry of the protection

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[9] John Locke, *Two Treatises of Government*, the McMaster University Archive of the History of Economic Thought, 1823, p. 24.

[10] *Supra* n. 8, p. 2.

[11] The Universal Declaration of Human Rights (UDHR), 1948, Art. 25 (1) and the Indian Constitution, Art. 21.

[12] Karl Marx, *On The Jewish Question, Works of Karl Marx, Deutsch-Französische Jahrbücher*, 1844, p.6.

[13] Michael Parelman, 'The Political Economy of Intellectual Property', 54 *Monthly Review* 08, 2003.

period. The innovator is incentivised through patent protection. According to Jeremy Bentham, "without the assistance of the laws, the inventor would almost always be driven out of the market by his rival, who finding himself, without any expense, in possession of a discovery which has cost the inventor much time and expense, would be able to deprive him of all his deserved advantages, by selling at a lower price"[14]. However, the arbitrary use of monopoly rights would endanger the 'socio-economic prosperity' of the nation. The profit making attitude of corporations must remind us about the importance of the provisions embodied in the Indian Constitution. Articles 39(b) and (c) clearly talks about distribution of ownership and control over the material resources of the community to subserve the common good and operation of the economic system to disrupt the concentration of wealth in few hands. Such State intervention is advisable in a country like India to make sure that legalised private property regime is not arbitrarily used by the multinational companies.

The Paris Convention for Industrial Property, 1883, underlines the use of compulsory licence as being for the purpose of preventing abuse of rights granted under the patents regime[15]. Following the Paris Convention, the TRIPs recognises the concerns of public health for developing countries through its provisions and gives the nations the liberty to promote and protect health and nutrition, by adopting measures consistent with the Agreement[16]. Article 31 of the TRIPs provides for compulsory licence in cases where the authorised patent holder declines to grant license within a reasonable period of time[17]. However, under TRIPs, the supply of the goods was restricted to the domestic market. Following the Doha rounds, the amendment to Article 31 (f) in 2003 by the insertion of Article 31*bis* allows a State to issue compulsory license and import the drug in situations where the domestic industry is not in a position to manufacture the said drug owing to lack of infrastructural or technical development. The concern was that the provisions of compulsory licence would become meaningless if the country did not have adequate resources to create the drug in question. The TRIPs Amendment in 2005 incorporated the waiver of 2003 and now Article 31(f) deal with (a) permitting pharmaceutical products made under compulsory licence to be exported to countries lacking production capacity; (b) avoiding double

[14] Jeremy Bentham and John Bowring, *Works of Jeremy Bentham*, Vol. 3, Part I, W. Tait, 1839, p. 71.
[15] Article 5.
[16] TRIPs, Art. 7.1.
[17] TRIPs, Art. 31.

remuneration to the patent holder through regional trade agreements involving least developed countries; and (c) on violation and retaining all existing flexibilities under the TRIPs Agreement[18].

The Indian Patents Act, 1970, contained a provision for compulsory licensing even prior to the TRIPs Agreement[19]. Under the Act, there are certain conditions to be fulfilled for a compulsory licensing application to be allowed:

(a) That the reasonable requirements of the public with respect to the patented invention have not been satisfied, or
(b) That the patented invention is not available to the public at a reasonably affordable price, or
(c) That the patented invention is not worked in the territory of India[20].

Further, provisions of the section clarify and describe the conditions which the Controller of Patents is supposed to abide by before deciding on the application. The conditions of section 84 are more detailed than the provisions provided under Article 31 of TRIPs or all the basic elements encapsulated in Article 31 are inherently present in section 84. The balancing of private property rights for the much wider benefit of humanity envisaged under the Indian Patent Act and the apt recognition of the same *via* this decision is enthralling for those ailing within 1.2 billion population of India.

"The Patentee's conduct of not making the drug available as per the requirements of public in India during four years since the grant of patent is not at all justifiable"[21]

> "Maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community. Attending to public health, is of high priority—perhaps the one at the top"[22].

Maintenance of public health is the duty of the State under Article 47 of the Constitution. The availability of curative medicine lies at the heart of these

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[18] See. <http://www.wto.org/english/news_e/pr426_e.htm> (Viewed on 6-1-2012).
[19] Section 84.
[20] *Ibid.*
[21] *Supra* n. 8, pp. 22-23.
[22] *Vincent Panikurlangara* v. *Union of India*, AIR 1987 SC 990.

constitutional mandates. The decision in this case righty refers to the poor healthcare infrastructure in the State and the income level of the people. Access to healthcare facilities itself is denied to large segment of the population because of various reasons of backwardness. The calculated number of patients by the Bayer Corporation is keeping in mind the sales achieved by them. The actual number of patients is beyond such access points and is much more than what figured in the submissions. Moreover, even by records the calculated number according to the patentee (Bayer Corporation) was 8842 boxes while supply for the year was just 593 boxes which was much lower than the reasonable requirement. Each year, according to the Natco's submission, in India, at least 100,000 people suffer from different types of renal cell carcinoma and hepatic cell carcinoma. Further, every year, 30,000 new patients are diagnosed with both these diseases in India and nearly 24,000 patients die every year[23]. The State's priority to make sure that the public health is maintained and accessibility is ensured would override the interest of the multinational companies to withhold the drugs from the market, creating more demand and thus extracting higher prices.

"The reasonably affordable price has to be construed predominantly with reference to public"[24]

In various cases, the Supreme Court of India has stated that no law or State can interfere with public's access to medicines[25]. The State cannot avoid its constitutional obligation to provide adequate medical aid to the people on account of financial constraints[26]. While the State grants monopoly rights to the patentee, it should be more vigilant in complying with its constitutional obligations as the patent right is centered on an individual. 'Public Interest' is a broader category which must include reasonably affordable price and must be interpreted as being reasonable for the public[27]. The decision rightly quotes the argument of the patentee about 'affordable pricing to all sections of the public' which also infuses the concept of differential pricing

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[23] K. Gopakumar, "Stage set for compulsory license decision on anti-cancer drug", *Third World Network*, available at <http://twnside. org.sg/title2/health.info /2012/health 20120302. htm> (Viewed on 6-1-2012).
[24] *Supra* n. 8, p. 36.
[25] *Paramanand Katara* v. *Union of India*, AIR 1989 SC 2039; *Rakesh Chandra* v. *State of Bihar*, AIR 1989 SC 348; *Paschim Benga Khet Mazdoor Samity* v. *State of West Bengal and Anr.*, AIR 1996 SC 2426, etc.
[26] *Khatri* v *State of Bihar, (II)*, AIR 1981 SC 928.
[27] *Supra* n. 8, p. 35.

for different sections of the public according to their affordability standards. The patentee put forward this argument to state that patentee's interest to recover the costs cannot be denied upon. However, the decision indicates that the interest of the public overrides over the interest of the patentee or his interest is protected to the extent of royalty decided to be paid. Considering that the price of the drug is Rs. 2,80,000/- per month during the last four years from the year of grant of patent in 2008, it is beyond any imagination of affordability for even a middle class patient of India. Indirect denial of life saving drug on account of higher pricing cannot be justified and therefore the order rightly stated that the price of the drug was not available to the public at reasonably affordable price.

"Worked in the territory of India means 'manufactured to a reasonable extent in India"[28]

Compulsory Licensing provision under the Indian Patent Act is an example of effective utilisation of the discretion left with each member nation in terms of the grounds available for compulsory licensing. The Rajagopala Ayyankar Committee Report states that the advantages of rewarding inventors with the grant of exclusive rights for a limited period depends upon one main factor that the patented invention must be worked in the country which grants the patents[29]. The concept of 'working of the invention in the territory of India' needs to be interpreted as manufactured in India to ensure that India does not become merely a selling ground for foreign patentees and export market through the patent system.

Mr. Langner[30], while giving evidence before the Temporary National Economic Committee of the U.S.A., stated the importance of taking patents in foreign countries in order to promote export of goods. Such patents can be used to establish protected foreign markets[31]. The intention of foreign countries to obtain patents in other countries to export and sell their products is not beneficial for a developing country like India. It is essential to protect the domestic market from being flooded with imported goods which are

[28] *Supra* n. 8, p. 45.
[29] N. Rajagopala Ayyankar, *Report of the Revision of the Patent Law*, 1959, para. 23, p. 11.
[30] Member of the firm of Langner, Parry, Card & Langner, international patent lawyers, testified in 1935 and again in March 1938 before the House Committee on Patents, USA, in opposition to compulsory license laws.
[31] William.B.Bennett, *The American Patent System: An Economic Interpretation*, University Press, Louisiana, 1943, p. 19.

against attaining self-sufficiency in terms of infrastructure and technological development. This intention is very much contained in section 83(b) of the Patents Act[32]. The harmonious reading of section 84(1) (c) and section 83(b) clarifies the position that working of the invention clearly indicates manufacturing the invention to a reasonable extent in India. Despite having the infrastructure for manufacturing of drugs in India and the patent was granted in 2008, the patentee relied on importation and did not bother to start manufacturing in India or grant voluntary license to anyone to work the invention in India. Lapse of four years was sufficient time under section 86 to state that the patentee had no bonafide intention to work the invention from India.

The validity of the Bayer's patent has been separately challenged and is pending decision in the Delhi High Court. However, the grant of compulsory license in this case is a significant advancement in Indian IP jurisprudence in that this is the first compulsory license granted with respect to a pharmaceutical product in India after the 2005 amendment to the Patent Act. Such a license would ensure that the drug reaches its intended target at a significantly reduced rate and public health is taken care of.

The developing countries and less-developed nations have hurt themselves by not taking full advantage of the opportunities for encouraging utilisation of compulsory license. To make life-saving drugs available at affordable prices and to improve public health, the compulsory licensing opportunities opened up by TRIPs should be seized selectively and imaginatively. Section 84(1) incorporates the aspect of 'reasonable public requirement', 'reasonable price' and 'workability of patent' and these three conditions encapsalate the essentials of granting of a compulsory license. There is a cautionary approach to compulsory license which suggests that an excessively protective environment may not respect IP laws resulting in a possibility (although unlikely) that the situation becomes such that pharmaceutical companies find it a loss making venture to bring their drugs to the Indian market for fear of compulsory license. Well reasoned orders and strict conditions imposed upon a licensee, when all conditions of compulsory negotiations are satisfied and the waiting period of 3 years is observed will balance out the inconvenience caused to the patentee.

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[32] Section 83(b) states that the patents are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article.

The appeal against the decision before the Intellectual Property Appellate Board (IPAB) was rejected on the ground of public interest. The IPAB also noted that "the right of access to affordable medicine is as much a matter of right to dignity of the patients and tho grant of stay at this juncture would really affect them"[33]. Such well reasoned Order by the Controller and its confirmation subsequently by the IPAB sparks a ray of hope for poor and the disadvantaged population in terms of affordability and availability of medicine.

Compulsory licensing is, in fact, one of the ways in which market dominance can be curtailed. Section 4 of the Competition Act, 2002, prevents abuse of market position and market power held by a dominant firm and helps equalize the market dynamics to negate any unfavourable advantage that may accrue to the dominant firm. The ideology of intervention of Competition Law to prevent abuse of dominant position and compulsory licensing synchronise to the extent it promotes availability of goods to the public at adequate quantity and reasonable price. The aim of granting compulsory licence to Natco is to ensure that public health is not at stake by the unreasonable operations of the Bayer, which was reluctant to make the drugs available at reasonable quantity, quality and price. The 'essential facilities' doctrine[34] by which monopolisation of essential facilities is prohibited is also a useful tool to curtail market dominance and provide adequate supply for the needy. 'Drugs' are also included under the Essential Commodities Act, 1955, which empowers the State to take control over the recognised essential commodities when such goods are not adequately available for production, supply and distribution. The exercise of compulsory licensing is a legitimate function of the State to comply with the objective of a 'socialist state' in the preamble of the Indian Constitution[35].

Sophy K. J.*

[33] *Bayer* v. *Natco*, Judgment of IPAB dtd. 14-9-2012, available at <https://docs. google.com/ viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnxzcGljcWIwZmlsZXN8Z3g6N2VmZmE4ZWUyNmY5OWRlNQ> (Viewed on 6-10-2012).

[34] *US* v. *Terminal Railroad Association of St. Louis*, (1912) 224 US 383.

[35] The word 'socialist' in the Preamble of the Indian Constitution is interpreted as State's duty to strive to achieve welfare of the people, minimise inequalities of income and opportunities and provide people with an adequate standard of living. See, M. P. Jain, *Indian Constitutional Law*, 6th Edn., Lexis-Nexis India Butterworths Wadwa, Nagpur, 2012, p. 98.

BOOK REVIEW

Tavleen Singh, *Durbar*, Hachette Books, Gurgaon, 2012, pp. XII+312, price Rs. 599.

The political culture of any country is strongly reflected by the policies and laws that are made in those countries. The book under review is set in the milieu of the socialist phase practised in India during the seventies. It is the vision of a young journalist belonging to an elite segment of the society in trying to decode the length and breadth of the country by closely following the policies of the Government of India during the period of Mrs. Indira Gandhi and her son Rajiv Gandhi's regime. The book is interesting to read as it talks about the problems of the country in the famous lounges of politicians and socialites who are renowned politicians today and interestingly many of them are into politics by default. They include politicians like Rajiv Gandhi, Sonia Gandhi, Naveen Pattnaik, Vasundhara Raje and Akbar (Dumpy) Ahmed. There are many who have been disillusioned by being in politics, like, Arun Singh, Arif Mohammed Khan and Amitabh Bachhan. It is a strange coincidence to see people from varied backgrounds being friends and enjoying the social status and wealth, being indifferent to politics during their youth and becoming hard-core politicians at the end of the career and some retiring by being disillusioned from its outcome. This book is an interesting mix of all the people mentioned above being friends (including the author) and yet each of the individual has viewed the problems and policies of the government with different perspective.

The book is divided into two parts with 19 chapters in all. In the first part, the author begins with the tragic end of India's most charismatic leader of all times, Rajiv Gandhi. His death still remains in our history as one of the worst political assassinations of the world but we still have not been able to completely steer clear of the possible reasons for his assassination though many a times the LTTE has only shared the blame of this ghastly attack. The author delves into the local connect and tries to put the controversial pieces together (true to her journalistic background) but has not found any convincing answers. She takes us through the career-graph of Rajiv Gandhi who was exalted to the position of being the only Prime Minister of India with the highest mandate (maximum number of Lok Sabha seats) which would have given him the license to aggressively pursue economic and political reforms more than anybody else. But the best part of the book is a

candid description of the mistakes committed by Rajiv as the Prime Minister and the friendship which the author shared with him and Sonia was on stake as she as a journalist chose to be true to her profession in writing openly about the mistakes committed in domestic and foreign policy bearing serious repercussions in Indian politics. The seeds were sown when Mrs. Gandhi had relied far too much on Sanjay Gandhi and declared emergency curtailing the rights of the people.

The three most important analyses in the text are that the socialites never discussed emergency in their drawing rooms. Not that they were not aware of the exigencies but none wanted to make Rajiv and Sonia feel awkward. Their silence was seen more as they being apolitical and least interested in polities. Secondly, it not only analyses the growth of Sanjay as the political successor of Mrs. Gandhi but also explains the culture of political sycophancy in India. None dared to question the wrong policies undertaken for the fear of moving out of the inner circle of the P.M. The chapter 'Turkman Gate' is the most engrossing in the first part as it dissects the utter failure of the most ambitious policy of Family Planning. The idea was unique in off-loading the pressure of population to make easy availability of resources to all as envisaged under the socialist ideology of the state but the manner in which it was executed was far more alarming. The author gives an account of a rickshaw puller being dragged and sterilized even when he was not married.

She recounts the growth of two important persons, Rukhsana Sultan and Jagmohan. Jagmohan had led the war of beautification campaign of Delhi and that was the point of time when all squalors and chawls were demolished in Lutyens Garden and the people were sent off to low budget homes across the Yamuna which today has the worse form of slums and unauthorised colonies which get legitimacy during every elections as vote-banks. The loss of elections post-emergency discusses the growth of future leaders of India, namely, Atal Vajpayee, Rajmata of Gwalior, Chandrasekhar, Morarji Desai, Charan Singh and many other leaders who occupy important positions today. The first non-Congress government was established but what remains interesting in the description of the book is the confidence of Sanjay that they would be back in the corridors of power. This confidence was neither visualised by Mrs. Gandhi nor the opposition leaders. Even the press went agog with the details of how they had been gagged and it was near impossible for Congress to come back to power. But the already fractured opposition also faced a stiff bureaucracy which was not responsive to the

demands of the common man. The author recounts her visits to the various constituencies to cover stories for election campaigns for the newspaper she was reporting and was astonished to find that the mass appeal of Mrs. Gandhi remained intact and the people had forgotten her alleged misdemeanor of emergency. She came back with renewed vigour with the fall of Janata Government and a new hope to the downtrodden that it was Congress only under her leadership that would alleviate the masses from impoverishment, much to the astonishment of the opposition and the psephologists who predict election results.

Thirdly, in the last two chapters of the first part there is vivid discussion on the mistakes committed by Mrs. Gandhi in handling the two most difficult States of India. The first was the decision of conducting a military operation in the Golden Temple (Operation Bluestar). The intricacies of the operation highlights how the government was run by Sanjay and his group of advisors and the democratically elected P.M was relegated to a proxy position. She was ill-advised by her son and his advisors that the Sikhs would not have any problem in conducting the operation in the main shrine, the Akal Takht. Bhindranwale should have been stopped by the Cengress government from the very beginning in his call for Khalistan. The amonnt of artillery found in the main shrine puzzled the army and the people at large. The Sikh soldiers were kept out of the operation and the non-Sikh soldiers had no clue about the lay-out of the Golden Temple. Hence, there were serious casualties from both the sides but the damage done to the sacred monument was enough to enrage the whole Sikh community which ended with unimaginable repercussions in Indian Politics later.

Around the same time, on the advise of her few loyalists the democratically elected government of Jammu and Kashmir was dissolved and with the help of the Governor (Jagmohan) a minority government was established under Gul Mohammed Shah (Farooq's brother-in-law). It was difficult to imagine that any sensible government would want to destabilise its two most sensitive border states. The result was disastrous for India as Mrs. Gandhi was shot by her own security guards in her own residence (both guards being Sikhs) and simultaneously, the increasing alienation of the Kashmiris followed by growing instances of insurgency and terrorism. The two States are yet to achieve normalcy and often remain susceptible to cross-border terrorism. Rajiv Gandhi is sworn in as the next Prime Minister of India after the death of Mrs. Gandhi but he had to handle at first instance the Sikh riots. "An eye

for an eye" had suddenly become the state ideology and it was endorsed by Rajiv with a public statement that "when a big tree falls, the earth shakes". It was later that Atal Vajpayee refuted the insensitive remark of the rather sensitive P.M (as a friend the author had always found Rajiv as a compassionate person, which she has justified in the book by recalling a few instances) that it is only when the earth shakes that trees fall.

In the second part of the book the author describes the popularity of Rajiv and his ideas that seemed to charm every class of Indians that in voting for Rajiv they were actually voting for a change from the old system. A country where more than 80% of the people were deprived from bare necessities like clean and safe water, electricity and other public services apart from large many that had no access to the basic necessities like food, shelter and clothing was a challenge to the new P.M who had raised hope for millions who wanted to come out of the shackles of a controlled and centralised economy created in the name of Nehruvian socialism. This desire for change had resulted in the loss of heavy weights from various constituencies. The book goes into an analysis of the defeat of Atal Vajpayee (who later becomes the P.M) and H.N Bahuguna (the most powerful leader of U.P then).

Soon everybody seemed to have put behind the trauma of emergency, the war with Pakistan, the sikh riots, poverty and destitution behind and reposed faith in this new leader whose charisma evoked a sense of trust. In the initial days of the tenure every Indian was getting to know Rajiv and his foreign wife better as Sonia always present with her husband during their tours of the country. Two important developments were the allegation against Mrs. Gandhi's most trusted stenographer R.K Dhawan being behind the conspiracy of her assassination and that the CIA had a role to play in her death. The second development was the new recruits in the corridor of power. Sam Pitroda was recalled from U.S. where he had a thriving business to help Rajiv build India on the power of telecommunication. This was one of the major successes of the Congress party that today even if one cannot afford a square meal a day definitely does have the access to a mobile phone.

One important aspect of Rajiv's tenure was that the person he trusted most was his wife Sonia and it was gradually Sonia who called shots as to who would be invited to the P.M.'s house. It also marked the change of P.M.'s residence and the ambience which was personally supervised by Sonia. From the shackles of socialist austerity there was a shift towards a better looking

residence. Graduallly the old inner circle started giving to the new found friendship of opulence and elegance as one would have imagined in European style. The P.M. and his wife did not shy away from their love for Rolex watches, Lotto shoes (unfortunately, it is with this pair of shoes that we identified his body in Sriperumbudur), Carpets, Shatoosh shawls (though banned by Indian Government now), Russian Fur coats, etc., to name a few.

Thus the trend of a opulent lifestyle by politicians became the rage after discarding the old Gandhian style of austerity and simple living (interestingly, the Congress Chintan Shivir in Jaipur where Rahul Gandhi has been anointed as the Congress Vice-President under the leadership of Sonia Gandhi are heard giving a call for back to austerity). The changes in technology oriented development ignored its use in the most relevant areas, like, land reforms, EXIM policy, license-permit rules, etc. The decision of delayed elections in Jammu & Kashmir had emboldened the Muslim fundamentalist parties to openly declare Kashmir to secede from India. Senior journalists in India had started addressing Rajiv's government as 'Babalog', an expression which meant that it was his select group of doon-school educated coterie was running the country. The kindest criticism he faced initially was his naivety in the profession he had been forced upon but gradually he was expected to deliver as people had voted a young politician for the change they desired from the traditional style of governance.

The next challenge he faced was the *Shah Bano* case where he had to take a decision. As usual it was debated in the parliament and the final decision which he took over-ruling the judiciary sowed the seeds of discontentment once again between the two communities. When he realised that he had antagonised the sentiments of the Hindus by appeasing the Muslims he found a way out of this dilemma by allowing the Hindus to worship in an unused and disputed mosque in Ayodhya. It might not have won Rajiv the desired support of the Hindus but it definitely managed to divide India on communalist lines and not to mention the trauma of the demolition of Bahri Masjid and its after effects in the form of communal riots in Mumbai and later in Godhra. Of course naivety could never be a plea that could be taken by him as he belonged to a third-generation politician from the famons Gandhi-Nehru family.

The freedom of speech and expression remained curbed as private news channels were not given the requisite permission to operate and any news

broadcast was restricted to Doordarshan. The blue-eyed bureaucrat of Rajiv was brought in to deliver but Bhaskar Ghosh was not able to make Prasar Bharati free itself from the clutches of the ministry of Information & Broadcasting. By then changes in Soviet Russia was fast happening and did not keep pace with the call of liberalisation coming so strongly from the communist world. The ITDC stuck to its old standards of hygiene and sanitation (the CWG scam redefined the corruption in hospitality industry ... sh Kalmadi legitimised the loss of Indian Ex-chequer in conducting ... Rajiv's government could not see the famine in Orissa while the ... the International organisations and the media was busy defining ... zone (Kalahandi, Bolangir, Koraput districts of Orissa). He was made ... households where food was available, by the then CM Janaki Ballav ...naik, and after his State visit Rajiv declared that there were no famine related deaths in Orissa and it was all a media exaggeration. Needless to say that Congress has not been able to come to power in Orissa since the tenure of J. B. Pattnaik and it has been more than 15 years that a socialite friend of the Gandhis and an equal novice in politics has been able to decode poverty better than the Congress which highlights itself as an Aam-Admi party (the title now hijacked by Arvind Kejriwal).

The last nail in the coffin was cast by the 'big arms deal' by a company called Bofors and the last allegation that Rajiv would have ever wanted in his career was taking kick-backs. A lot of people got dragged into this mess and before he could realise he had lost out on the friendship of Arun and Nina Singh, Amitabh and Ajitabh Bachhan. He had to sack his own minister V. P. Singh for over-zealously trying to investigate the scam and with one point agenda to nab the bribe-takers. This sent out a negative signal in the country that Rajiv was part of the scam or else he should not have reacted in the manner he had. The Quattrocchis shattered the clean image of Rajiv and when Sonia Gandhi took over she deliberately distanced herself from them. It was not unknown in the Delhi social circles that the Quattrocchis were close to the Gandhis and made no qualms about it. The investigative agencies in India could never get them to India for trial and even when they managed they could not file a substantial charge-sheet against them.

The LTTE problem had started getting aggravated as he had sent the IPKF to disarm LTTE in Sri Lanka. The Indian army was fighting a phony war with a seasoned guerilla warfare strategist, Prabhakaran, and we lost nearly 1500 Indian soldiers trying to broker peace in Sri Lanka. Rajiv was now criticised

from all quarters for his failure and he was totally aware of the fact that if he had to get his second innings he had to take the calculated risk of opening the economy which was sordidly poor with a 3% annual growth rate (subsequently Manmohan Singh who helped P. V. Narasimha Rao has been the longest serving Congress P.M with a non-Gandhi surname and a party which always commanded majority was reduced to a stronger partner in a weak coalition). When Rajiv staked a claim for his second innings, the author is of the view that he had neither the support of Muslims whom he had appeased nor of the Hindus but definitely had escalated the tensions between the two communities and he behaved like any other seasoned Prime Minister in ordering an inquiry and delaying the report so that it fades out of the public memory.

He ended his tenure by banning Salman Rushdie's 'The Satanic Verses' and began his campaigning for his second term from Ayodhya with a slogan to establish 'Ram Rajya'. It was increasingly clear that he would be losing his next elections though in the campaigning schedule it was apparent that Congress had still not conceded defeat. History stands testimony to the fact that no other Congress government since then has secured a majority of the kind that Rajiv had and even after his death we have slid into a more murkier and dirtier politics of coalition which is bereft of any principles except only consolidation of power and more so in the hands of democratically elected dynasties.

This book holds relevance for all those who want to understand the nuances of the Indian politics. I feel that the author has taken great pain in compiling the facts and circumstances, as being a journalist it would have been well-investigated and well-researched and not a biased piece of research based on drawing-room discussions. I would recommend that the students, politicians, academicians, lawyers and journalists would highly benefit from this book. It is moderately priced and definitely worth the buy.

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BOOK REVIEW

Avtar Singh and Harpreet Kaur, *Competition Law*, Eastern Book Company, Lucknow, 2012, pp. XXIV+294, price Rs. 650 (Hard bound).

Prof. Dr. Avtar Singh's standing as a Professor of Law and his prolific acumen in academic writing is by now part of the law publishing lore[1]. It cannot be denied that the veteran academicians' best in print, treasured as works of substance, are those dealing with subjects on commercial law. Therefore, when a subject such as competition law is authored by Prof. Dr. Avtar Singh, the expectations must be served by the contents within and to a great distance, through this book under review, he does not let down the reader. While the learned professor's insignia on the cover does reassure that the material has passed the experienced scrutiny of a trusted teacher, the books status to be at par with the same authors' hugely followed - the Law of Contract or Company Law - might be debatable. Perhaps, the trend of factory assembly mode of text book writing, catering to the appetite of a text book market has weakened the process of value creation. However, in libraries that have few specialised works on the subject of 'competition law' both from the basic to an authoritative commentary, Prof. Dr. Avtar Singhs' work on 'Competition Law' fills the vacuum with substance and guidance in terms of juridical content and references to prepare for exams and spur further study.

What stands out in the text is an array of over 450 cases cited, referred and at times elaborated with a lucid narrative that fits the context. In this regard, Prof. Dr. Avtar Singh has sustained his typical textual architecture and dependability of reference sources. The major access to case law literature has been from the US, UK, Europe, Canada and Singapore complemented by cases from India, particularly, the apex court on the matter. The prior rulings of the MRTP Commission have been referred to in a large measure though the rulings of the Competition Commission of India, since its inception, are not as profuse. The reference is mainly to cases pronounced by the Supreme Court of India updated by latest rulings in critical areas.

The text has been divided into ten chapters and deals with the statute, the Competition Act, 2002, progressively moving through the sections dealing with correlated topics that lie proximous to one another. The topic of 'prohibition of certain agreements, abuse of dominant position and

[1] Prof. Dr. Avtar Singh has authored over 21 books on Law in English mainly on topics on commercial law and 14 texts in Hindi besides works on jurisprudence and Tort.

regulation of combinations' (sections 3-6 of the Act) has been exhaustivel treated and the devotion to the topic is evident from the deft analy references and footnote illustrations[2]. A sizable chunk of the text is devot to this very important topic which the author has rightly identifie requiring labourious definition and identification of conditions fulfill same. The authors have strenuously sought to clarify the subjects, with insightful analysis supported by illustrative case laws from India ar there is a shortfall from jurisdictions outside. However, this stres topic, though undeniably critical to the discourse on competition lav to have diminished the attention on other subjects on the topic, and th intensity of research and richness of treatment is not uniformly throughout the text.

A segment that does not disappoint is the one on 'duties and powers commission'. It provides an insight into the progress of a litigation proc right from the commencement to the higher stages of procedure. Reference is made to the latest case laws from the Supreme Court of India. The authors have identified the subtle areas of current debate, particularly, th one regarding applicability of rules of natural justice during investigation the Director General. While the treatment of the topics on jurisdiction of the Commission and its procedural intricacies and niceties has been rendered with reference to appropriate case laws, the work falls short of being an authoritative persuasive commentary to make it an aliy for the practicing lawyer before courts of law grappling with the ambiguous zones of procedural and jurisdictional power of the Commission.

The text dwells on some topics of contemporary debate and analysis inclnding the emerging conflicts and dilemmas in the intersection of intellectual property rights and competition law. The text commendably undertakes to light up the complex relationship between the two disciplines, helping to comprehend the point of harmony as well as the conflict between sustained enjoyment of intellectual property rights and the point at which the rights begin to rough up the standards laid down by competition law[3].

Much more circumspection and diligence could have been exercised w categorising topic heads and cases relevant under it. Topics seem to

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[2] Avtar Singh and Harpreet Kaur, *Competition Law*, Eastern Book Company, Lucknow, 2 pp. 9-180.

[3] *Id.*, pp. 34-40.

strayed into subjects under discussion, while another appropriate chapter waits to conveniently discuss the same. For instance, issues regarding jurisdiction of the Commission is found amidst the discussion of prohibited agreements, while it should be logically under the chapter on Duties and Powers of the Commission[4]. The layout of the topics and case laws could have been more comfortable in terms of subheadings as well as font readliness. A more well spaced page lay out would have been helpful to the reader than a crammed handy book format. A person who is looking forward to a prolonged association with this book could find the format demanding. Some of the terminologies employed which have not been explained nor defined by the bare Act but are wound importantly around the subject matter could have been better understood if a rudimentary explanation had been attempted. Particularly since the book has pretensions to be a guide for the beginner in competition law.

A heartening highlight of the text has been the profuse references to foreign commentaries and reports where competition law has been assiduously practiced and judicially administered. The ensemble of case laws and references to foreign reports and commentaries on convergent topics gives the position of law enabling a comparative assessment. However, there are a few instances of editorial slackness or casualness, where the rationale of a reference is left begging an explanation[5] or a reference is made, inadvertently overlooking the need for identifying the source[6]. There are profuse references to judgments of the MRTPC shedding light on the provisions that continue in

[4] *Id.*, p. 48.

[5] See, *supra* n. 2, p. XXXIX. While explaining the objects and reasons behind the Indian enactment of 2002, there is a sudden abrupt discussion on the Canadian Competition Policy and case law. Its relevance in the passage of the India Act is not pointed out - whether any reference and thrust to the Indian initiative was provided by the preceding Canadian legislation. There is no reference to the high power committee, quoted widely in various Supreme Court of India judgments including *Steel Authority* judgment that studied the need for a revamp of the law in India and proposed the framework of the present Act.

[6] See, *supra* n. 2, p. 25. While discussing cartels, and specifically 'Hardcore Cartels', the text discusses recommendations of the council concerning effective action against hard core cartels, 1998, without identifying the source of the document. So also, see, *supra* n. 2, pp. 33-34. While discussing Anti Trust Act, the sequence switches haphazardly between English common law and Anti Trust Act, 1890 (Congress enacted law), leaving one confused as to the Act's pedigree. The arrangement of thought in the text seems to be jerky (vacillates between different jurisdictions) and does not blend making at times for staggered reading. While discussing the transfer of intellectual property, the text uses an illustration from a set of guidelines but not divulging the source of the guidelines. The reader is made to guess from another subheading that it could be the 1992 Horizontal Merger Guidelines. But then the blaring question would be from which country does it emanate and whether it is a Federal or a State guideline? If so, what would be the value of a guideline if it is disregarded?

the present enactment as well as comments on deleted provisions. The text qualifies the statutory analysis with latest case law that culminated in the Supreme Court too; however, there is a dearth of references to orders from the CCI and the appellate tribunal[7]. Retention of long windy sentences stapled by intermittent commas sometimes takes the reader on a one lane expressway of 130 words[8]! Even though it may be a borrowed dictum from a judgment, editorial pruning could have made it more reader friendly. Nevertheless, the comparative law study guides the reader with possibilities of healthy juridical inferences.

While being a handy volume for a student wading into the subject at the undergraduate level, the book is at times too cryptic with a certain 'capsalised' breathlessness about it to be adequate for higher reaches of post graduate and research programmes. The work is a much needed compilation from the undergraduate program point of view and is in an easy to clutch and carry size. However, never has Prof. Dr. Avtar Singh's work betrayed an impression of being one apt from the examination point of view rather than for deeper scholarship but this work slants more for a quick consumptive purpose meant for the former rather than the latter. The books research utility could have been enhanced by providing a bibliography at end of the text considering the references made to reports and commentaries from across the world.

Priced at a modest Rs. 650/- for the hard bound volume and Rs. 475/- for the paper back version, the text has reliable content for a healthy rudimentary understanding of the subject and the dynamic issues in its contemporary discourse. Its easy readability would aid a robust comprehension of the subject and sow possibilities for further study of the subject in the student.

Dr. Jayadevan S. Nair[*]

[7] References and analysis of orders particularly the well publicised ones in the last three years with respect to housing (DLF cases or cement manufacturing companies, etc.) could have thrown light on the perceptional trend of the CCI and its contrast, if any, held by the upper fora and forums in other parts of the world.

[8] See, *supra* n. 2, p. 42, para. 3.

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