Amity Law Review

A Journal of Amity Law School, Delhi

ISSN 2249-2232
Volume 9
2013

AMITY LAW SCHOOL (DELHI)

Amity Law Review: A Journal of Amity Law School, Delhi

Volume 9 2013

EDITORIAL COMMITTEE

Published and Distributed by
Amity Law School (Delhi)

Amity Law Review is published annually.

ISSN: 2249-2232

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Amity Law Review
Amity Law School (Delhi)
(An Institution of the Ritnand Balved Educational Foundation)
(Affiliated to Guru Gobind Singh Indraprastha University, New Delhi)
F-1 Block, Sector 125, Amity University Campus
Noida-201313 (U.P.) Tel: 0120-4392681
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Printed at
K. S. Enterprises
28/8, Street No. 15, 60 Feet Road, Vishwas Nagar,
Shahdara, New Delhi - 110032
Phone : 011-22570110, Mobile : 9810757460
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ISSN 2249-2232
Volume 9
2013

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Cross Border Terrorism and Contradictions of Governance*

Prof. (Dr.) A. P. Singh**

ABSTRACT

Contradictions in the governance process, national and international, including environmental governance, have been the root cause of terrorism in general and cross border terrorism in particular. Cross Border Terrorism or International Terrorism, the definition of which shall possibly be never crystallized in academic terms, has turned truly global in more sense than one and poses single most important and gravest challenge to the International community in the days to come. The threat of terrorism that the world faces today does not fit in any existing paradigm of law and order maintenance processes. This is a new phenomenon, the perpetrator of which respects no borders, no boundaries and no state institutions, who feeds on the absence of state authority and move across territories in the execution of his 'global' campaigns. This paper makes an attempt to study this new phenomenon of cross border terrorism, seeking to highlight the contradictions that have given rise to the current menace of terrorism. The paper shall also make an attempt to suggest solutions of the problem.

INTRODUCTION

Cross Border Terrorism, today constitutes one of the single most important threats to international peace and security. In fact during recent times inter-state conflicts have not drawn as much attention of the world community as the acts of terrorism. Be it 26/11 in Mumbai or the strife-torn North West Frontier province in Pakistan, the Bosnia of Balkans or Chechnya of Russia, every single incidence of terror heralds a new prognosis of terrorism and presents the crisis with a newer dimension. Nevertheless, the definition of terrorism continues to be the most controversial issue in the contemporary international law and politics. All dictionaries agree that terrorism is all about fear, uncertainty and violence, and a terrorist is one who uses

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* Paper presented in the conference of All India Law Teachers Congress, held at Indian Society of International Law, New Delhi, 9-10 May, 2009

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act of violence and terror, or other fear-inspiring means, to coerce a government or a community to agree on something that the terrorist wants. However, there is utter lack of consensus on what constitutes terrorism? What causes terrorism? Who is a terrorist? What are the various forms and manifestations of terrorism? Quite often, one state's 'terrorist' is another state's 'freedom fighter'. In this situation, the definition of terrorism has become country-specific, serving their respective geo-political or economic interests.

This paper makes an attempt to study this new phenomenon of cross border terrorism, which in the humble opinion of this author emerges from the contradictions of our governance process. Be it national governance in poorer countries, where conflicts are most frequent, especially in those areas that are ill governed and where there are sharp inequalities between ethnic or religious groups or international governance where western interventions have encouraged the emergence of terrorist groups first in the third world countries and then internationalized them leading to the heat of terrorism being felt by the erstwhile promoters of these terrorist outfits, in both cases the root cause is traceable to contradictions of governance process. Environmental governance is another area of governance which is not an exception and the cases of mis-governance or no governance continues to be the breeding grounds of terrorist outfits. The naxalite upsurge in India, ethnic troubles in Sri Lanka or Nepal are just few manifestations of the contradictions of our governance process.

Truly conflicts, and terrorism by analogy, often rear their ugly heads when groups feel marginalized and when there are little or no opportunities for economic development. The causes of terrorism in general and cross border terrorism in particular, as such, are too many and it is not possible to cover the entirety of issues in one paper alone. Therefore, this papet concentrates on one important dimension of cross border terrorism, i.e. the International dimension of it and the contradictions involved in the current paradigm of international relations management in which state actors themselves for this or that reason become iustigators or supporters for the cross border terror network.

MEANING AND NATURE OF CROSS BORDER TERRORISM

U.S. State Department defines the term 'terrorism' to mean premeditated, politically motivated violence perpetrated against the non-combatant targets by sub-national groups or clandestine agents.[1] The acts of terrorism when committed across borders by agents instigated, supported, assisted or allowed by state or non-state authorities on the other side of the border, the phenomenon would be termed as cross border terrorism. Such assistance takes two forms: territory and resources.[2] "Providing territory" means that terrorists enjoy geographical non-intervention as a consequence

1 National Strategy for Combating Terrorism 1 (2003), available at http://www.whitehouse.gov/news /releases/ 2003/02/counter_ terrorism/counter terrorism strategy.pdf

2 Ibid, at p/6

of a host nation's sovereignty. Such protection may arise from a state's complicity or active support. "Providing resources" means that government advances its political goals by donating money, technology, information or other assistance to terrorists.[3] This way cross border terrorism becomes a substitute for war for the State actor. When war will not accomplish states' ends, or is not available as an option, terrorism opens another road to Rome.[4] States which support terrorism intend to extort political concessions which they otherwise can not win in war. But that does not mean that all the terrorist outfits that exists today, all stand on the crutches of this or that state's support. However most of such terrorist outfits have either been created or supported by the state actors at one of the other time.

NEW FORMAT OF CROSS BORDER TERRORISM

There is something new about this new breed of terrorists. There have been terrorists and terrorist organizations earlier as well and strictly speaking they could also be termed as 'cross border' terrorists as they also operated across national boundaries. The national movements that came into prominence in 1960s, 70s and 80s, such as Ireland Revolutionary Army, (IRA), Palestine Liberation Organization, (PLO) etc, were also the groups that crossed state boundaries, committed acts of terror, sought refuge and smuggled arms. IRA got weapons from Libya and launched attacks across Britain; it also launched a one off attack in Germany and plotted an assault on British forces in Gibraltar. Palestine terrorists crossed in Israeli territory committed acts of terror and sought refuge in Egypt and Syria. They hijacked airplanes and took hostages to extract ransom in terms of political concessions, money or arms.

Yet these groups were tied, politically and organizationally to particular territory, they had limited aims defined in relation to that territory and membership drawn almost exclusively from that territory. The PLO sought to win back parts of Palestine from Israeli rule, the IRA sought an end to Britain's partition of Ireland and Kurdish Workers Party wanted autonomy in south eastern Turkey, Basque separatists concentrated their campaigns in northern Spain. Even when such groups, like the Palestinians, carried out international operations, these were aimed at highlighting and furthering their specifically local, national goals. These groups had state based aims their political aspirations and actions were moulded by notions of sovereignty and territory. Fundamentally, their aim was to create a sovereign nation state, they pursued largely irredentist aims and built up their memberships from a specific population, even if they sought the sponsorship of a foreign patron for arms and logistical support.

Compare this with today's cross border terror groups that have no such attachment

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3 See generally Hawala and Underground Terrorist Financing Mechanisms: Hearing before the Sub-committee on International Trade and Finance of the Senate Commission ou Banking, Housing and Urban Affairs, 107th Cong. (2001)

4 Stephen Sloan, Beating International Terrorism: A Strategy for Preemption and Punishment 9 (rev. ed. 2000), available at http:// purl.access.gpo.gov/GPO/LPS20458

to territory. They view territory expediently, as a base from which they can organize their campaigns and plot their attacks. The new breed of Islamic terror groups are explicitly global in the sense that they have broadly anti-western views rather than locally defined objectives and their members hail from different states rather than from a distinct community with distinct interests. For these global terrorists, territory is merely a place from which they can plot their terrorist acts. Such groups are really comparable to international business organizations, as they like any other multinational corporation, the new transnational terrorists' network utilize global economic transportation and communication systems for their operations. However the multinational corporations would be looking for stable political system that can give them long term business stability, the terrorists are drawn to failing or failed states, where the breakdown of authority gives them the ability to conduct their operations without risk or significant interference.

As such the terrorist groups of yesteryears sought to build or remake nation states, today's cross border terrorists feed off the demise of state authority. Where national liberation movements sought to redraw state boundaries, cross border groups think nothing of moving from one failed state to another. Earlier violent groups focused their energies on achieving limited local aims even as they carried out international operations, today's terrorists talk about spreading Jihad around the globe.

INTERVENTIONIST APPROACHES OF WESTERN ELITE: THE CAUSATIVE FACTOR

What are the reasons for this turn around? A group of authors, like Takeyh and Gvosdev[5], argue that the western intervention in the third world, specifically the humanitarian interventions of the post cold war era, encouraged the emergence of to-days cross border terrorism. By undermining State authority and notions of sovereignty, humanitarian intervention created the space for the rise of non-state actors, and by internationalizing local conflicts, western intervention did much to encourage the flouting of traditional border and the movement of armed groups between territories. While the postwar world, organized around principles of sovereign equality, gave rise to armed groups with territorial aims, the humanitarian approach, with its deep suspicion of state authority has given rise to stateless terror network. Therefore the current paradigm of cross border terrorism, as Takeyh and Gvosdev would argue is the mess made by the west's interventionist approaches.[6]

These interventions were basically meant for the domestic audience, rather than driven by a newfound concern for the downtrodden people around the world. In essence, humanitarian action became an attempt to invest western elites with some moral vision, which it lacked at the domestic front. Designed basically to temporarily

5 Ray Takeyh and Nikolas K Gvosdev, Do terrorist Network need a home Washington Quarterly, Vol.25 number 3, 2002.

6 Brendan O' Niel, A mess made by the West, www.spiked-online.com/articles, visited on 6.5.2009

to offset the political crisis at home, this interventionist role of the west undermined the institutions which were at the base of the world order of the postwar period. Under this newfound moral vision of the western elite, for the purpose of justifying their humanitarian role, they assumed it to be their responsibility to ride into any nation where people were oppressed or down-trodden, this way they actively undermined the sovereign state authority of the third world countries. In fact during this humanitarian period sovereignty became a dirty word, increasingly seen as an outdated idea that tyrants hid behind in order to escape international judgments, rather than a political principle which required to be defended as it formed the basic building block of the post war period. "Nationhood as we know it will be obsolete, all states will recognize a single global authority" declared Strobe Talbott, the erstwhile Secretary of State during Clinton era.[7] During Bush era this policy almost remained the watchword and US as the only policemen of the world overrode the state's supposed sovereignty everywhere from Indo-china to Middle East and from Central Asia to Europe and Africa.

Such explicit disdain for sovereign statehood was a significant shift in international politics. Right since the founding of UN, international relations were organized around the principle of formal sovereign equality between nation states. UN Charter upheld that states should have equal legal and political rights, regardless of their economic wealth or military power. Humanitarian intervention laid down an unpredictable shift in international politics and a stage was set where traditional state authority held increasingly less sway in world affairs. It is in this context that the emergence of non-state actors formed an important development of this era. A significant part of these non-state actors were terrorist outfits supported and added by the new advocates of humanitarian interventionist approaches.

Some third world states who recognized sovereignty as one of the few means through which they could assert state control, particularly over groups that sought to challenge their authority, did raise the issues, but their voices obviously the cries in the wilderness. There was a real concern that the third world states might end up on the receiving end of humanitarian warfare, as Iraq, Somalia and Serbia had. They also feared that in a world where sovereignty counted for little, they might lose the one thing granted to them by the old sovereign norm, i.e. an element of authority. With little by way of political legitimacy or central authority, third world states could at least fall back on national sovereignty as a means of maintaining control over their territories. The new found political morality of the western elite threatened to rob them off these last vestiges of legitimacy.

By attacking the centrality of sovereignty, the west detached politics from national interests. It held that there was a higher form of political life, over and above the distinct interests of individual nation states, which all must recognize. By creating a distinction between the political good and the national interest, western intervention

7 Quoted in Time, 20 July 1992

undermined the traditional capacity of state authority in world affairs. It created the conditions for the rise of non-state actors, the major chunk of which turned out to be terrorist outfits, who actively fed off the collapse of state authority. Western intervention from Iraq to Balkans to Kosovo to Iraq again created vacuums in to which armed groups tentatively moved, like parasites on the weaknesses of their undermined governments.

IRAQ AND BALKAN REGION

One of an important example of this was Iraq, the first state to be invaded. Northern Iraq was taken out of Saddam's control and turned into a UN safe heaven where Iraq's beleaguered Kurdish community could exercise limited self rule. This area became a safe heaven for outlaws, who opportunistically moved into the vacuum left by west's intervention. No authority or international institution had any shred of control there. Later it became a heaven for drugs and arms smugglers as well. Obviously the instability creates an atmosphere in which terror and terrorists can flourish. Kurdish Islamic Group Ansar Al-Islam said to have links with Al Qaeda built up its strength in this territory, this group of course was eliminated by US in and around 2001-02. Even US officials who later acknowledged that the northern Iraq was used as a launching pad for terrorist activities accepted that undermining state authority over a region makes that region a good place for stateless terror creating a free for all territory for terrorists.[8] Balkans was another example of West's anti-sovereignty intervention. In the 1990s, after the intervention of the west, secessionism was encouraged amongst various regional players, which eventually ruptured the Yugoslavia. There was a rise of armed Islamic groups that fought against Serb forces on Bosnian Muslim side. Some of these Islamic groups managed to take over towns and villages turning another safe heaven for the terrorist activities.[9] In this region, for the purpose of creating the new nation states western intervention fundamentally undermined the notions of state independence and sovereignty.

The routing of the Taliban by the west in Afghanistan in early 2001 created the space for Afghan's old Mujahedeen warlords, turning the entire region into a bandit territory. Here it is only Kabul where some semblance of authority is there. It is well documented that USA played a major role in creating mujahidin in Afghanistan which gave rise to Osama bin Laden's Al Qaeda network and other groups. US forces financed and armed the Islamic Mujahidin to fight the Soviet occupation. These Islamic groups were later allowed to move into Europe, this way globalizing the Islamic terrorism. These groups moved to fight on the Muslim's side in Bosnia, with western backing. It was through this process that Islamic terrorists became globalised, transforming from small groups with a local mission in Afghanistan into a small group with a borderless mission to spread Jihad. In fact state department of

8 Ibid, Brendan O'Neill (Powel Does't vow)

9 Lessons from Bosnia and Herzegovina: Travails of the European Raj, Gerald Knaus and Felix Martin, Journal of Democracy, July 2003, Volume 14, Number 3

US at one time under President Clinton prepared a report claiming hundreds of foreign Islamic extremists who became Bosnian citizens after battling Serbian and Croatian forces presented a potential threat to Europe and US.[10]

This phenomenon of cross border movement, or armed terrorist groups flouting state boundaries in the execution of their mission, is the western creation, which has become almost a hallmark of western foreign policy thinking during recent years.

INDIAN PARADIGM OF TERRORISM: THE SUBSTITUTION EFFECT

In the Indian Sub-continent as well this pattern of anti-sovereignty propaganda has been repeated with disastrous consequences. In the Kashmir region the porous borders allow substantial movement of man and material with relative ease away from the glare of the armed forces, and here Pakistan has been adding and abetting terror network, for the last three decades as an active policy of Pakistan, policy of thousand cuts bleeding India to death, first under Zia-ul-Haq and then under every single regime that has come to occupy office in Pakistan. Though the frame of Shimla accord would not allow an active and supportive role for the western powers yet implicitly US policies have ensured that the so called political and moral support to the terror network of Kashmir continues to have safe heavens in POK enabling them to operate across borders.

This brings us to a new phenomenon of state abetment of cross border terrorism that really has become almost a policy to treat terrorism as a substitute of war. Many international law scholars and other experts agree that state-sponsored terrorism has become a substitute for war, though few use the word "substitute." Many prefer terms like "proxy war," "alternative," and other synonyms. Renowned terrorism expert Walter Laqueur deems state-sponsored terrorism "warfare by proxy,"[11] calling it a "cheaper and less risky alternative" to conventional battle; it is undertaken because not even an empire, "however powerful, could afford to live in a state of perpetual war."[12] Calculations based on war costs may be used to explain why states resort to terror.[13] When war becomes prohibitively expensive, terrorism picks up where combat ends.[14] Accordingly, experts often refer to terrorism as the weapon of the weak.[15] States that finance and encourage terrorism today tend to

10 America used Islamists to arm the Bosnian Muslims, Richard J Aldrich, *Guardian*, 22 April 2002

11 Walter Laqueur, The New Terrorism 156 (1999) NY.

12 Id. Laqueur's statement, while made in the context of ancient times, holds also for the modern world. The problem of cross border terror in the Kashmir region representing the policy of thousand cut to bleed India to death is one example in the modern world.

13 Ray S. Cline & Yonah Alexander, Terrorism as State-Sponsored Covert Warfare 9-10 (1986)

14 Ibid.

15 M. Cherif Bassiouni, Legal Control of International Terrorism: A Policy-Oriented Assessment, 43 Harvard International Law Journal 83, 86 (2002)

care little for their international reputations and lack the means to wage successful full-scale war against enemies.[16] They also tend to be authoritarian and now as US would name them the "rogue" states.[17] Today, many of the most active state-sponsors of terrorism fund and encourage terrorist groups because they have already attempted to accomplish political goals through war and failed. For example, the Arab-Israeli and Indo-Pakistani wars gave rise to subsequent terrorist campaigns by the defeated party in each contest.

The two examples i.e. the Arab-Israeli and Indo-Pakistani conflicts demonstrate, war and terrorism are effectively substitutes, the latter representing a last recourse for the weaker party. In both conflicts, repeated military losses made the prospect of another armed conflict with the winner costlier. As the costs of war increased, the losing party increasingly resorted to terrorism instead of war in order to accomplish the same or similar goals. In both cases, the loser substituted terrorism for war. State-sponsorship of terrorism may have its own uses quite aside from its ability to take the place of war in some circumstances. Likewise, there may be some results achievable through war that sponsoring terrorism could never replicate. Overall, the Arab-Israeli and Indo-Pakistani conflicts furnish convincing example of a substitution effect between sponsorship of terrorism and use of war.

Two major inferences can be drawn from the above. One, what is termed as contradictions of the current paradigm of international governance allows the state parties to flagellate the established norms of international law of post-war period for the simple purpose of feeding off their domestic audience. Today western officials may be writhing their hands over the nihilistic terrorists who don't do things in a civilized way. Yet such terror networks are the products of west's undermining of its own international framework. Today the west appears to be facing the heat of its own mess. Second, the current paradigm of international law and governance do not have a fixed frame to handle these terrorists networks. Though there are a few conventions dealing with the phenomenon of terrorism, specially 1994 and 1997 declarations of U N General Assembly, they at best form part of soft law in international law terminology. So the question arises as to how do we deal with the scourge of cross border terrorism?

CONCERTED GLOBAL ACTION

India has consistently been highlighting the need for a unified international response to transnational and trans-border terrorism which is today affecting many number of countries and challenging established societies and governments. India has sought to emphasize at international level that terrorism is a global menace to which democracies are particularly vulnerable. India has called for concerted global action

16 Laqueur, The New Terrorism, supra note 11, at 158

17 Sean P. O'Brien, Foreign Policy Crises and the Resort to Terrorism: A Time-Series Analysis of Conflict Linkages, 40 Journal of Conflict Resolution. 320 (1996)

to counter terrorism and to ensure the enactment of measures such as sanctions against states responsible for sponsoring terrorist acts across international borders. The Government of India has actively supported the 1994 declaration adopted by the UN General Assembly on measures to eliminate international terrorism and the 1997 International Convention to Suppress Terrorist Bombings adopted by the UN General Assembly. India has also actively associated with resolutions in the United Nations Human Rights Commission condemning terrorism as a prime violator of human rights.

It may be noteworthy in this context that the information technology revolution has massively increased governmental ability to collect, store and retrieve records of people involved in terrorist activities and to match those records reliably to individual identities. Collecting information on terrorists is vital to control and prevent terrorist activities. Only if the international community could now come together for a concerted global action to counter terrorism, we could find a way out of this scourge. The following discussion however indicates at a different kind of prognosis, i.e. that the states are neither prepared for such a concerted action nor do they have a needed faith and confidence in the jurisdictions of another. Due to the deep seated suspicion as to intentions of other party in the international arena, the state parties do not find themselves as willing and confident cooperators to fight out the menace of terrorism. It has been noted elsewhere in this write up that it is due to this particular element of suspicion that the parties on an issue of such vital importance for the peace and security of international order fail to cooperate amongst themselves and the beneficiaries obviously are the terrorist organizations.

IMPEDIMENTS IN CONCERTED GLOBAL ACTION

First and probably an important problem of coordination is that though most political leaders and law enforcement officials are in favor of more cooperation and better information-sharing in principle, everybody saying that they are in favor of co-ordination, but nobody is in favor of being co-ordinate. The reflex of officials in such cases is always to jealously protect their powers on the national level even though the fight against terrorism is a global one.

Further national privacy laws and general privacy concerns are other crucial obstacles to cross border records sharing on terrorists and terror networks. Some countries have laws against connecting their electronic databases to other country's computers. For example, the national laws of Belgium, Germany, and Italy, among others, do not permit connection to a database situated in a foreign jurisdiction. Efforts to increase records sharing on terrorist outfits across national boundaries constantly confront and must overcome security objections. Law enforcement agencies are notoriously reluctant to divulge information. Officers fear that providing direct or indirect access to their intelligence, even to record databases, might compromise confidential information about lot of sources of information as to their own witnesses, victims, and offenders.

It is also important to note that creating an information database system that would permit records to be exchanged among several countries would, in many instances, mean overcoming inadequate criminal record databases, incompatible computer software, and different languages and alphabets. Further a successful system for sharing criminal records information must allow its end users to obtain the information they need quickly and efficiently without fear of overwhelming the database. In all such cases even if a sufficient international or regional system for sharing criminal records could be established, there would be substantial problems interpreting criminal records compiled in different legal, political, and linguistic cultures. Language differences alone pose a huge challenge. Criminal jurisprudence is complex and nuanced. How confidently will decision makers be able to comprehend convictions and sentences rendered in a foreign language and based on foreign law and jurisprudence?

CONCLUDING OBSERVATIONS

It may be summed up by way of concluding observations that the threat of terrorism in general and cross border terrorism in particular has been getting worse every passing day. Democracies are particularly vulnerable to this threat and therefore some drastic action has to be taken to prevent the slide into chaos. What is required in terms of remedies for this malaise of cross border terrorism is stabilization of international order. The basic building blocks that have been sustaining the current paradigm of international order have got to be put back in place. The element of sovereignty has got to be given a new lease of life. The fluidity in international order has already taken a big toll in terms of destabilizing the whole politico-economic order of the international community. There is no claim on the part of this author that the current paradigm of international order is the best. Obviously, there are many numbers of limitations of this system. However until we are able to develop an alternative paradigm of international governance the current paradigm of governance has got to be saved.

A concerted action on the part of global community has to be sorted out to enable a unified international response to transnational and trans-border terrorism which is today affecting many number of countries and challenging established societies and governments. India has sought to emphasize at international level that terrorism is a global menace to which democracies are particularly vulnerable. India has called for concerted global action to counter terrorism and to ensure the enactment of measures such as sanctions against states responsible for sponsoring terrorist acts across international borders. And for this purpose, reliable methods of data sharing of the people involved in terrorist activities is the first step towards meeting the challenges of the menace of terrorism.

Chief Justice's Power to Appoint Arbitrators : Judicial Approach

Prof. (Dr.) Guru Gyan Singh*

ABSTRACT

Parties are free to agree to the procedure to be followed for appointing the arbitrators. In case parties fail to do so, there is default clause providing for appointment of the arbitrators. If any of the parties again fails to appoint arbitrators, other party can approach the Chief Justice for the appointment of the arbitrators. Institution of the Chief Justice has been introduced to ensure that appointment of arbitrators would be made in fair and transparent mannet. Help of the institution of the Chief Justice has not been sought for the sole reason of expertise in law. By involving the institution of the Chief Justice, the Legislature did uot iutend to make some provisions ineffective and redundant. Majority judgment in *Patel Engineering Co. Ltd.* has created two classes of cases. In one category of cases, sections like 16, 34, etc., is to have application and in another, they are not to be invoked. It is not attuned to the established principles of interpretation of the statutes.

INTRODUCTION

Making of the Arbitration and Conciliation Act, 1996, is deeply influenced hy the experiences of the working of the Arbitration Act, 1940, and the scheme and intent of UNCITRAL Model Laws. Its professed policy is expanding and strengthening party autonomy and restricting scope for judicial intervention to ensure successful arbitration. In this way, the Act combines characteristics of both civil and common law systems, aiming to promote an efficient, effective, inexpensive and speedier arbitration. However, some problems were realized in the working of the Act and accordingly to effect necessary changes an amendment Bill was introduced in the Parliament in the year 2003. Tlic Bill has been rejected by the Committee on Personnel, Public Grievance, and Law. Disputes are arising on bigger scalc rclating to determination of the nature and scopc of different provisions of the Act[1]. Scheme of the Act dealing with appointment of arbitrators is one of them. Arbitrators are like judges of the proper courts. It is the quality, competence, capability and commitment of arbitrators to neutrality, impartiality and disinterestedness that can

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1 Determination of the meaning and scope of the provisions like ss. 2(2), 10, etc., have invited huge litigation.

instill confidence in the parties in the system of justice through arbitration and, also, create hope for honest, bonafide and fair resolution of conflicts. In this backdrop, the article aims to enquire into the trend of judicial decisions relating to the nature and scope of the power of the Chief Justice to appoint arbitrators under the scheme and intent of section11.

SCHEME OF POWER AND PROCEDURE OF APPOINTMENT OF ARBITRATORS

It is evident from the scheme and structure of the provision of section11 that there are three sets of situations dealing with the appointment of arbitrators and procedure relating thereto. First, parties are free to agree to the procedure for appointment of the arbitrator or arbitrators[2]. It includes the procedure wherein parties themselves directly appoint arbitrators and the procedure of appointment of arbitrators by individual or institutions as agreed by the parties[3]. The second one is where there is a statutorily prescribed procedure for appointing the arbitrators as an alternative system in ease of parties' failure to agree to a procedure for appointiug the arbitrators[4]. This mechanism is also known as the default clause. The third set of situation authorizes the aggrieved party to invoke intervention of a third party or an external agency for appointing the arbitrators, i.e., the Chief Justice or any person or institution designated by him. This situation arises when there is failure to appoint arbitrators in accordance with the procedure as agreed between the parties[5] or in accordance with the mechanism statutorily prescribed as an alternative to the situation when parties fail to agree on a procedure to be followed for appointing arbitrators[6]

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2 Section 11(2) reads: "Subject to sub-section (6), parties are free to agree on a procedure for appointing the arbitrator or arbitrators."

3 Section 2(1) (a) reads: "arbitration "means any arbitration whether or not administered by permanent arbitral institution". Also see s.2(1)(8), " Where this Part- (a) refers to the fact that the parties have agreed or that they may agree, or (b) in any other way refers to an agreement of the parties, That agreement shall include any arbitration rules referred to in that agreement.

4 Section 11 (3) reads: "Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator."

5 Section11(6) reads: "Where, under an appointment procedure agreed upon by the parties.- (a) a party fails to act as required under procedure; or (b) the parties; or the two of the appointed arbitrators, fail to reach an agreement expected of them under that procedure, (c) a person, including an institution, fails to perform any function entrusted to him or under that procedure, A party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

6 Section11(4) reads: "If appointment procedure in sub-section (3) applies and- (a) a party fails to appoint an arbitrator within thirty days from the receipt of the request to do so from the other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, The appointment shall be made, upon the request of a party, by the Chief Justice or any person or institution designated by him."

DISTINCT FEATURES OF POWER AND PROCEDURE UNDER SECTIONS 11(4) AND (5)

There are some distinct features of the procedure, statutorily prescribed as an alternative mechanism for the appointment of arbitrators when parties fail to agree on a procedure to appoint arbitrators. They are, (1) the time limit of thirty days for appointing the arbitrator, (2) involving of a constitutional institution, i.e., the Chief Justice or any person or institution as designated by him in appointing of arbitrators, (3) imperative nature of his duty to appoint arbitrators on satisfaction of the conditions precedent and that (4) he is not to take any action suo motu rather (5) to be duly approached by the party feeling aggrieved in case arbitrator is not appointed.

It naturally raises the question whether this time limit of 30 days is of mandatory or directory nature. What would be range of effects and implications of its being of either character? It could reasonably be inferred that if this time limit bears mandatory character, party failing to appoint arbitrators within that limit would stand divested of right to appoint arbitrators. Otherwise, he would be free to stall appointment of arbitrators for any period of time delaying constitution of the arbitral tribunal. There is no express or implied outer time limit for approaching the Chief Justice with request to appoint the arbitrators. Any norm has not been given to count the limit of thirty days to approach the Chief Justice or his designates in case two arbitrators happen to be appointed on different dates. Such situations give rise to possibilities of application of law of limitation. Judicial approach on this issue is at variance under section 43 of the Act[7].

Doubts about the nature and scope of the thirty days time limit has been explained by the Apex Court[8]. Opposite party's power to appoint arbitrator continues to the date request is made to the Chief Justice to appoint the arbitrator. Thereafter, he stands divested of the power to appoint arbitrator and if any appointment is made after filing of request to the Chief Justice to appoint arbitrator, that is to be a nullity and non-est in law. This approach has followed the middle path and obviated the need to decide the nature of time limit as mandatory or directory. However, it does not provide any reply to the situation of absence of outer time limit to approach the Chief Justice after expiry of thirty days time limit.

'Judicial authority' under section 8 and 'Chief Justice' under sections.11(4) and (5)

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7 *Hati Gold Mines Company Ltd.* v. *Vinay Heavy Equipments Ltd.*, 2008 (2) Arb. LR 140 (SC), referred to in *infra* n. 12 at p. 603 "... provisions of Limitation Act would apply to all proceedings under the Act, both in court and in arbitration except to the extent expressly excluded by the provisions of the Act." Matter has been explained with the help of decided cases that Law of Limitation has to have application in approaching to the CJ or the person or the institution to appoint the arbitrators at p.322 and case holding contrary view has, also, been referred to at p.323 of "Law Of Arbitration & Conciliation-Practice and Procedure" by S.K. Chawala , Second Edition,2004, Eastern Law House Calcutta

8 *Datar Switch gears Ltd.* v. *Tata Finance Co.*, (2000) 8 SCC151

are equally situated, at least to the extent they are duty bound, respectively, to refer the parties to arbitratiou and to appoint arbitrators, only on being properly approached and uot to intervene on their own[9]. However, those provisions are not identical and vary in their scope in some areas[10].

DISTINCT FEATURES OF SECTION 11(6)

It is noteworthy fact that provisions of S.11(6) do not refer expressly or by way of implication to any time limit like that of the thirty days in ss.11(4) & 11(5). There is nothing express or implied in the expression "a party may request the Chief Justice or any person or institution designated by him to take necessary measure" warranting an inference that the Chief Justice is endowed with authority to appoint arbitrators and that is of imperative nature. Phraseology might be said to be a product of the professed policy of promotion of the party autonomy that appears to be duly entrenched in the scheme of section.11. Judicial approach on the above matters is not uniform and the same[11]. At one place, the Apex Court has observed that "...since unlike sub-sections (4) and (5) no period of limitation is provided in sub-section (6) of S.11, the limitation of thirty days provided under sub-sections (4) and (5) can not be invoked under sub-section (6)"[12]. On the other hand, expression that "...a party may request the Chief Justice or any person or institutiou designated by him to take necessary measure" has been interpreted to include request to the Chief Justice to appoint arbitrator and his power to appoint arbitrator in pursuance thereof[13]. There is, also, a strand of strong opinion that limitation of thirty days is equally applicable under section 11(6) as it has been interpreted and applied in cases involving sections 11(4) and (5)[14]. The judicial approach on the aforesaid issues is almost settled. Yet, it underlines the rising trend of judicial interference at different levels of arbitral processes undermining the professed policy of party autonomy and minimal judicial interference.

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9 Section8 ordains that Judicial Authority shall ... refer the parties' to arbitration. And ss. 11(4) & (5) state that Chief Justice and his designate shall appoint arbitrators. Decision in *SBP & Co.* v *Patel Engineering Ltd.*, (2005) 8 SCC 616, has drastically changed the nature and scope of power of CJ under ss.11 (4), (5) and (6)

10 B. P. Saraf & S. M. Jhunjhunwala, *Law of Arbitration and Conciliation*, 5th Ed., Snow White Publications Pvt. Ltd., Mumbai. 2009, pp. 324-25

11 *Id.*, pp. 295-298

12 *Id.*, p. 295. Also see, *Subhas Projects and Marketing Ltd.* v. *South Eastern Coalfields Ltd.*, AIR 1998 MP 276

13 *Ibid.* Also see, *Kokan Railway Corporation Ltd.* v *Mehul Construction Co.*, AIR 2000 SC 2821, Para 5, referred in p. 313 of S. K. Chawala, *Law of Arbitration & Conciliation*, . 2nd Ed., Eastern Law House, 2004, p. 313, that explains the rationale behind the similarity in Chief Justice's power to appoint arbitrators in ss.11(4),(5) & (6), i.e., removal of obstacles in appointing of arbitrators

14 A three Judge Bench of Supreme Court in *ACE Pipe line Contract (P) Ltd.* v. *Bharat Petroleum Corp. Ltd.* (2007) 5 SCC 304, has expressed such a view following *Datar Switchgear Ltd.* v. *Tata Finance Ltd.*, (2006) 2 SCC 638

CHIEF JUSTICE AND HIS POWERS

Chief Justice is a constitutional functionary and his office has a public character. It avails high esteem, honor and dignity. It is self-evident that reference to the Chief Justice is not to the Court of Chief Justice rather it is to the office of Chief Justice ex-officio. He is to function within the framework of law as laid down by the provisions of the Arbitration and Conciliation Act, 1996.The term 'Chief Justice' has reference to the Chief Justices of High Courts in connection with domestic arbitrations and to the Chief Justice of Supreme Court in relation to 'international commercial arbitration'[15].

Institution of the Chief Justice has been expressly empowered to devise 'scheme as he may deem appropriate for dealing with the matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him'[16]. However, the scheme framed by the Chief Justice under the aforesaid provision cannot override any express or implied norms laid down by the Act itself. The Chief Justice or the person or institution designated by him shall have due regard to the qualifications as required by the parties through their argument and other considerations as are likely to secure appointment of an independent and impartial arbitrator. It is just an explanation or clarification by way of special care and caution. Section 12 explicitly speaks of these things. Another important provision states that the decision of the Chief Justice or the person or the institution designated by him on the matters covered by sections11(4) or 11(5) or 11(6) is to be final[17].

The term 'final' could be ascribed several shades of meanings. In the ordinary course of the things finality of decision means and implies that there is no provision of appeal under the relevant statute at the level of its administration[18]. It could, also, be interpreted and understood that decision of the Chief Justice as a third party, is final in the sense that parties to the arbitration are not allowed to agree on other or different set of procedure for appointing the arbitrators after failure of the processes covered by sections 11(2), (3), (4), (5) and (6)[19]. Parties are divested of authority to appoint arbitrators with the filing of request with the Chief Justice or his designates to appoint arbitrators. For, the Act provides opportunities to the parties to ventilate their grievances in this regard if there be any. In this backdrop it could reasonably be inferred that meaning and scope of the term 'final' is not of the magnitude as explained by the majority opinion in *Patel Engineering Ltd.*

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15 Section 11(12)

16 Section 11(10) Also see infra n. 38 that explains the historical background and purpose of Section 11(10)

17 Section 11(7)

18 Section 37 does not provide for appeal against the order passed by the Chief Justice appointing arbitrators

19 A bare glance at the scheme and structure of section 11 reveals that parties are empowered to agree on the procedure to be followed in the appointment of arbitrators

JUDICIAL APPROACH TO THE NATURE AND SCOPE OF CHIEF JUSTICE'S POWERS

Administrative Nature and Limited Scope of Inquiry - Existence of a Prima-facie Case

Judicial opinion on the issue of the nature and scope of the power of the Chief Justice to appoint arbitrators is deeply divided. A brief historical account of the development of judicial approach to the matter has been rendered by an eminent author[20]. In *Sundaram Finance Ltd.* v. *NEPC India Ltd.*[21], an obiter observation was made that the nature of power was not judicial. This observation was affirmed by a Bench of two judges of the Supreme Court in *Ador Samia (P) Ltd.* v. *Peekay Holdings Ltd.*[22]. And the reason advanced was that 'as the Chief Justice or his designate under s.11 (6) acts in administrative capacity... it is obvious that this order is not passed by court exercising any judicial function nor it is a tribunal having trappings of a judicial authority". Further, in *Konkan Railway Co.* v *Mehul Construction Co.*[23], it was reiterated by a Bench of three judges of the Apex Court that an order passed by the CJ, appointing arbitrators was an administrative order. The later two decisions were referred to a larger Bench by another two judge Bench in *Konkan Railway Co.* v. *Rani Construction Co. Pvt. Ltd.*[24]. In this way matter reached to a five judges Bench of the Supreme Court in *Konkan Railway Co.* v. *Rani Construction (P) Ltd.*[25]. Reviewing the earlier decisions it has been observed that "section 11 does not contemplate a decision by the Chief Justice or his designate on any controversy between the parties. The decision to nominate an arbitrator is not adjudicatory but administrative. There is nothing in section 11 that requires a party other than the party making the request to be noticed. It does not contemplate a response from the other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that other party may raise. The Chief Justice or his designate has to take into account the qualification required of the arbitrator by the agreement between the parties and other considerations likely to secure the nomination of an independent and impartial arbitrator also cannot lead to the conclusion that the Chief Justice or his designate is required to perform an adjudicatory function.

The only function of the Chief Justice or his designate is to fill the gap left by a party or the two arbitrators and to nominate an arbitrator. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that nomination of arbitrator is made by a person occupying high judicial office or his designate,

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20 O. P. Malhotra & Indu Malhotra, *Law and Practice of Arbitration and Conciliation*, 2nd Ed., LexisNexis Butterworths, New Delhi, 2006, pp.552-53

21 (1999) 2 SCC 479

22 (1999) 2 SCC 388

23 (2000) 7 SCC 201

24 (2000) 8 SCC 195

25 AIR 2002 SC 778

who would take due care to see that a competent, independent and impartial arbitrator is nominated. It might be that, though the Chief Justice or his designate might have taken due care to nominate an independent and impartial arbitrator, a party in a given case may have justifiable doubts about the arbitrator's independence or impartiality. In that event, it will be open to that party to challenge the arbitrator under section12, adopting the procedure under section 13".[26]

MINORITY OPINION IN *PATEL ENGINEERING LTD.*

SBP & Co. v. *Patel Engineering Ltd.*[27] is a seven judge Bench decision of the Supreme Court on the issue of nature and scope of the power of the Chief Justice and his designates to appoint arbitrators under section11. A lone judge's dissenting opinion agrees with *Rani Construction (P) Ltd.* decision that the nature of the power to appoint an arbitrator is pure and simple administrative. It is not judicial or quasi judicial. The Chief Justice is to be prima-facie satisfied that conditions precedent attracting exercise of his authority to appoint arbitrators exists. Decision in this regard is not be made on merit undertaking a detailed enquiry extending opportunity to the opposite party. There is no duty to act judicially though it is to act fairly. Section 16 provides in express and imperative terms that arbitral tribunal is vested with the power to rule on its jurisdiction and also, to decide the existence and validity of the arbitration agreement. Party aggrieved is free to seek remedy under sections 34 and 37. The Chief Justice's decision could be assailed under Article 226 of the Constitutiou and appeal against decisiou made there under could be taken to the Supreme Court under Article 136. However, the High Court should observe self-restrain in exercise of its power under Article 226 of the Constitution. For, the Arbitration and Conciliation Act, 1996, provides a detailed scheme of provisions to safeguard the lawful and legitimate interests of the parties to arbitration. Remedies available there under must be availed before approaching the High Court. It draws support and sustenance from professed policy of party autonomy and minimal judicial interventiou as embodied in sections 5, 8, 9, 14(2), 34, 36 and 37 of the Act. Section 16(1) is a new development illustrative of civil law approach to arbitration under the Act.

MAJORITY OPINION IN PATEL ENGINEERING LTD.

Majority opiniou has ruled that the power exercised by the Chief Justice under section 11(6) of the Act is not an administrative power but a judicial power. This power could be delegated in its entirety by the Chief Justice of High Court only to the judge of that High Court and by the Chief Justice of India to the another judge of the Supreme Court. The Chief Justice or the designated judge will have the right to decide the matter of jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of

26 S. K. Chawala, *Law of Arbitration & Conciliation - Practice and Procedure*, 2nd Ed., Eastern Law House, Kolkata, 2004, p. 317

27 (2005) 8 SCC 618

the conditions for the exercise of his powers and on the qualifications of the arbitrator or arbitrators. As the order passed by the Chief Justice or any other designated judge of the High Court concerned is of judicial nature, appeal against that order would lie only under Article 136 of the Constitution. There can be no appeal against the order of the Chief Justice of India or any other designated judge of the Supreme Court passed under section 11(6). The arbitral tribunal constituted without having recourse to section 11(6) could decide all matters as contemplated by section 16(1) of the Act. Majority judgment is to have prospective operation. The decision in *Konkan Railway Corporation Ltd.* v. *Rani Construction Co. Ltd.*[28] has been overruled.

CRITICISMS AGAINST MAJORITY OPINION

In the scheme of the legal system of the country majority decision forms part of the law of the land and it has to have binding character[29]. However, it has invited criticisms[30]. It has been termed to be case of judicial legislation. Decision is said to be in conflict with the settled canons of construction of statutes. Majority decision implies that no dispute can be raised regarding the appointments made by the Chief justice or his designate judges of Supreme Court and the High Courts, as the case may be, within the framework of law laid down by the Act. It has the effect of deletion of number of provisions in all matters related with the arbitrator appointed by the Chief Justice or the Judges designated by him. It would be sheer guesswork that a party to the arbitration can challenge, under sections 12(3) and (4), the continuance of an arbitrator appointed by the Chief Justice or his designate judges of the Supreme Court and the High Courts, as the case may be, in the arbitral tribunal despite having justifiable doubts about his independence and impartiality. Similarly, an award made by the arbitrators appointed by the Chief Justice could also, not be assailed with reference to such arbitrators under section 34.

Majority decision has created two sets of arbitration laws within the Act itself. One is to apply in case of arbitrators appointed by the Chief Justice and the other where arbitrators are appointed without having recourse to sections 11(4), (5) and (6) of the Act. In the latter case, provisions of the Act are to apply in prescribed setting or the order. It must conform to the requirements of reasonable classification. Once it is proved beyond doubt that appointment of arbitrators under sections 11(4), (5) and (6) inevitably entails a number of benefits, like, decline in litigation, reduction in cost of arbitration and speedy resolution of disputes, it would be genuine and justified to effect necessary changes in the Act. For, it would not be wise and beneficial to continue with two parallel procedures of arbitration despite the fact that one of them is comparatively not conducive to realization of the objectives of the Act as the other one is.

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28 *Supra* n. 24

29 Article 141 of the Constitution

30 *Supra* nn. 20 and 26 at pp. 557-58 and 313-15 respectively

There are several provisions[31] in the Act that involve enquiry into the validity, existence, meaning and scope of the arbitration agreement that constitute the cornerstone of the whole gamut of arbitration. Section 8 has been interpreted to be confined to a summary enquiry or to the prima facie satisfaction that arbitration agreement exists[32]. Detail enquiry could be made at other levels say section16 or section 34[33]. Under section 45 the judicial authority is to be satisfied that the arbitration agreement is not "null and void, inoperative or incapable of being performed". Almost same is the position under section 54. In the cases involving determination of the scope of the power of the judicial authority, need of a limited enquiry has been found to be valid[34]. Majority decision has been characterized as a result of the common law approach and decisions upholding scope for limited enquiry represent civil law approach towards arbitration, i.e., competence-competence[35].

The Chief Justice and the judges of the High Court or the Supreme Court designated by him, as the case may be, perform judicial function in appointing the arbitrators. The higher judiciary has been brought within the Act because of their expertise in law and the respect and honor they command and avail in the society. It would be improper and against their status to provide for review of their decisions by the arbitral tribunals and courts below the High Court and Supreme Court[36].

To cope with the situation arising out of the parties failure to agree to procedure for appointing arbitrators, failure of alternative thereto and failure of the procedure as agreed by the parties in this regard, provision of the interference by a third party was being considered. Many options were discussed and ultimately Chief Justice ex-officio was selected[37]. Basically, there was need of an independent institution or organization to act as a third party to appoint the arbitrators. It reveals that judicial

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31 Sections 8, 9, 11, 12, 13, 16, 34, 45 and 54

32 Agri Gold Exims Ltd. v. Shri Lakshmi Knits and Wovers, Civil Appeal No.326 of 2007 decided on 23 January 2007, referred to in Aloke Ray and Dipen Sabharawal, "Competence-Competence: An Indian Trilogy"., White & Case LLP.Feb.2006|01063

33 In *P. Gajapathi Raju* v. *PVG Raju & others*, AIR 2000 SC 1086, a case was pending in the Supreme Court. During pendency, the parties concluded an arbitration agreement to submit the dispute to arbitration. Their application for referring the dispute to arbitration was allowed under section 8. And, ultimately award was made and approved. Had a party to the dispute not appointed an arbitrator, party aggrieved thereby might have requested the Chief Justice of the concerned High Court to appoint arbitrator. Then the High Court was to hold a detailed enquiry and decide the matters involved on merit.

34 *Ibid.* Also see, *Shin-estu Chemical Co.* v. *Optifibre Ltd.*, (2005) 7 SCC 618

35 Competence- Competence, An Indian Trilogy by Aloke Ray and Dipen Sabharawal, White & Case LLP, Feb 2006] 01063

36 File://D:\Sec.11 of the Arbitration Act.htm at p.5 of16 Not clear

37 Ibid at p.11-12 "The initial draft of the Arbitration and Conciliation Bill had contained a provision giving power to 'arbitral institution' to be notified by the Govt. of India to appoint arbitrators under section 11. But question was which institution would render the service. It was proposed to constitute an independent body under the aegis of Ministry of

training, experience and knowledge were not the decisive factors. Retired judges of the High Courts and that of the Supreme Court, distinguished lawyers and eminent and erudite persons from the field of trade, industry and business are, also, involved in the arbitration.

Therefore, such grounds advanced for holding appointment of arbitrator to be of judicial nature are not tenable. Controversy veering around the expressions 'administrative' and 'judicial' nature of the act of appointment of arbitrators has, also, been examined by an eminent jurist in the context of the nature of process of arbitration itself[38]. Arbitration is essentially a contractual process of resolution of disputes. Parties are free to agree on the procedure of the constitution of their private court. Institution of the Chief Justice is employed to perform a function of the same nature. So, it is immaterial and unwarranted to attract controversy over the nature of the power to appoint arbitrators.

CHIEF JUSTICE'S POWER TO APPOINT ARBITRATORS AND NATIONALITY OF ARBITRATORS

Section 11(1) reiterates the professed policy of party autonomy in terms of appointment of the arbitrators. So long as parties have not agreed otherwise a person may be appointed as an arbitrator irrespective of his or her nationality. It is of general application and covers arbitrators appointed by the parties as well as the third arbitrator called the presiding arbitrator. Parties' failure to agree on the matter of nationality would not create any problem. But, their failure in not appointing arbitrators according to their agreement pertaining to nationality of arbitrators would pose problems of legal nature.

There is nothing in express in the body of section 11 to the effect that party feeling aggrieved of it, could approach the Chief Justice or his designates to appoint arbitrators of nationality as per terms of the agreement between the parties to the effect. Logically help can be sought from section 11(6) as interpreted and explained by majority opinion in *Patel Engineering Ltd.* And, after being satisfied of the existence of the conditions precedent for exercise of power there under, the Chief Justice or his designate is bound to act accordingly, i.e., to appoint arbitrators of the nationality as agreed by the parties.

However, the scheme and structure of section 11(9) do not completely conform to the premise developed above. Section 11(9) is confined to the 'international

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Law and Justice. But it was a time consuming process. Hence at Calcutta meeting of Law Ministers, the provision which provided for 'arbitral institution' to be notified by the Govt. of India was replaced with "Chief Justice or any person or institution designated by him".....It was thought that Chief Justice would designate an institution of credibility to function under this provision In sub-section (10) the word 'scheme' was used to indicate this.

38 *Supra* n. 20, pp. 561-62

commercial arbitration.' Power given thereby is of directory and discretionary nature[39] and could be exercised only in appointing the sole or the presiding arbitrator. Its rational implication is that the said provision has very limited scope of application. As, there is no express provision for the situations and contingencies lying beyond the scope and ambit of section 11(9), it appears quite logical and reasonable to import application of section 11(6) to deal therewith.

CONCLUSION

It emerges from the above that judicial opinion is divided on the issue of the nature and scope of power of Chief Justice to appoint arbitrators under section 11 of the Arbitration and Conciliation Act, 1996. Broadly, this state of fact is represented by the majority and minority opinions expressed in *SBP & Co.* v. *Patel Engineering Co.* Majority opinion has invited criticisms. In cases involving appointment of arbitrators made by the Chief Justice, many of the provisions like sections 16 and 34 are not to have any application. It is against the settled principles of interpretation of statute and has been termed to tantamount to judicial legislation. History of incorporation of expression "Chief Justice or any person or institution designated by him" in section 11 leads to the conclusion that institution of the Chief Justice has not been preferred simply because of its knowledge and expertise in law. It is for the reason that it commands great respect and honor as an independent and honest institution and would create confidence in the people in the system of arbitration and fairness in the appointment of arbitrators. Decision reflects the conflict between scope of judicial interference on the one hand and competence of arbitral tribunals and party autonomy on the other. Decision needs to be reviewed. Controversy should be clinched by appropriate legislative measures.

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39 In *Dolphin International Ltd.* v. *Ronak Enterprises Inc.*, (1998) 5 SCC 724, word 'may' as used in section 11(9) was interpreted to mean 'shall', i.e., of imperative nature. However, approach has changed in *Malaysian Airlines Systems BHD (II)* v. *Stic Travels (P) Ltd.*, (2001) 1 SCC 509 and power has been construed to be of directory nature

NOTA Ensures Right to Secrecy Not Right To Reject

Prof. (Dr.) Isheeta Rutabhasini*

History stands testimony to the fact that no other movement has aroused more emotions than the movement of Democracy. Owing its origin to the Greeks, it has developed through the Puritan Movement in England in the 17th century and achieved mass appeal through the American War of Independence and the French Revolution in the 18th century. The world rallied behind two ideological camps and fought two world wars, ironically enough to prove that one was a better democrat than the other. The call given in the 20th century was to make the world safe for democracy and interestingly we are still struggling to endorse the best format. However, during the early 19th century Bentham and John Stuart Mill laid the theoretical foundations of adult franchise and pleaded for representative form of government[1]. Bentham was of the opinion that democracy protects people from arbitrary and repressive governments. Hence, the essential features of a thriving democracy would be universal franchise, secret ballot, free and periodic elections, and freedom of speech, expression and public opinion[2].

India like many other countries who freed themselves from the shackles of colonialism, adopted a constitutional democracy as its inherent premise of governance. The determination of mandate for ruling would be solely reliant on the conduct of a free and fair election. Hence, the absence of the confidence of the people in such a system would endanger the foundations of a healthy democracy. Over a period of time, elections became the most legitimate procedure of nation-building particularly in a multi-pluralist society with a high degree of heterogeneity in its culture, religion, language, caste and class[3]. The purpose was to build a united India which was fragmented by the Britishers particularly on the basis of religion and caste. But the practice of democracy was far from the reality conceived by the makers of the Constitution. Communalism and casteism have been regularly used either to come to power or to continue remaining in power. This tendency has further divided the people and has disturbed the fine balance of democracy. Major

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1 Andrew Heywood, *Political Theory-An Introduction*, Palm Grave Mac-Milan, New York, 2004, pp.28-32

2 R. L. Gupta, *Political Theory*, Sultan Chand & Sons, New Delhi 2003, p.319

3 Anand Ballabh Kafaltiya, *Democracy and Election Laws*, Deep & Deep Publications, New Delhi, 2003, pp. 36-38

National parties have lost the faith of the people, state and regional parties are on an increase. Rather than providing a stable and united India, we have moved towards divisive politics creating instabillty of government resulting in frequent elections and hung parliament/assemblies.

Further it was observed that the people of India were fast losing their interest in elections and the percentage of voter participation was declining with every General Election, so much that parties have formulated majority government with vote-share of less than fifty percent. There has been huge difference in the percentage of participation in various states, and also of participation of men and women. Non-voting is common among women and particularly in the rural areas. Apathy towards voting is also common among voters of lower income groups, illiterates as well as the elites.

A low voting turn out is an indicator of people not having faith in the system of representative government. Many a time, it was argued that we should introduce compulsory voting in India. But this step has never been possible as it is only a statutory right granted on a voluntary basis. Since right to vote is derived from Article 19 of the Constitution where a citizen has a right to free expression, the citizen equally bas the right not to express himself. There is also the availability of right to privacy under Article 21 of the Constitution. So, compulsory voting cannot be introduced as a mechanism to ensure a good voting turnout. Therefore the best alternative to lure people to the polling booth is by increasing the awareness among the illiterate and backward masses about the value of voting. There has also been a call by the election commission through various print and electronic media advertisements for the informed and elite voters to come out and register their dissatisfaction.

The Conduct of Election Rules, 1961 gives the citizens the right, not vote for any candidate, through Section 49(o). This section finds utility only with a section of well-informed voters, who can have their fingers inked and then convey to the Presiding officer that he/she does not wish to vote for any of the candidates mentioned in the EVMs and this is recorded in a register. This move implied that the voter openly declares that he/she is rejecting the candidates. In a long pending petition filed by PUCL, an NGO, on introducing negative voting, the Supreme Court in its Judgment in September 2013 provides to citizens now the right to a secret ballot even while exercising his right to reject all the candidates by providing the new pink button[4]. This has been immediately accepted and implemented by the election commission in the recent State Assembly elections conducted in various states in 2013.

The proposal was made first by the Election Commission in December, 2001 during the tenure of J.M. Lyngdoh and then again reiterated by CEC T.S. Krishnamurthy

4 *PUCL v. Union of India*, (2013) Indlaw SC 641.

in July 2004. The matter was finally decided when a PIL was filed by PUCL and the Supreme Court delivered its historic judgment in 2013. The government has however maintained that the writ was not maintainable as 'right to vote' was neither a fundamental right nor a constitutional right but only a statutory right. The Supreme Court has maintained the status of right to vote as a constitutional right and not a fundamental right per se. Since going to a polling booth and casting the vote tantamount to one's expression of interest as provided under Article 19(1)(a) which is a fundamental right. Hence the Supreme Court was well within its ambit of justification in accepting the writ petition under Article 32 of the Constitution, The Chief Justice of India, P. Sathasivam pointed out that provision for negative voting sends a clear signal to political parties and their candidates as to what the electorate thinks about them.

The court has cited that various countries have already adopted a provision for neutral protest or negative voting and hence it would strengthen Indian democracy by introducing the right to reject. Those who did not participate in elections earlier were considered as dissatisfied voters will now turn up to register their dissent. This according to the court would ensure the following[5]:-

a) Those voters who were dissatisfied with the choice of candidates and were not turning up for voting would now come forward to register their dissent.

b) The Conduct of Elections Rules under the Representation of Peoples Act, 1951 breached the Fundamental right under Article 19(1)(a). Whether the candidate votes or does not vote, secrecy has to be maintained. In the current situation it was breached as one had to register his dissent with the Returning Officer. Therefore a voter who decided not to cast his vote was treated differently and allowed the clause of secrecy to be violated. This was construed to be arbitrary, unreasonable, and violated the right to secrecy in voting implied under Article 19 of the Constitution. It is also ultra vires of Section79 (d) and Section 128 of the RPA which violated the right not to vote and also denied the right to secrecy in voting[6].

The court has thus sought to incorporate a new button in the EVMs that will register dissatisfaction in the same manner as it has been used so far to register satisfaction. When a vote is cast, a high- pitched beep sound emanates from the machine which is an indication that a correct vote has been cast. But in case a voter decides not to cast his vote in favor of any of the candidates mentioned on the EVM and hence does not press any of the button then the same sound will not emanate from the machine. This is enough of an indication that an invalid vote has been cast and the

5 *Id.*

6 Section 79(d) of the RPA, 1951 reads as-" electoral right means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election" Section 128 of the RPA, 1951 talks of the procedure for maintenance of secrecy of voting

rules of secrecy have been compromised. Therefore it was pertinent that the EVMs carry the buttons in the same machine for voting and also for non-voting to ensure secrecy.

COMPARATIVE POSITION OF NOTA IN OTHER COUNTRIES

India would be the 12th country to add NOTA to its Election Rules .In USA only the state of Nevada has given the option of NOTA since 1975. The validity of such an option was challenged and declared unconstitutional by the district judge but was later overturned and reinstated as an option. All other states in USA treat blank votes as invalid votes. In UK, a political party named No Candidate Deserves My Vote was established in 2000 to pressurize the government to introduce a Bill in the Parliament to include the option of NOTA. There is still a pressure built in U.K to incorporate NOTA in the General Elections of 2015. Russia had granted NOTA as an option to its citizens but has withdrawn this since the year 2006. The other countries which have provided this option are France, Belgium, Greece, Brazil, Bangladesh and Pakistan. Pakistan wanted to implement this system in 2013 general elections but had scrapped it at the last moment due to paucity of time. The most interesting option is that which is available in Colombia. In 2011 the elections for the post of Mayor was conducted again as majority of the voters had pressed the NOTA button, rejecting the only candidate. The candidate had only received 37.19 per cent of votes against 56.7 per cent of votes which rejected his candidature[7].

The Supreme Court judgment is silent about the impact of using the NOTA button that has got added to the EVMs. It has only ensured secrecy to the voters by giving an additional pink button to register his dissatisfaction over the choice of candidates by various political parties. This was so far registered by the returning officer in a separate register, thus denying the voter the right to secrecy in expressing their dissatisfaction. According to the former Chief Election Commissioner S.Y. Quraishi, the Supreme Court in this judgment has given 'the right to register a negative opinion". This provision by no means suggests that the candidates in a constituency would stand rejected if they get votes which are quite less than the number of votes cast in the NOTA button. To quote Mr. Quraishi, "Even if there are 99 NOTA votes out of a total of 100, and candidate X gets just one vote, X is the winner, having obtained the only valid vote. The rest will be treated as invalid or 'no votes',". The only relevance of adding NOTA to the conduct rules would be to "ensure secrecy of the voter wanting to make a choice that amounts to abstention and also to ensure that nobody casts a bogus vote in his place"[8].

One issue which stands clear is that NOTA would put pressure on political parties to nominate only good candidates with clean background. The court has refrained

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7 Karishma Kuenzang, "the right to not vote", The *Sunday Express*, New Delhi 6th October, 2013, p.12

8 "NOTA option does not mean right to reject and won't affect election results, says former election commissioner" Indian Today online, New Delhi, 3rd October, 2013

itself from commenting on right to reject as the petition filled by PUCL demanded NOTA and not the right to reject. But a nascent party introduced in 2012 by the name of Aam Aadmi Party (AAP) has a different opinion of the pink button on its official website[9]. It suggests that if right to reject button gets a majority of votes, the elections to that constituency will be cancelled and fresh elections will be held within a month. The parties and candidates rejected in the cancelled elections will forfeit their right to contest again in the re-elections. The AAP has made a stunning debut in the Delhi assembly elections. Having decimated Congress by defeating their Chief Minister in the New Delhi constituency, it lost out on one of its prominent members by a wafer thin margin of 326 votes. Interestingly the number of votes cast in this constituency under the NOTA option was 528 votes. The fear of being rejected is also highlighted by the notice served by the Election Commission on senior Congress leader Ajit Jogi for allegedly misleading the tribal voters over the new button on the EVMs. He is reported to have advised the tribals not to press the button on the EVMs as they would suffer electric shock[10]. The Government of India has maintained its stance that the petition filed by PUCL is not maintainable as the right to vote is neither a fundamental right not a constitutional right nor a common law right but is a pure and simple statutory right. Further the meaning of election according to section 2(d) of RPA means to fill a seat and it cannot be interpreted as an election not to fill a seat. The Supreme Court in its various judgments[11] has clearly distinguished right to vote and freedom of voting as a variant of freedom of expression. The crux of the judgment is that right to vote is a statutory right but the decision taken by the voter after verifying the credentials of the candidate either to vote or not is his right to expression under Art.19(1)(a) of the constitution. Hence, the writ was maintainable and the court had to decide on the issue of secrecy only. The right not to vote is available in the conduct rules but treats the voter differently in requiring registering his vote of dissent and is therefore arbitrary, unreasonable and violative of Art.19.

IMPACT OF NOTA IN ASSEMBLY ELECTIONS OF 2013

The first test of NOTA button was put to use by the Election Commission immediately in the five states which went for assembly elections in 2013. The popular perception that pressing the button would amount to rejection of candidates was dismissed as it had no impact on the election results. But it has definitely sent out strong messages in states like Madhya Pradesh, Rajasthan and Chhattisgarh that people are dissatisfied with the process of governance in most of the interior parts of the

9 http://www.aamadmiparty.org/page/righttoreject/ as visited on 27th November 2013, 11.30 A.M.

10 "Did Jogi say EVMs deliver shock to voter", The *Times of India*, Delhi, 14th November, 2013, p.15

11 *Jyoti Basu* v. *Debi Ghosal*, (1982) Indlaw SC 110, *Lily Thomas* v. *Speaker, Lok Sabha*, (1993) 4 SCC 234, *Association for Democratic Reforms* v. *Union of India*, (2002) Indlaw SC 308

country. The option for the exercise of this button was perceived for educated and well-informed voters but the maximum usage of this was seen in the naxal-dominated areas of Chhattisgarh which registered 4.4% of NOTA votes[12]. In Kawardha, Khairagarh, Khallari and Dongargaon constituency of Chhattisgarh the victory margin was far less than the votes polled under NOTA. It is also reported that the Maoists have been encouraging the people in the constituencies of south Chhattisgarh to exercise the NOTA button[13]. The swing in the election results and the neck-to-neck contest between the two major National parties suggest that in many constituencies that have recorded a close contest, NOTA votes have exceeded the victory margin. In the Laslot constituency of Rajasthan the victory margin of the winning candidate was 500 votes where as the number of NOTA votes were 4000.Similarly in the Gongunda constituency of Rajasthan the NOTA votes polled were 5893 and the victory margin was by 3345 votes. In Madhya Pradesh, BJP's Parul Kesri won by a thin margin of 141 votes and the votes polled under NOTA were 1500. In the Rewa constituency of M.P the BSP's woman candidate lost against BJP by mere 276 votes and the 2215 voters had opted for NOTA[14]. It was utter surprise to the major parties that the tribals would have been aware of such a provision so quickly but it is for everyone to take note that no sooner had the Supreme Court given its judgment the Election Commission was ready to implement it and had given wide spread publicity for participation in elections, even if it meant registering their dissent.

The Supreme Court stands vindicated in its stance in entertaining the petition by PUCL as Mizoram has recorded the highest voter turn-out of 80% and NOTA has been exercised widely even in the states which are not so developed. Hence to conclude in the words of the court on negative voting, "A voter may refrain from voting for several reasons, including the reason that he does not consider any of the candidates worthy of his vote. One of the ways of such expressiou may be to abstain from voting by not turning up at all, which is not an ideal option for a conscientious and responsible citizen. Thus, the only way by which it may be made effectual is by providing a button in the EVMs to express that right. This is the basic requirement if the lasting valnes in a healthy democracy have to be sustained, which the Election Commission has not only recognized but also asserted"[15].

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12 M. Rajsekhar and Avinash Celestine, "NOTA shows all not well in Tribal belts", The *Economic Times*, New Delhi, 10th December, 2013, p. 4.

13 Aarti Dhar, "NOTA vote maximum in Chhattisgarh", The *Hindu*, Delhi, 9th December, 2013.

14 Mitul Thakkar, "Chhattisgarh Assembly Election: NOTA matches victory margin in 45 seats", The *Economic Times*, New Delhi, 9th December, 2013.

15 *Supra*, n.4.

Constitution, Human Rights and Social Democracy in India-Revisited**

Prof. (Dr.) Alok Misra*

CONSTITUTION AND THE HUMAN RIGHTS

Human beings started leaving the forests disagreeing with the Law of Jungle about seven thousand years ago. They invented potter's wheel and systematic agriculture initiating the development of civilization. Gradually, the Rule of Law started developing, leaving the Law of Jungle in the background. It has taken about five thousand years to replace the Law of Jungle and Rule of Individual by the Rule of Law. In Indian context it finally happened when the Rule of the Constitution came into existence for the first time in Indian History when the Constitution of India, one of the greatest innovations ever done in the field of constitutional jurisprudence, was promulgated. From that day the Rule of Legal Technology started getting established replacing the individual on the throne.

The Constitution is defined as a document which provides fundamental and supreme principles for the governance, administration and management of a country and the nation. The first Republic Day i.e. 26th January, 1950 was of signal importance in the long and continuous history of India. On this day people of India placed the Constitution on the throne of the emperor of India with profound sacredness and respect, replacing the rule of an individual whether a foreigner or a native. From this day the rule of the Constitution and law started on India. The Constitution of India is the ruler of India. No one is above the Constitution. The President of India aided and advised by the Council of Ministers performs the duty of custodian of the Constitution. He takes the oath of preserving, protecting and defending the Constitution. The only ground for the impeachment of the President provided in the Constitution is the violation of the Constitution i.e. violation of his oath and duty. The Parliament is the creation of the Constitution and functions as per the provisions of the Constitution.

** Paper presented in the international Seminar on "Transcending Caste: Dr. B.R. Ambedkar and Social Democracy in Contemporary India" on 14th & 15th April 2013, organized by *Department of Political Science*, Babasaheb Bhimrao Ambedkar University (A Central University) Vidya Vihar, Rae Bareli Road, Lucknow-226025 in Collaboration with Institute for Development & Communication, Chandigarh.

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The Supreme Court is the sentinel of the Constitution.

The Constitution of India is a legal, political, social, cultural, economic, national, international and humane document. Some scholars have also termed it as a spiritual document also because it aims on the multidimensional evolution of a human being individually and also collectively. The Constitution of India does not subscribe the ideology or philosophy of any single individual. We find reflection of the ideas and humanism of Swami Vivekanand, Mahatma Gandhi, Shri Jawaharlal Nehru, Karl Marx and many of our national and international ancestors. It is based on well defined and accepted principles of constitutionalism. It is a rational legal document. It is one of the most modern, longest and lengthiest constitutions of the world. It is a very caring document by its nature. The commitment of establishing a welfare state is the spirit of this document.

According to Learned Prof. P.M. Bakshi, the Constitution operates as a fundamental law. The governmental organs owe their origin to the Constitution and derive their authority from, and discharge their responsibilities within the framework of the Constitution. The Union Parliament and the State Legislature are not sovereign, the validity of a law, whether of Union or State, is judged with reference to their respective jurisdictions as defined in the Constitution. The Judiciary has power to declare a law unconstitutional, if the law is found to have contravened any provision of the Constitution.[1]

Speaking in the constituent assembly with regard to the Objectives Resolution Learned Prof. S. Radhakrishnan said, "...We cannot say that the republican tradition is foreign to the genius of this country. We have had it from the beginning of our history. When a few merchants from the north went down to the south, one of the Princes of Deccan asked the question, who is your King? The answer was, some of us are governed by assemblies, some of us by kings. Panini, Megasthenes and Kautilya refer to the Republics of Ancient India. The Great Buda belonged to the Republic of Kapilvastu. Much has been said about the sovereignty of the people. We have held that the ultimate sovereignty rests with the moral law, with the conscience of humanity. People as well as kings are subordinate to that Dharma, righteousness, is the king of kings. It is the ruler of both the people and the rulers themselves. It is the sovereignty of the law which we have asserted."[2]

During this historical period of Indian History deep sentiments were expressed by the their new and dynamic British Prime Minister of the Labour Party, Clement Rechard Attlee. He had said on March 15, 1946 in a speech, "In the mass of Asia, an Asia ravaged by war, we have one country that has been seeking to apply the principles of democracy. I have always felt myself that political India might be the light of Asia...nay, the light of the world, giving to its distracted mind an integral

1 The Constitution of India by P.M. Bakshi, Ninth Edition, 2009, Universal Law Publishing Co. Pvt. Ltd., New Delhi

2 Constituent Assembly Debates, Vol. II, Pp. 253-63

visiou and to its bewildered will an upward direction."[3]

According to Shri Alladi Krishnaswami, preamble is very helpful to understand the policy and legislative intent. It expresses "what we had thought or dreamt for so long"[4].

According to Learned Professor M.P. Jain of Delhi University unlike the Constitutions of Australia, Canada or of the United States of America the Constitution of India has an claborate Preamble. The purpose of the Preamble is to clarify that who has made the Constitution, what is its source, what is the ultimate sanction behind it; what is the nature of the polity which is sought to be established by the Constitution and what are its goals and objectives. The Preamble gives a direction and purpose to the Constitution. It outlines the objectives of the whole Constitution.

Learned Prof. J.N. Pandey of Allahabad University has mentioned that the preamble declares in unambiguous terms that it is the people of India who have adopted, enacted and given to themselves the Constitution. It declares, therefore, that the source of authority under the Constitution is the People of India and there is no snbordinatiou to any external anthority. Obviously, the sovereignty in Indian Political System and Constitution lies with the people of India.[5]

Human rights are enshrined and nurtured because they are the corner stone of the multifold development of human personality and hence social and national personality. India had been a dynamic member of this international campaign of rights from the inception of U.N.O. and promulgation of U.N. Charter of Human Rights on 10th December, 1948. It was fortunate that the Indian Constitution was prepared soon after the turning point of World History that is the Second World War and the consequent founding of the United Nations Organization with its Charter enforced from 24th October 1945. The U.N. Charter of Human Rights also got implemented on 10th December 1948 when the Constituent Assembly of India was drafting the Indian Constitution. The ideals of these two Charters were embodied in Indian Constitution and the domestic and foreign policy (Article-51) was attuned accordingly.

Human Rights are the means to achievc the ends of democracy. They are human responsibilities. When and wherever they are violated people are the victims. They and their families need practical help. They are the touch stone of democracy and development of the civilization and society.

With the establishment of the United Nations Organization on 24th October 1945, the process of globalization started in all walks of life for the maintenance of international peace and security, liberalization being the tool and method for achieving

3 Constituent Assembly Debates, Vol. II, Pp. 253-63 quoted from the speech of Prof. S. Radhakrishnan

4 Constituent Assembly Debates, Vol. 10, 417

5 Constitutional Law of India by Dr. J.N. Pandey, Forty Sixth Edition, 2009, Central Law Agency, Allahabad.

it. The first half of tbe 20th century was a cruclal stage in the history of world civilization. Tbe Great War and the World War humbled the cgo of mighty dictators and arrogant nations. The emergence and failure of communism reformed crude capitalism pushing it into very deep introspection, ultimately leading it to the emergence of democratic capitalism and democratic socialism. The emergence of Welfare Jurisprudence has changed the entire orientation of the member States. Glohal standards evolved with regard to organized nationalities of tbe member nations.

The Universal declaratiou of Hnman Rights, 1948, reflected the needed protest against thousands of years of oppressiou and exploitation of man by States, groups or other men. In the words of Dag Hammarskjold,[6] late Secretary General, United Nations Organization on Human Rights Day, December 10, 1956 : "The Declaration is no formal treaty. It is a declaration of man's faith in himself, of his belief in human dignity, of his aspiration towards a moral order. It sets forth in words of rights and freedoms which are man' greatest gifts and which those in power are pledged to promote. When these are denied, and the dignity and worth of the human person is forgotten, there can be no peace."

THE PROTECTION OF HUMAN RIGHTS ACT, 1993

Pursuant to the direction enshrined in Article-51 of the constitution and international commitments the Parliament has passed the Protection of Human Rights Act, 1993. The Act provides for the setting of a National Human Rights Commission and Human Rights Courts to meet the growing concern for human rights in the country and abroad. Similar commissions may be set np in the states also. It would not be mandatory for the governments of the states to constitute human rights commissions of the states. Thc National Human Rights Commission started functioning from 1993. The provisions of the Act are applicable to the armed forces and the State of Jammu and Kashmir. However the action taken against the personnel of the armed forces for violations of human rights will not be made public as it will affect their morale in dealing with anti-social elements.

The National Human Rights Commissions will have powers to go into instances of negligence on the part of public service personnel in preventing violations. The annual report of the Commission along with the action taken report by the union government will be presented in the Parliament.

The background of the forefathers of the modern Indian Renascence and the Freedom Movement also constitute the set of ideals in the Constitution. The rational outlook of Raja Ram Mohan Roy, the first modern man of India, the reformative urge of the family of Tagores, the youthful dynamism of Swami Vivekanand, the first youth leader of India, and the seasoned as well as high ideals of numerous freedom-fighters are reflected in tbe Indian Constitutiou. It is noteworthy that Indian Constitution not only incorporated the hest politico-legal concepts available at that

6 Teaching Human Rights, United Nations (Second Edition, 1963), New York, p.35.

time on the globe but also took care to attune them in the kaleidoscopic panorama of multi-dimensional Indian Culture. It is a wonderful innovation in the realm of Constitutional Jurisprudence. Further, it is being progressively interpreted by the Judiciary.

The Constituent Assembly of India consisted of not only great nationalists but also very seasoned freedom fighters. They were not only political leaders but patriots with very deep knowledge and understanding of global and national life. The members of Constituent Assembly had undergone a long process of training and hard work. The qualitative composition and the evolution of this body through the process of national struggle of independence was the most fortunate aspect which has provided unique resilience to democracy in India during the last sixty years. This body did not come into existence by the stroke of any executive order to write the Constitution but it was a body of people with great learning and vast knowledge of law, who had experienced the pleasure and pain of knowledge related to hard realities of India and the satisfaction of happiness of future generations.

The galaxy of freedom fighters representing millions of Indians, assembled in the form of Constituent Assembly for the first time on 9th December 1946. On 13th December 1946, Pt. Jawaharlal Nehru moved his 'Objectives Resolution' for the Constitution.[7] Mr. K.M. Munshi termed this Resolution as "the horoscope of Sovereign Democratic Republic of India". In a span of about three years, the longest known Constitution in the world was prepared and enacted. The Indian Constitution was promulgated on 26th January, 1950. The reason for its promulgation on this particular date was that 26th January was a landmark in the history of freedom struggle. After Labore pledge Indians celebrated their Independence Day on 26th January, 1930 onwards every year, though India got freedom on 15th August 1947. So, the Constituent Assembly decided to commence the constitution on this date, naming it the Republic Day.

Science in application is known as Technology. The object of Technology and Science is the welfare of humanity and the living world. Similarly, various walks of human life erstwhile 'Humanities' and now systematized as 'Social Sciences' such as Political Science, Sociology, Economics, Law, Philosophy, Psychology, Anthropology, History etc. also aim at welfare of life. All these branches of learning and research aim at the search for truth which by knowing and practicing, the real happiness and well-being can be achieved.

Science and technology can explore the truth relating to matter. But the human life is not simply one dimensional that is related to matter. At least there are two other dimensions that is the soul and the Supreme Soul. The truth relating to the matter, soul and the Supreme Soul as well as the relation among these three dimensions is investigated by the subject Philosophy. Indian philosophers have been searching this

7 Constituent Assembly Debates, (1947), 304

truth from ancient times and in this respect Indian Culture has a unique place in the world because way-back around 800 B.C. the learned Sages defined 'soul' and its attributes in "the Bhagwad Geeta". [8]

This quest of knowledge and truth is well-embodied in the Constitution of India when they aim at higher moralities like justice, liberty, equality and fraternity. The Constituent Assembly adopted the phrase "Satyameva Jayate", Truth alone triumphs from the Mundaka Upnishad in the National emblem of India. Due emphasis has also been given to Dharma-Chakra in the National emblem signifying enforcement of Dharm, contrastingly different from its English translation that is Religion. In this sense Indian Constitution is really a philosophic as well as a spiritual document. In the National Anthem also there is an invocation to the Dispenser of India's destiny praying for his blessings.

CONSTITUTION AND SOCIAL DEMOCRACY

An outstanding feature of Indian Constitution is the inclusion of both justiciable and non-justiciable right that is Fundamental Rights, Directive Principles and Fundamental Duties. The makers of the Constitution believed that even if some rights may remain legally non-enforceable, they will operate as moral restraints on the Government in future and shall provide the definite orientation to the policies of the Government, ensuring the compliance of the manifesto of the freedom struggle and shall fulfill the requirement of Law of the land to be organic, holistic and all pervading as a real tool for social development.

The philosophy behind the Directive Principles of State Policy is clear and candid. Besides both Article-12 in Part-III and Article-36 in Part-IV of the Constitution clearly enshrine the components of the State. 'The State' clearly incorporates also the local authorities besides Union and State authorities. This provision clearly brings the Local authorities also under the moral obligation to comply with the Directive Principles. In fact, Part-IV constitutes the edifice of philosophy of the 'Welfare State' in the Indian Constitution. A significant objective in the Preamble and Part-IV is to secure social democracy also besides political and economic democracy.

In fact, the concept of taking democracy to the grass-root level should not stop itself by taking it only up to village level by providing constitutional status to village-panchayat, rather it should reach the level of the family in the form of family democracy, because it is not simply the village in rural area and ward in urban area which constitute the basic unit of the social system but it is the family which constitutes universally the basic unit of the social system. In this context it is further to be emphasized that the national, state, regional and local policies will not be able to bring real fruits unless and until the policies of the family are attuned to the policies

8 The attributes of the soul have been described in "The Geeta" canto Second : Shlokas XXIII to XXX. "Naenam chindanti shastrani, naenam dahati pavakah; Na chaenam kledayantyapo, na shoshayati marutah." Shloka XXIII

of the State such as the policy of the size and structure of the family, policy towards children of the family, policy towards nourishment and nurturing of child in a family, educational policy in the family, economic policy, matrimonial policy of the family attuned to dowry less marriages etc. housing policy, policy of progressive attitude towards the reception of new technologies, policy for the care of old people and the welfare policy of the family towards society etc. In this context the democracy within family, interaction and detiberations between members of different age-groups of the family, absence of imposing things on others etc. will prove to be the real accomplishment of a welfare social system.

Obviously, it is not only the task of Brahmo Samaj, Prarthna Samaj, Arya Samaj, Ram Krishna Mission, Bandhua Mukti Morcha, People's Union of Civil Liberties and People's Union of Democratic Rights to fight tooth-and-nail for socio-religious reforms and that also against the politicized post-Nehruvian State for reforms. It is not only for non-governmental organizations to strive for such reforms but also the State should adopt such a sprit. Further, the State cannot relinquish its responsibility of bringing about socio-religious reforms under the pretext of secularism and it is to be emphasized that religion or religious system is also a social institution which is also required to be directed on scientific lines for furtlier and cannot be taken as something untouchable.

Article-37 of the Constitution declares that the Directive Principles of the State Policy shall be fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. The makers of the Constitution firmly believed that besides the moral sanction behind them there is political sanction also. Dr. B.R. Ambedkar stated in the Constituent Assembly that "If any Government ignores them, they will certainly have to answer for them before the electorate at the election time."[9] Obviously, the credibility of the Government is directly related to the Directive Principles of the State Policy and if the Government fails to implement them, they are powerful instruments in the hands of the opposition, media, academics and other instrumentalities related to the public opinion. In fact, the executive and legislative actions cannot be in contravention to the Directive Principles.

The Adviser to the Constituent Assembly on constitutional matters, Mr. B.N. Rau believed that these directives are moral precepts for the authorities of the State and they have at least an educative value. In fact, the political parties and political leaders on the one hand, the bureaucracy and it licads on the other have virtually lost the commitment towards studies on their part, of being learned and being people of vision. In fact, they have also forgotten their role as teachers of political philosophy and political education. Unfortunately, it has come to be believed that it is only the academics wlio are supposed to educate the people. In fact, the task of educating illiterate millions of Indians is the responsibility of politicians through mammoth rallies. The spirit of the Preamble and the Directive Principles can be put before the people

9 VII Constituent Assembly Debates 49, 476.

in such rallies which should turn into socio-political rallies rather than mud-slinging political rallies at least by the opposition parties to make the party in power more responsible for such constitutional commitments. Dr. Ambedkar had clearly stated in the Constitutional Assembly that in democracy where a Government in power rests on popular votes can hardly ignore these principles while shaping its policies. According to Dr. Subhash C. Kashyap, an eminent Advocate and Consultant on Constitutional Law, "Most of the socio-economic rights of the people have been included under this head."[10] That is Directive Principles of State Policy.

The Directive Principles have been broadly classified under three heads. First, Directives of Social and Economic character; Secondly, of Social Security character and Thirdly of Community Welfare character. The Supreme Court of India observed in *Keshvanand Bharti v. State of Kerala*[11] that the Directive Principles draw their basic inspiration from the concept of a Welfare State.

According to Prof. S.N. Dhyani, "The Constitution aims at the creation of new legal norms, social philosophy and economic values which are to be affected by striking synthesis, harmony and fundamental adjustment between individual rights and social interests to achieve the desired community goals."[12]

Granville Austin has observed, "The Judiciary was to be an arm of the social revolution upholding the equality that Indians had longed for"[13] The Constitution is the Supreme Law of the Land. There is a definite and comprehensive philosophical vision behind each and every provision of the Constitution. It is a dynamic Law. An evolutionary interpretation of it is always required by an independent judicial body with the passage of time to implement the philosophical vision in it and to meet the changing needs of the Nation with the ongoing social change. In this light the final power to interpret it has been given to the Supreme Court and it has been assigned the role of guardian of the Constitution. Obviously, the aforesaid observation of Granville Austin is in consonance with the constitutional role of the Supreme Court as the guardian of the social revolution in upholding the Constitutional objectives, especially balancing the process of individual liberty and social control making law the real tool of social development and progress.

Marbury v. Madison[14], formed the basis for the exercise of judicial review in the United States and subsequently in the world. This case resulted from a petition to the Supreme Court by William Marbury, who had been appointed by President John Adams as Justice of the Peace in the District of Columbia but whose commission

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10 Our Constitution, An Introduction to India's Constitution and Constitutional Law by Subhash C. Kashyap National Book Trust India, New Delhi (1994), p.47.

11 A.I.R. 1973, S.C. 146.

12 Fundamentals of Jurisprudence : The Indian approach by Prof. S.N. Dhyani, Central Law Agency, Allahabad-2 (1992), p.245.

13 The Indian Constitution - Cornerstone of a Nation (1966) p.169.

14 5 U.S. (Cranch 1) 137 (1803)

was not subsequently delivered. Marbury petitioned the Supreme Court to force Secretary of State James Madison to deliver the documents, but the court, with John Marshall as Chief Justice, denied Marbury's petition, holding that the statute upon which he based his claim, the Judiciary Act of 1789, was unconstitutional. In this case the Supreme Court of America declared something unconstitutional for the first time and established the concept of judicial review i.e. the idea that courts may oversee and nullify the actions of another branch of government in the United States. This landmark decision helped in upholding the doctrine of checks and balances. This doctrine of judicial review subsequently travelled to other parts of the world.

In fact, the power of judicial review with the judiciary is the oxygen of the rule of law. It is the sanction behind the rule of law. It is the vital force of the rule of law. It is the pillar on which the rule of law rests. It is the essence of the rule of law as a technology which has replaced the rule of individual. It is the control on the Rule of State and the Rule of Mandate. In fact it requires an accountable, independent and impartial judiciary to translate it into action and to uphold the rule of the Constitution and law.

In Indian Constitution there is no provision explicitly declaring judicial review. But it is very much implied in Articles-13, 32, 71, 136, 141, 144, 147, 226 etc. of the Constitution. The power of the Supreme Court to issue writs under Article-32 for the enforcement of fundamental rights and of the High Courts for the enforcement of the fundamental rights as well as legal rights under Article-226 make the doctrine of judicial review a basic feature of the Constitution. Dr. B.R. Ambedkar had said in the Constituent Assembly if I would be asked without which article the Constitution shall become a nullity, I would say it is Article-32 of the Constitution. He was rightly of the view that Article-32 would prove itself a milestone in the history of Indian democracy.

When India became independent in 1947 and the Constitution was promulgated in 1950, the Constituent Assembly, the Parliament and the State Legislatures stood decorated by a galaxy of innumerable nationalists, patriots and people of vast knowledge and experience of the main currents of socio-political thought and also of Indian social ethos. This situation remained so at least in Nehruvian Era. Gradually the majority of these wise men started diminishing and turned into a minority ultimately resulting into a micro-scopic minority. Great men and philosophic organizers like Gandhi, Nehru, Sardar Patel, Maulana Azad, B.R. Ambedkar, G.B. Pant, B.C. Roy, K. Kamraj, Rajendra Prasad, S. Radhakrishnan, Zakir Hussain, Lal Bahadur Shastri, Purshottam Das Tandon etc. were no more because death laid its icy hands on them. Misfortune again gripped the country as has happened repeatedly in the roller-coaster history of India. The ongoing process of modern Indian renaissance and reforms went into background very fast in the post-Nehruvian Era and the quality and caliber of the Parliament and legislatures rapidly declined.

The reason, why the legacy of this remarkable generation of patriots could not

work, was that the new generation which took-over was the second or third generation from the families of the freedom fighters, to a large extent. These subsequent generations were not having that commitment to the cause of the Nation like their ancestors. In fact, they politicized the State to a great extent and had been largely responsible for the criminalization of politics. They forgot that the political process is not simply for governance bnt to serve the people and to realize the welfare objectives as enshrined in the Constitution. The spirit of true social service vanished and only fruits were enjoyed on the background of the ancestors. This had a bad impact on the national life because it resulted into the disappearance of role models for the youth. The saddest aspect of this has been the decline of nationalism. Virtually, the Parliament and the Legislatures have lost their ground.

In Indian Constitution the doctrine of co-operation of powers has been invoked with regard to the legislature and the political executive. Since there has been tremendous decline in the quality and caliber of the legislature it has resulted into similar decline in the political executive. Now the situation is arriving when it will be difficult even to have a couple of unblemished leaders to constitute the Government. Although there are several causes for the dearth of political role models yet an important cause is the lack of inter-disciplinary and multy-disciplinary composite education system. This has created the crisis of excellence which was the corner-stone of academic leadership and academic role models. India is producing teachers and not Gurus at least in the post-Nehruvian Era. This resulted into the problem of indiscipline in educational institutions of higher learning where a lot of mental input has to be provided to the minds of students for producing the right type of sensitive generation. The problem of indiscipline in academic institutions has resulted into not producing the political leaders for tomorrow.

The political leadership is failing to provide the true vision and leadership to the permanent bureaucracy in various ministries. This has perpetuated the crisis in bureaucracy. Neither the academic institutions are producing the right type of individuals for Civil Services as Union Public Service Commission has been mentioning in its Annual Reports for a long time nor the political leadership is able to provide the right type of guidance and motivation to the civil servants. The net result of this situation is that two major organs of the State namely the Legislature and Executive are trailing behind to meet the needs of the resurgent nation. Most of the contemporary legislations and the executive decisions are not in consonance with the positive social change rapidly taking place in the nation. The Executive and Legislature both are unable to sort out even the issues relating to water and the heights of dams. Virtually every problem is reaching before the judiciary. In the light of the aforesaid acute crises the role of judiciary has become of historical importance. Fortunately, this organ of the State is coming up to expectations and has maintained its balance till now though working under great work pressure. When the Judiciary puts the things in right spot after adjudication of a dispute quite often the legislations and Executive decisions stand discredited. This sometimes makes politicians complain

that there is 'Judicial Activism'. But unfortunately they fail to undergo self-introspection when they wrongly compare their caliber with the caliber of those leaders who had fought the freedom struggle and were constituents of the team of architects of Modern India. A person or institution does not become strong simply by powers vested by law but also by self-generated power by being morally upright and committed.

So far as the Judiciary is concerned it also had a galaxy of eminent judges like Hon'ble Justice Hira Lal J. Kania, Justice M. Patanjali Shastri, Justice Mehar Chand Mahajan, Justice B.K. Mukherjee on the Bench and brilliant Lawyer like M.C. Seetalwad at the Bar when India became a Republic. This tradition of glory continued with Justice P.B. Gajendragadkar, Justice K. Subba Rao, Justice M. Hidayatullah and S.M. Sikri. After Justice Sikri there was subversion of the Constitution and supersession of judges by the political executive. Justice Shellet, Justice Hegde and Justice Grover were bypassed by the then Government. But the Supreme Court gulped the poison with utmost sublimity in 1973. The story was repeated when Justice Khanna was bypassed. The glorious tradition of the Supreme Court never declined. It kept on giving the required progressive turns to constitutional jurisprudence. Justice Y.V. Chandrachud, Justice P.N. Bhagwati, Justice M.N. Venkatachaliah, Justice J.S. Verma etc. have led the Supreme Court with great merit.

Social, religious, linguistic, geographical, racial and ethnic diversities which exist in Indian social milieu do not weaken the Indian Social system or Indian Nation. Rather they contribute to its enrichment and strength. Such diversity has always stood the test of time and provides the essential unity, the foremost characteristic of Indian Culture. In fact, diversity constitutes the major strength and resource of the Nation and that is why it has been nurtured since Ages with the ideal of 'Vasudhaiva Kutumbkam'. It stood nurtured by the process of socio-religious reforms in the form of heterodox Buddhist and Jain Movements in ancient times; Sufi and Bhakti Movements in medieval times and Renaissance Movement in Modern times.

It is also to be highlighted that Indian Culture is not merely the Ganga-Yamuna Culture that is Indo-Islamic Culture, but it has evolved as a global-culture with the arrival of the Europeans in India during the last five hundred years and after the process of globalization which began with the establishment of the United Nations Organization in 1945. Certainly, Indian Culture has transformed itself from Ganga-Yamuna Culture into the global-culture. It is really fortunate that besides the beautiful diversity in flora and fauna we have kaleidoscopic socio-cultural diversity also. It is the real essence of any Republican Democracy. It is in consonance with socialistic and secular ideals. Its lofty ideal is of a world-family. This ancient Indian concept of 'Universal Brotherhood' is in consonance with 'Universal Human Rights' principle; the ideal of welfare of humanity. In Indian context it is not a failure but a great success. Other nations of the world are also trying to achieve such a wonderful

diversity.

It is vital to note that in order to sustain it and to promote it the socio-legal therapy in the form of reforms will always be needed. In order to strengthen it, the input of progressive ideas and the usage of law as a tool for social development is to be provided The process of sociological modernization must sweep as gentle breeze through the corridors of religion and family.

The importance of fundamental rights to constitutional remedies was emphasized by Dr. B. R. Ambedkar. He had said that if he was asked to name any particular Article in the constitution as, most important, an article without which this constitution would be a nullity; he could not refer to any othei article except article-32. According to him this article is the very soul of the constitution and the very heart of it.

It is true that a declaration of fundamental rights is meaningless unless there is effective machinery for the enforcement of the rights. It is remedy which makes the right real. If there is no remedy there is no right at all. Due to this our constitution makers incorporated a long list of fundamental rights and also provided for an effective remedy for the enforcement of these rights under Article-32 of the constitution. Article-32 is in itself a fundamental right. Article-226 also empowers the High Courts to provide the same remedy for the enforcement of fundamental rights.

The directive principles of state policy are the rights of the collectivity whereas the fundamental rights are the rights of the individual. So far as the constitutional remedies are concerned the directive prineiples are not justiciable but fundamental rights are justiciable. According to Article-37 Directive Principles are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making policies and laws. Fundamental rights are enforceable by the courts and the courts are bound to declare as void any law that is inconsistent with the fundamental rights. The Directive Principles are not so enforceable by the courts. The courts can only issue directions to the state in this regard.

While Part-III contains negative commands to the state i.e. not to violate the fundamental rights of the individuals, Part-IV contains positive commands to the state to promote the social welfare and the Ideal of the welfare state. In the earlier decisions the Court gave less importance to the directive principles on the ground that they are not justiciable like the fundamental rights. In its later decisions the court has taken the view that there is no conflict between the directive principles and the fundamental rights and they supplement each other in aiming at the same goal of bringing about a social revolution and the establishment of a welfare state which is envisaged in the preamble. In view of this the courts have the responsibility to interpret the provisions of the constitution in such a way as to ensure the implementation of the directive [illegible] the individual rights. This is the mandate of the constitution not only to the legislature and the executive, but also to the Courts as well.

According to Dr. B.R. Ambedkar, although these directives are not enforceable by the courts, yet these principles have been declared to be fundamental in the governance of the country. It is the duty of the state to apply these principles in making laws. If any Government ignores them they will certainly have to answer for it before the electorate at the time of election. The directive principles are not intended to be merely moral precepts.

There is no antithesis between the Fundamental Rights and the Directive Principles. They are meant to supplement one another. Prof. Granville Austin, has described the fundamental rights and the directive principles as the "conscience of our constitution."

In both the flagship democracies of the world i.e. the United States of America and India there is no doubt that the judiciary is not above law. It is the creation of the great Constitutions of these countries, one being the first written Constitution of the world and the other being the most comprehensive, latest and modern. But it is to be appreciated that in both the constitutions the judiciary has been placed as an independent organ. Its role is quite different than the role of the executive and the legislature. On the one hand it is required to be a guardian and sentinel of the Constitution and law whereas on the other hand it is required to be an arm of social revolution. Although it cannot be put at par with the executive or the legislature because of its sacrosanct role yet there is no doubt that it is required to be honest and transparent as a sentinel of the Constitution. By and large in the post constitutional era the judiciary has justified its role. It is during last two decades some of the events have tarnished the upright image of judiciary. In a resurgent nation transforming very fast, the judiciary will have to be very honest and transparent as an institution. It is expected that the high offices of the executive and legislature should be open and transparent. Equally and even more it appears to be expected from the judiciary.

ROLE OF UNIVERSITIES AND SOCIAL DEMOCRACY

The role of the universities is fast changing in the present education revolution in India. It is being continuously discussed and supported by each and everyone. The students are the end products of a University. They are the future generations of the society and nation. They are required to be equipped with variety of mental, physical and technological skills for actualizing themselves and for being socially responsible individuals. For this their personalities are to be developed manifold. In this context, talent hunt competitions, personality development and enhancement programs, co-curricular activities on a large scale, better study materials, exposure of various places and events, intellectually stimulating atmosphere, self presentation skills and opportunities, closer interaction of the parents-teachers-students, fostering respect for national ancestors and society are to be developed in the students before their passing out. This onerous responsibility hes on the universities in the 21st century. In fact it has not been fulfilled properly by most of the traditional universities during the last three decades of the 20th century.

A university is known as a body of teachers and scholars, at a particular place, imparting instructions in the higher branches of learning. They associate together as a society or corporate body with definite organization and acknowledged powers and privileges, especially that of conferring degrees, forming an institution for the promotion of education in many and the higher or more important branches of learning like– law, philosophy, medicine, social sciences and technology, comprising of the colleges, institutes, schools of thought, buildings and other movable and immovable property belonging to such a body. The role of the university is to preserve, disseminate and advance knowledge. It is required to provide intellectual and social leadership setting the moral tone of the society. It has to promote national integration and a national culture, which are tools for bringing about the social transformation as envisaged in the Constitution of India. The universities are required to produce trained personnel to advance the prosperity of the country by making full use of modern knowledge. The fundamental functions of the universities are namely teaching, research and to provide skilled and qualified personnel for the progress of India.

The fundamental duty of a university is to maintain the high standards of its teaching, admission of students from all parts of the world and standardized examinations. Universities should look towards ways of creating opportunities for a satisfying career outside traditional roles for graduates in scholarship, teaching, and the professions. The universities should enable students to learn from their history and culture, helping them to realize their intellectual and creative abilities, and encouraging them to become humane. The university adds to the understanding and enjoyment of life. It should be instrumental in solving the problems of society. India gets guidance from her men of letters, men of sciences, poets and artists, discoverers and inventors etc. These intellectual crusaders and pioneers of her civilization and culture are to be trained and produced in the universities, which are the cradle and sanctuaries of the intrinsic life of the nation. Universities are thus, our national institutions.

To conclude, in fact C. Rajgopalachari defined democracy in one of the finest ways that knitting together people's heart is democracy.

Implication of the Supreme Court Judgment on Presidential Reference in 2G Spectrum Aliocation Case

Prof. (Dr.) Kanwal DP Singh*
& Varun Chauhan**

ABSTRACT

Arrest of former telecom minister and the Supreme Court's February 2012 verdict cancelling all the 122 telecom licenses, has diverted attention from environmental protection and creation of the boundaries to differentiate the separate powers of Executive and Judiciary. Subsequently, government of India invoked the advisory jurisdiction of the Supreme Court through Presidential Reference under Article 143(1) of the Constitution raising some doubts regarding over-reaching implication of the Supreme Court judgment on 2G spectrum allocation by the government.

The central idea of this research was to clearly study the judgment of the Supreme Court on 2G spectrum allocation and to discover the power of the Court to review a policy decision of the Executive in larger public interest. The article is aimed at specifically understanding the implication of the Supreme Court judgment on presidential reference in 2G case. Research methodology was purely doctrinal in its approach and it has used and assessed many academic works of various jurists and eminent writers and publications of numerous newspapers and magazines to reach conclusion.

INTRODUCTION

Supreme Court judgment on 2G spectrum allocation matter has once again diverted our attention towards the need of a comprehensive analysis of how law operates as an instrument of environmental protection and creation of the boundaries to differentiate the separate powers of Executive and Judiciary. After the ruckus following the arrest of former telecom minister and the Supreme Court's February 2012 verdict cancelling all the 122 telecom licenses, the Telecom Regulatory Authority of India (TRAI) was asked to make fresh recommendations for grant of licenses.

Subsequently, government of India invoked the advisory jurisdiction of the Supreme

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Court through Presidential Reference under Article 143(1) of the Constitution raising some doubts regarding over-reaching implication of the Supreme Court judgment on 2G spectrum allocation by the government. The Supreme Court answered the Presidential Reference later in September 2012 through a constitutional bench comprising five judges including the then Chief Justice of India Mr. S.H. Kapadia.

This research has been premised on the following hypothesis/research questions:

1) Courts are permitted under the law to guide the government in policy making involving financial matters.

2) Disposal of natural resources has to be done in a like manner resorting to a specific method.

3) Policy of 'First-Come-First-Served' which has been followed by the government in the allocation of scarce natural resources is ultra vires the provisions of Article 14 of the constitution.

4) Power of Judicial Review exercised in larger public interest violates the basic principle of separation of powers.

OBJECTIVE AND RESEARCH METHODOLOGY

Main objective of this research was:

- To clearly study the judgment of the Supreme Court on 2G spectrum allocation;
- To see whether the Court can guide the government in policy making;
- To see whether there can be a universal method for allocation of natural resources;
- To ensure the legality of an arbitrary decision of the government even if it involves a huge amount of financial investment by the private individuals including Foreign Direct Investment;
- To discover the power of the Court to review a policy decision of the Executive in larger public interest;
- To see whether the Court can encroach upon the areas designated to the Executive by the Constitution while exercising the power of Judicial Review and to what extent;
- To reach a conclusion regarding reasonable and just method of disposal of scarce natural resources like spectrum for their proper utilization;
- To specifically understand the implication of the Supreme Court judgment on Presidential Reference in 2G case.

Research methodology was purely doctrinal in its approach and it has used and

assessed many academic works of various jurists and eminent writers and publications of numerous newspapers and magazines to reach conclusion.

ALLOCATION OF NATURAL RESOURCES AND THE LAW

Natural resources do not have a universal definition but they have been understood as the individual elements of natural environment which are required for economic and social assistance to the human society and they are considered very momentous in their relatively unmodified and natural form.

Natural resources belong to the people but the State legally owns them on behalf of its people. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest.[1] Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b)[2] of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best sub-serve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection.[3]

SPECTRUM AS A NATURAL RESOURCE

No one in the general parlance could have imagined until the 2G spectrum allocation in 2008, that, an abstract and intangible entity like *spectrum* can be treated like a natural resource. Also, its allocation by the Indian government in a manner which do not conform to the principles of equality and justice that resulted in an unfair and arbitrary procedure, was then, confronted with the social upheaval nationwide. It was realized that spectrum is not only a natural resource but also a scarce and limited one.

Spectrum can neither be created nor be destroyed. It is like 'atman' of Bhagwad Geeta, eternal, invisible, non-destroyable (and hence not producible), which was always there, and will be there! Thus, however much the government may want to share it with the public, there is a real shortage. It is the use of spectrum, which can

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1 Article titled 'Government has no right to alienate, transfer or distribute natural resources/ national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution', can be reached at http://indialawyers.wordpress.com/2012/02/02/ government-has-no-right-to-alienate-transfer-or-distribute-natural-resourcesnational-assets-otherwise-than-by-following-a-fair-and-transparent-method-consistent-with-the-fundamentals-of-the-equality, last visited on January 10, 2013.

2 Article 39(b): The State shall, in particular, direct its policy towards securing - that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good.

3 *Supra* 1.

be regulated so as to maximize its usage, given its capabilities and constraints.

THE CASE OF 2G SPECTRUM

The case of 2G Spectrum which is popularly known as 2G Scam is one of the most talked about scams in the history of Indian democracy. Not because of the huge loss of Rs. 1.76 lakh crores to the exchequer as anticipated by the Comptroller and Auditor General (CAG) of India's report on the issue, which is also another vital consideration; but for the very nature of the element involved in the issue, i.e. the spectrum.

Supreme Court's judgment in a PIL[4] which was directly related to the 2G case ordered cancellation of all 122 licenses issued in 2008 and stated the policy followed by the executive as flawed and arbitrary. The telecom minister, A Raja, was forced to resign and Prime Minister Manmohan Singh was asked to explain himself to the Supreme Court.

FROM SPECTRUM TO SCAM

The 2G spectrum scam relates to the 122 Unified Access Service (UAS) Licenses (UASL) granted by the Central Government in 2008. UAS is an umbrella term referring to the combination of mobile and fixed services. An UAS licensee can provide wire line as well as wireless services in a service area.

While distributing these 122 licenses, the market based mechanism were ignored[5] for allocation of UAS licenses (and the 2G spectrum linked to the UAS license) on the basis of the level playing field theory, the market based auction procedure was followed for discovering the market price of the 3G and BWA[6] spectrum (since the 3G and BWA/4G services were to be launched in India for the first time). In 2010, the 2.1 GHz band was auctioned for 3G services; and 2.3 GHz band was auctioned for BWA services. The auction brought in revenues for the government far beyond expectations. For the winning companies, the UAS license was amended and the permission to provide 3G and BWA services was added to the scope of the license.

The grant of 122 UAS licenses in 2008 out of the 575 applications received - stirred a hornet's nest. There were allegations from many quarters on the irregularities

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4 Centre for Public Interest Litigation and others v. Union of India and others- Writ Petition (Civil) No. 10 OF 2011 along with Dr. Subramanian Swamy v. Union of India and Others Writ Petition (Civil) No.423 of 2010

5 While the research work uses the word "ignore" to characterize the attitude of the government, the reader is requested to develop an independent point of view. The market based allocation methods can maximize revenues for the government but also burn holes in the pockets of the operators. The costs will inevitably be pushed to the end consumer which will lead to an increase in tariffs. The level playing field theory is an even stronger defense for shunning market mechanisms.

6 Broadband Wireless Access (BWA): Provision of broadband services on a wireless medium. Equated to 4G

committed in the issue of UAS licenses (and the 2G spectrum linked to the UAS license) in an arbitrary manner by:

- Advancing the cut-off date[7];
- Manipulating the FCFS[8] policy;
- Cherry preking the TRAI recommendations[9];
- Side tracking the Ministry of Finance[10];
- Ignoring the Law Minister's advice, etc.

The grant of these licenses raised many eyebrows and ruffled many feathers. What irked most is the grant of licenses in 2007- 2008 at a price determined in 2001 ostensibly to favor certain companies. These allegations were eventually brought to light by the Comptroller and Auditor General (CAG) of India in 2010-2011.

CAG'S REVELATIONS[11]

(i) Gap in policy implementation:

(ii) Telecom commission not consulted; Finance ministry overruled; Advice of Law ministry and Prime minister's office ignored:

(iii) Issue of license to ineligible applicants; Arbitrary changes by DOT in the cut-off date:

(iv) First Come First Served (FCFS) policy was not followed:

Organizations like Centre for Public Interest Litigation, Telecom Watchdog and activists like Dr. Subramanian Swami, filed a PIL[12] in the matter of 2G spectrum allocation and the following issues[13] were raised before the Supreme Court:

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7 Procedural irregularities wherein the concerned minister advanced the cutoff date at a short notice from October 1, 2007 to September 25, 2007

8 First Come First Serve. As per this policy, the applicants who applied first were given the license first; in that order

9 Specifically, ignoring the recommendation for implementation of the second phase of the unified licensing regime wherein spectrum is delinked from the license; and cherry picking only the recommendation for providing the license at 2001 prices in order to provide a level playing field.

10 The MOF suggested that market based mechanisms like auctions would fetch more revenue for the Government. This was not accepted on the pretext of providing a level playing field to the new players.

11 Case study on the 2G scam judgment of the Supreme Court by Guru Acharya, p 16, electronic copy can be reached at: http://ssrn.com/abstract=2048719, last visited February 15, 2013.

12 Public Interest Litigation (PIL)

13 Issues which are relevant to this research work are mentioned here.

ISSUES

1. *Whether the recommendations made by the Telecom Regulatory Authority of India (TRAI) for grant of Unified Access Service (UAS) License with 2G spectrum at the price fixed in 2001, which were approved by the Department of Telecommunications (DOT), were contrary to the decision taken by the Council of Ministers in 2003?*

2. *Whether the policy of first-come-first-served followed by the DOT for grant of licenses is ultra vires the provisions of Article 14[14] of the Constitution?*

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

Supreme Court cancelled all 122 UAS[15] licenses allocated by the Telecom Ministry in 2008, the department of telecom felt the judgment had far-reaching implications for various other sectors as well which also follows the first-come-first-served policy for distribution/allocation of natural resources such as coal and iron ore. Further, the government's defense such as the 'zero loss' theory floated by Telecom Minister Kapil Sibbal was rejected when the judgment clearly upheld the fact that spectrum was indeed a scarce resource, and further, that the beneficiary companies had offloaded their stakes for a huge profit thereby causing an equivalent loss to the state exchequer. It directed:

- "The licenses granted to the private respondents on or after 2008 ... and subsequent allocations of spectrum to the licensees are declared illegal and are quashed."[16]

- "The above direction shall become operative after four months."[17]

- "Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of license and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band."[18]

In the wake of all this mystification, Central Government invoked the advisory

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14 Article 14: Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

15 Unified Access Services, for details refer chapter 2.2, p 34

16 Writ Petition (Civil) No. 423 OF 2010 with No. 10 OF 2011, Para 81, p 92

17 *Ibid.*

18 *Ibid.*

jurisdiction of the Supreme Court through Presidential Reference[19] on April 12, 2012 which the Court answered on September 27, 2012.

Under the Constitution of India, the central government through President of India can invoke the advisory jurisdiction of the Supreme Court for matters of public importance. The President can seek the opinion of the Supreme Court on certain important issues of facts and law which he thinks fit for clearing any doubt. Such a reference being made by the President in his official capacity before the Supreme Court is known as Presidential Reference.

Article 143[20] empowers the President of India to present before the Supreme Court its doubts regarding some important issues which are fundamental to the public interest and it becomes very much significant for the sake of clarity that the Supreme Court must clear the confusion. Supreme Court can also reject such reference made by the President if it deems fit in the nature and circumstances of the case.

The President may formulate the questions for the advisory jurisdiction of the Supreme Court relating to the validity of the provisions of the existing laws as well as the provisions of a bill proposed to be introduced before the legislature, or any other question of constitutional importance.[21] A question of law which has already been decided by the Supreme Court under its judicial exercise cannot be referred to it by way of Presidential Reference.[22] The Supreme Court can however refuse to express its advisory jurisdiction under Article 143(1) if it is satisfied that the questions raised under the Presidential Reference are purely socio-economical and political in nature and do not have any constitutional significance.[23]

The questions[24] put forward by the President seeking advisory opinion and clarifications of the Supreme Court were:

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19 Special Reference No.1 of 2012

20 Article 143: Power of President to consult Supreme Court - (1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon. (2) The President may, notwithstanding anything in the proviso to Article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

21 Powers, Privileges and Immunities of State Legislature, Re, A.I.R. 1965 S.C. 745

22 The matter of Cauvery water disputes Tribunal, Re, A.I.R. 1992 S.C. 522

23 M. Ismail Faroqui v. U.O.I A.I.R. 1995 S.C. 605 [S.C.] as seen in Manupatra, National Law School of India Review, ed. 2009, vol. 21(1)

24 Questions which are relevant for this research work are taken only and other technical issues are therefore ignored for the purpose of this report. Also, the other set of questions were returned unanswered by the Supreme Court.

Q.1 *Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?*[25]

Q.2 *Whether a broad proposition of law that only the route of auctions can be resorted to for disposal of natural resources does not run contrary to several judgments of the Supreme Court including those of Larger Benches?*[26]

Q.3 *Whether the enunciation of a broad principle, even though expressed as a matter of constitutional law, does not really amount to formulation of a policy and has the effect of unsettling policy decisions formulated and approaches taken by various successive governments over the years for valid considerations, including lack of public resources and the need to resort to innovative and different approaches for the development of various sectors of the economy?*[27]

Q.4 *What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources?*[28]

Q.5 *Whether, if the court holds, within the permissible scope of judicial review, that a policy is flawed, is the court not obliged to take into account investments made under the said policy including investments made by foreign investors under multilateral/bilateral agreements?*[29]

SUPREME COURT'S CLARIFICATION

Court's clarification on the concerns shown by the Central government by way of presidential reference came on September 27, 2012 when five-judge bench including the then Chief Justice of India Justice S.H. Kapadia answered the questions put forward by the President in his reference dated April 12, 2012.

Here the issues and their clarifications[30] are dealt in a synchronized manner that would help the reader get an idea as to what has happened when the Court was faced with the problems pointed out by the President with regard to the anomalies in the allocation of the 2G spectrum.

Q.1 Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?

While answering this question the Supreme Court opined that court was not considering the case of auction in general, but specifically evaluating the validity of

25 In Re Special Reference No.1 of 2012, p 11

26 *Ibid.*

27 In Re Special Reference No.1 of 2012, p 12

28 *Ibid.*

29 *Ibid.*

30 Majority opinion of the bench was referred for the purpose of this research work.

those methods adopted in the distribution of spectrum from September 2007 to March 2008.

Q.2 *Whether a broad proposition of law that only the route of auctions can be resorted to for disposal of natural resources does not run contrary to several judgments of the Supreme Court including those of Larger Benches?*

One of the learned Senior Counsel, in support of his stand that the auction should be the only mode for the disposal of natural resources, submitted that a combined reading of Article 14, which dictates non- arbitrariness in State action and equal opportunity to those similarly placed; Article 39(b) which is a Directive Principle of State Policy dealing with distribution of natural resources for the common good of the people; and the "trusteeship" principle found in the Preamble which mandates that the State holds all natural resources in the capacity of a trustee, on behalf of the people, would make auction a constitutional mandate under Article 14 of the Constitution. Court was supposed to look into this matter as to whether the auction is the constitutional mandate that all the concerned ministries ought to follow while alienating/disposing the natural resources of the country at large.

The Court said that reading auction as a constitutional mandate would be impermissible because such an approach may distort another constitutional principle embodied in Article 39(b)[31]. The disposal of natural resources is an aspect of the use and distribution of such resources. Article 39(b) mandates that the ownership and control of natural resources should be so distributed so as to best sub serve the common good. Article 37 provides that the provisions of Part IV shall not be enforceable by any Court, but the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Q.3 *Whether the enunciation of a broad principle, even though expressed as a matter of constitutional law, does not really amount to formulation of a policy and has the effect of unsettling policy decisions formulated and approaches taken by various successive governments over the years for valid considerations, including lack of public resources and the need to resort to innovative and different approaches for the development of various sectors of the economy?*

Under this question, the Supreme Court was faced with the difficulty to answer the doubt in a way that would define the auction as not the only route to dispose the natural resources but other methods also as the equivalent good enough to maximize the revenue of the state at large while respecting the fundamentality of the Constitution

31 39(b): The State shall, in particular, direct its policy towards securing - that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good

side-by-side. Court also mentioned that different resources may require different treatment. Very often, exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources.

Q.4 What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources?

The learned Attorney General, G.E. Vahanwati, argued during the hearing of the Presidential Reference that dictating a method of distribution for natural resources violates the age old established principle of non-interference by the judiciary in the policy matters. Court cited some of the earlier judgments on the issue like *Rustom Cavasjee Cooper v. Union of India*[32] (commonly known as "Bank Nationalization Case")

In *BALCO Employees' Union (Regd.) v. Union of India & Ors.*[33], Supreme Court further pointed out that the Court ought to stay away from judicial review of efficacy of policy matters, not only because the same is beyond its jurisdiction, but also because it lacks the necessary expertise required for such a task [34]

Q.5 Whether, if the court holds, within the permissible scope of judicial review, that a policy is flawed, is the court not obliged to take into account investments made under the said policy including investments made by foreign investors under multilateral/bilateral agreements?

With regard to this fifth question, Court did not provide a direct but indirect answer while emphasizing only on the economic issue of the policy decision.

Crux of the Supreme Court opinion

- Supreme Court has said there is no going back on Spectrum Auction. It has clearly stated that if Government has to maximize revenue or reduced Profiteering then Auction is the only way out.
- Court has opined that Government has right to formulate the Policy. Court has also said the Government can't form a policy arbitrarily and the citizen has every right to question the government on its Policies in a Court of Law.
- Court has also observed the FCFS policy of the government was not followed in letter and spirit.
- Supreme Court has opined that auction is the way forward in 2G spectrum case because the companies got spectrum sold the spectrum to foreign companies at 8-10 times the value they paid for spectrum. Court is of the opinion that it is revenue foregone by the Government and it is a loss to the

32 (1970) 1 SCC 248

33 (2002) 2 SCC 333

34 In Re Special Reference No.1 of 2012, Para 141, p 137

exchequer. So the Supreme Court asked the Government to go for the Auction of spectrum.

- Supreme Court is of the Opinion that if the Natural Resources allocated by the government arbitrarily to private players result in windfall profit to the private players and government lose its fair share of revenue then Court has every right to cancel the allocation.
- The Court also opined that even if the Parliament does not adopt the CAG report this court will give due importance to CAG and its findings.
- Supreme Court's opinion on Presidential Reference is very clear that Government can formulate the policies and implement those polices in the right spirit. If anyone feels aggrieved then they can knock the doors of the court to settle the issue.

GOVERNMENT, JUDICIARY AND NATURAL RESOURCES

Presidential reference[35] in the *core case*[36] of 2G spectrum allocation matter was the first of its kind. None of the Presidential references in the history of Indian judicial system has questioned the Supreme Court's intention behind its judgment regarding participation in the policy making task, which is, considered as the sole duty and authority of the Executive wing of the government.

ROLE OF THE GOVERNMENT

To clear the role of the government in the allocation processes and methods pertaining natural resources in general and spectrum in specific In the 2G Case, the Bench framed the following question[37]:-

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

While answering question number (1) mentioned here above, the Court observed that the government is empowered to distribute natural resources as they constitute public property/national assets. According to the Court, natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the

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35 Special Reference No.1 of 2012.

36 This Research work has focused mainly on the 2G spectrum case and the subsequent Presidential Reference following its judgment by the Supreme Court.

37 While deciding the 2G case, bench formed five questions for consideration, out of which two pertain to the factual matrix of the case, two pertain to the first-come-first-served policy of the government which is already discussed in the previous chapters and are not relevant for this research work, remaining question is reproduced here.

State benefits immensely from their value. The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest.[38] Hence, government being a trustee of the natural resources has the right to alienate the natural resources by transferring them to the private hands by following a just and fair method of allotment. Such practice must be in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest.

JUDICIAL REVIEW AND LIMITATIONS

Judicial review and restriction on its use was challenged in the Presidential Reference[39] as one of the main issues by the Central government. The manner in which the 2G case was dealt by the Supreme Court paved the way for such an obvious reaction by the government. The Central government was looking shattered on the onset of the judgment of the 2G case and such a reaction seemed nothing but an angry expression from the government that has been besieged with bad publicity. Under the constitution of India parliament is not supreme. Its powers are limited in the two ways. First, there is the division of powers between the union and the states. Secondly, Parliament is competent to pass laws only with respect to those areas which are guaranteed to the citizens against every form of legislative encroachment.

Being the guardian of Fundamental Rights and the arbiter of constitutional conflicts between the union and the states with respect to the division of powers between them, the Supreme Court stands in a unique position where from it is competent to exercise the power of reviewing legislative enactments both of parliament and the state legislatures.[40] Judicial review is a powerful weapon in the hands of judges. It comprises the power of a court to hold unconstitutional any law or order based upon such law or any other action by a public authority which is inconsistent or not in line with the law of the land. In fact, the study of constitutional law may be described as a study of the doctrine of judicial review in action. The judges have the power to strike down any law, if they believe it to be unconstitutional.

At the same time, however, the power of judicial review is not absolute or unlimited. If the courts assume jurisdiction to review administrative acts which are 'unfair' in their opinion (on merits), the courts assume jurisdiction to do the very thing which is to be done by administration. If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk.[41]

The Supreme Court summarized in the context of the Presidential Reference in the

38 In Writ Petition (Civil) No. 423 OF 2010 with No. 10 OF 2011, Para 63, p 73.

39 Special Reference No.1 of 2012.

40 *Ibid.*

41 *Ibid.*

2G case that it has to be emphasized that the Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. Court held that it respects the mandate and wisdom of the executive for such matters.[42] The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. The Court cannot mandate one method like 'auction' to be followed in all facts and circumstances.

Therefore, judicial review has certain limitations with regard to the constitution itself for a healthy functioning of a democracy like India and Courts also understand this reality in the light of facts and circumstances of individual cases before it.

SEPARATION OF POWERS AND JUDICIARY

The separation of powers has been a central concept in modern constitutionalism.

In India, strictly speaking, no constitutional status has been accorded to the doctrine of separation of powers. Apart from the directive principle lied down in Article 50[43] of the Constitution of India, the constitutional scheme does not embody any formalistic division of powers. In India, the courts have been alive to the problems of the modern welfare government and the dangers inherent in the unchecked concentration of powers. Keeping in view the difficulties inherent in the enforcement of any strict doctrine of separation of powers in the functioning of a modern government and in defining in workable terms the division of powers, the courts in India have tried to refrain from falling in the controversy.

Though, the principle of separation of powers cannot be strictly followed in a welfare state scheme which, India is following in its democratic polity, Supreme Court while answering the Presidential Reference in the 2G case mentioned that the Courts must refrain from interfering in the decision-making arena of the executives as it lacks the necessary expertise required for such a task. The Court observed that while dealing with economic legislations, the courts, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those cases where the view reflected in the legislation is not possible to be taken at all.[44]

CONCLUSION AND SUGGESTIONS

Considering the core question under Presidential Reference in 2G case, of whether public auctions are the only constitutionally approved means of disposal or allocation or distribution of a public resource, the Court answered in the negative and provided three reasons. Firstly, with respect to the State, Article 14 is couched in negative

42 In Re Special Reference No.1 of 2012, Para 146, p 141

43 Article 50 of the Constitution of India, 1950: The State shall take steps to separate the judiciary from the executive in the public services of the State

44 In Re Special Reference No.1 of 2012, Para 141, p 137

terms. Rather than positively commanding the State to do something, it serves as an admonition against arbitrary, unreasonable, or discriminatory action. Reading an auction into the mandate of this provision would be completely contrary to the intent behind it. Secondly, endorsing an auction as an absolute principle would render void all actions that deviate from it, including welfare schemes, promotional policies, and social endeavors. Finally, reading an auction as a constitutional mandate would distort other constitutional principles such as those enshrined in Article 39(b)[45], that is, that ownership and control of resources be so distributed as to serve the common good.[46]

The apex court emphasized while answering the Presidential reference in 2G case that it respects the mandate and wisdom of the executive in allocation matters, but all such allocations have to be guided by common good and that courts will not hesitate in striking down any arbitrary allocation. Surely, there are lessons to be learnt. In the wake of disclosures highlighting crony capitalism aided by the prevailing opaque processes, dubious pricing, suboptimal utilization of such resources and corrupt practices, the Ashok Chawla Committee on Allocation of Natural Resources submitted its report back in May 2011.[47]

The objective of this report mentioned above was to help the government allocate natural resources in a more transparent, efficient and sustainable manner. However, this report is still not got the nod from the Parliament, this seminal work should not only be placed in the public domain for a more informed debate, but the government must also proactively inform of its status of acceptance and implementation.

The panel's recommendations reiterate merits of transparency, public disclosure, consultation, capacity building, competitive bidding and expeditious clearances. As can be seen, some of these factors resonate in the recent decisions of the Supreme Court on the issue and worthy of being incorporated in relevant policies.

Apart from the discussed anomalies so far in the allocation/alienation/disposal of natural resources and 2G spectrum in particular, apex court also declared the First-come-first-served (hereafter FCFS) policy of the government as void in the spectrum allocation matter, though subjectively. Comptroller and Auditor General of India (hereafter CAG) has also revealed in its report[48] that in a communication dated 2nd November 2007, the Hon'ble Minister of C&IT had even confirmed to the Hon'ble Prime Minister that the processing of applications for 2G spectrum were to be on the FCFS basis. However, audit found that Department of Telecommunication

45 *Supra 2*

46 In Re Special Reference No.1 of 2012, para 106, p 108

47 Pradeep S. Mehta, *Policies to allocate natural resources should be dynamic and transparent*, Article published in Economic Times dated 26 November 2012, can be reached at-http://economictimes.indiatimes.com/opinion/comments-analysis/policies-to-allocate-natural-resources-should-be-dynamic-and-transparent/articleshow/17365538.cms, last visited on February 10, 2013

48 CAG Report No 19 of 2010-11

(hereafter DoT) deviated even from the FCFS policy in letter and spirit. The applications submitted between March 2006 and 25th September 2007 was issued the Letter of Intents (hereafter LoIs) simultaneously on a single day, viz. 10th January 2008.

The said report of CAG also mentioned that a notice was issued through a press release giving less than an hour to collect the LoIs. This decision to issue LoIs simultaneously to all appheants was taken at the level of the Minister. As per the FCFS policy being followed those who were issued LoIs were given 15 days to fulfill the conditions. This included submission of a Performanee Bank Guarantee (hereafter PBG) and a Financial Bank Guarantee (hereafter FBG). By changing the FCFS criteria, some licensees, who could proactively anticipate such procedural changes were ready with the Demand Drafts drawn on dates prior to the uotification of cut-off date by DoT and could avail the benefit of first right to allocation of spectrum, having jumped the queue. The entire process followed lacked transparency and objectivity and has eroded the credibility of DoT.[49]

Therefore, the apex court held the FCFS policy of the government in the 2G case as vitiated and violative of Article 14 of the constitution of India and declared that auction could be the best method in such a situation where the public welfare policy included the profit maximization by the government exchequer. The arbitrary decisions taken at the level of Ministry were unconstitutional and unlawful. Modified version of the adopted FCFS policy in the concerned case is not only a sheer example of favoritism but it trounced the government exchequer a huge loss of more than one lakh crore rupees[50].

As already discussed above, court did not opined in the 2G case in an objective manner but subjectively and held that the government need not resort to the sole method of auctions as a means to alienate with the natural resources iu general. Executive wing is free to choose from a number of methods of allocation in this regard according to each and every case. Judiciary is not the right wing to decide the policy matters of the government and it can only check the legality of such methods only when such policy decisions hamper the fundamental or legal rights of the citizens of India in any manner whatsoever. The role of judiciary in the environmental governance can be seen in terms of judiciary interventiou iu the environmental policy making process as well as its role in the implementation of existing environmental laws and shaping its implementation process. The intervention by the judiciary in environmental cases has resulted in giving new lights to several provisions of the constitution. which earlier remained unnoticed. For example, the Court fortified and expanded the Fundamental Rights enshrined in Part III of Constitution. In the Dehradun Quarrying Case[51], the Supreme Court held that the

49 CAG Report No 19 of 2010-11, p vii

50 For more details see CAG's estimates on p 47

51 Rural Litigation and Entitlement Kendra and Others v. State of Uttar Pradesh AIR, 1987 SC 395

fundamental right to a wholesome environment is a part of the fundamental right to life in Article 21 of the Constitution. In addition to this, in numerous environmental cases the Supreme Court is stepping into the shoes of the administrator, marshalling resources, issuing directions to close down factories, requiring the implementation of environmental norms, cutting through bureaucratic gridlock and so on. With the intervention of judiciary, hundreds of factories have installed effluent treatment plants and there is a heightened environmental awareness among administrators, the subordinate judiciary, police and municipal officials, all of whom are involved in implementing the court's orders.[52]

The activism of the court has been visible in issues relating to environmental protection due to the initiative taken by public interest litigation (PIL) like the one in the present research work. The liberal interpretation of various rights by court was utilized by action groups in filing thousands of PILs on range of issues related to environment. Since early 1980s, the court could be seen dealing with range of environmental issues such as pollution by hazardous industries, protection and conservation of forests, urban and solid waste management, vehicular pollution, protection and conservation of wild life.[53] In other words, with the emergence of PIL as a strategic tool to aid the general public, the judiciary can be seen in almost every case dealing with environment protection

Supreme Court's opinion on Presidential Reference is very clear that Government can formulate the policies and implement those polices in the right spirit. If anyone feels aggrieved then they can knock the doors of the court to settle the issue. There cannot be in any way possible harassment of the public at large and the natural resources which are scarce. Courts are reluctant to guide the executive in the policy-making process because they respect the wisdom and authority of the executive in taking policy decisions for the country at large. But they also venture ont to make certain rules and pass certain orders for confining the policies of the government to the constitutional scheme and notion of equality and justice in case they divert from their actual or intended means and goals.

It is now settled that the power of judicial review exercised in the larger public interest does not contradicts the age old principle of separation of powers. As the principle itself do not creates a strict boundary line between the separate fields of the three wings of the government particularly when it comes to the democratic form of government like India. In a democracy, the cooperation of all the departments is indispensable and its success depends on the level of cooperation and co-existence of various departments for a specific goal of development.

Further, the concentration of powers in any one organ may, by upsetting the fine

52 Geetanjoy Sahu, *Environmental governance in India,* p 4, electronic version can be reached at- http://www.ecoinsee.org/T.S.%20III%20A/sahu_environmental.pdf

53 Ahuja, Sangeeta, *People, Law and Justice: a PIL case Book* "(1997), Hyderabad: Orient Longman Publications.

balance between the three organs destroy the fundamental premises of a democratic government. The doctrine of separation of powers is better appreciated as a doctrine of 'check and balance' and in this sense 'administrative processes' cannot be described as an antithesis of the doctrine.[54]

In the end, it can be said that the Indian Judiciary has played a significant role in environmental as well as social governance of India. In numerous cases, particularly cases related to the larger public interests like environmental issues, the Judiciary is stepping into the shoes of the executive, marshalling resources, issuing directions to close down factories, requiring the implementation of environmental norms, suggesting ways of allocation of natural resources, etc. As a result of which, hundreds of factories have installed effluent treatment plants and there is a heightened environmental awareness among administrators, the subordinate judiciary, police and municipal officials, all of whom are involved in implementing the court's orders.

In doing so, judiciary does not cross the line of action but simply bridges the gap between the acts which have been done and those which are ought to be done by the administration wing. Supreme Court, being the highest ranked office of the Judiciary, administers justice in a broad way and gives liberal interpretation to the laws formulated by the other respective organs of the government subject to the norms of constitutional law. In a scenario where corruption plasters each wall and street of the country in a sense that obstruct every just and liberal move of any public or private entity, Supreme Court seems to be the only hope for a change. Because of this country needs no act but action.

54 Noor Mohammed Bilal, *Dynamism of Judicial Control and Administrative Adjudication*, (2004), p 23.

Questioning the Coucept of Sustainable Development and Corporate Responsibility for 'Buda Nala'[1] in the City of Ludhiana : A Study

Ashish Virk* & Aman A. Cheema **

1.1 INTRODUCTION

*1.2 'Human survival is menaced by another equally homicidal missile euphemistically described as environmental pollution.' **V.R. Krishna Iyer***[2]

1.3 Great ideas are usually simple ideas. While the specific analysis of any important topic will necessarily involve complexity and subtlety, the fundamental concepts which underlie powerful paradigms of thought are usually relatively straightforward and easy to grasp. In the area of social science, ideas which affect millions of people and guide the policies of nations must be accessible to all, not just to elite. Only thus ean they permeate institutions from local to the global level, and become part of the human landseape, part of the fabric within whicli we define onr lives. Such is the coneept of sustainable development.[3]

1.4 Sustainable development[4] has always been the agenda of the governments

1 Buda Nala is a seasonal water stream, which runs through the Malwa region of State of Punjab. After passing through highly populated Ludhiana district, it drains into Sutlej River, a tributary of Indus River. Today it has become a major source of pollution in the region and Sutlej River, as it get polluted after entering the highly populated and industrialized Ludhiana city, turning it into an open drain

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2 V. R. Krishna Iyer, Environmental Pollution and the Law, Vedpal Law House, Indore, 1984, p.2

3 Jonathan M. Harris, Basic Principles of Sustainable Development, Tufts University Press, Medford; USA, 2000, p-10

4 P. B. Sahasranaman, Handbook of Environmental Law, Oxford University Press, New Delhi, 2009, pp. 21-33; Brundtland Report, World Commission on Environment and Development (WCED), Our Common Future, Oxford University Press, Oxford, 1987, p.43

of almost all countries over the world. To achieve the target of sustainable development delicate balance between the industrial growth and environment preservation needs to be maintained, for which the corporate sector needs to be responsible.

The idea of this balance commonly known as corporate social responsibility[5] sets a realistic agenda of grass-root developments through alliances and partnerships with sustainable development approaches. At the heart of solution lies intrinsic coming together of all stake holders in shaping up a distinct route of an equitable and just social order.[6]

To obtain the target of sustainable development the concept of Corporate Social Responsibility has gained growing recognition as a new and emerging form of governance in business, because conscious efforts to save environment and right to clean environment are fundamental targets of all around the world.

1.5 HUMAN RIGHTS TO CLEAN ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: A LEGAL PERSPECTIVE OF INDIA

"Probably more than any other jurisdiction on Earth, the Republic of India has fostered an extensive and innovative jurisprudence on environmental rights." ***Anderson***

1.6 CONCEPTUALISING LEGAL RIGHT TO ENVIRONMENT

1.7 Environmental rights do not fit neatly into any single category or generation of human rights. They can be viewed from at least three perspectives, straddling all the various categories or generations' of human rights. First, existing civil and political rights can be used to give individuals, groups and NGO's access to environmental information, judicial remedies and political processes. On this view their role is one of empowerment, facilitating participation in environmental decision-making and compelling governments to meet minimum standards of protection for life, private life and property from environmental harm. Second, possibility is to treat a decent, healthy or sound environment as an economic or social right, comparable to those whose progressive attainment is promoted by the 1996 UN Covenant on Economic, Social and Cultural Rights. The main argument for this approach is that it would privilege environmental quality as a value, giving it

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5. **Corporate Social Responsibility** is a continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large. Lord Holme, Richard Watts, Making Good Business Sense, *World Business Council for Sustainable Development*, January 2000, p.10

6 Indu Jain, Corporate Social Responsibility: Indian Legal Perspective, *Legal Services India*, March 26, 1011, p.1.

comparable status to other economic and social rights such as development, and priority over non rights-based objectives. Like other economic and social rights it would be programmatic and in most cases enforceable through relatively weak international supervisory mechanisms. Third option would treat environmental quality as a collective or solidarity right, giving communities rather than individuals a right to determine how their environment and natural resources should be protected and managed.[7]

1.8 The first approach is essentially anthropocentric insofar as it focuses on the harmful impact on individual humans, rather than on environment itself: it amounts to a 'greening' of human rights law, rather than a law of environmental rights. The second comes closer to seeing the environment as a good in its own right, but nevertheless one that will always be vulnerable to trade-offs against other similarly privileged but competitive objectives, including the right to economic development. The third approach is the most contested. Not all human rights lawyers favor the recognition of third generations, arguing that they devalue the concept of human rights, and divert attention from the need to implement existing civil, political, economic and social rights fully. The concept in general adds little to an understanding of the nature of environmental rights.[8]

Generally, global and regional treaties on environmental rights since 1991 contain at least some reference to public information, access or remedies, although this practice is not usually followed in the case with watercourse agreements. Such agreements tend to focus on interstate management and utilization of freshwaters without reference to public information and participation.[9] Human rights treaties of the past decade are fewer in number than the total of environmental agreements adopted during the same period and most of those that have been concluded have been at the regional level. In general, global treaties have not included specific reference to the environment or to environmental rights. In contrast, even prior to the Rio Conference, regional instruments contained provisions on environmental

7 Awasthi & Kataria, Law Relating to Protection of Human Rights, Orient Publishing Company, New Delhi, 2005, pp. 450-525.

8 *ibid.*

9 See, e.g. the *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (Chiang Rai, April 5, 1995), the *Protocol on shared Watercourse Systems in the Southern African Development Community Region* (August 28, 1995), the *Convention on the International Commission for the Protection of the Oder* (Wroclaw, April 11, 1996), and the U.N. *Convention on the Law of the Non-Navigational Uses of International Watercourses* (New York, May 21, 1997)(the last does contain a requirement of non-discrimination in respect to any remedies that are provided). The exceptions in this regard are the regional *Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes* (Helsinki, March 17, 1992), as discussed below and the *Convention on Cooperation for the Protection and Sustainable Use of the Danube River* (Sofia, June 29, 1994).

rights.[10] However, environmental rights in India do not really exist in written form. They were rather created from lawyers, activists, and from other available resources. In the proceeding part of the paper the general provisions of the Constitution of India is discussed and the attitude of the Indian Courts on environmental related grievances has been argued.

1.9 CONSTITUTIONAL RIGHT AND DUTY TOWARDS ENVIRONMENT

According to the Indian Constitution '*The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country.*'[11] Here, the duty to protect and improve the environment is imposed on the State. Moreover, the Indian Constitution also says '*It shall be the duty of every citizens of India – [...] g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures,*'[12]

Human rights protect individuals against the arbitrary action of the state; however, according to Article 51A (g), of the Constitution of India the protection of the environment is a fundamental duty not only of the State, but also of every citizen. Many environmental crimes are thus committed not only by the state, but by private actors as well. The Constitutional right to environmental in India could therefore also be indirectly claimed against private. In other words, the State has to prevent the private persons from damaging the environment, because the rights of other could be affected. Even if no direct damage or no injuries were caused to the population, or has been caused by any act still the court can give order in favor of the protection of environment rights. The dimension of the interpretation for environmental rights can be thus understood with the perceptive of Article 48A and 51A (g) of the Constitution of India.[13] The Indian Constitution is a landmark in itself. It contains variety of rights and duties for the overall dignified life of a human being. Right to clean environment is one of such right and duty enshrined in the Indian Constitution.

THE JUDICIAL APPROACH

In India, the jurisdiction of the Supreme Court has widened the scope of the Right to Life under Art. 21 and included the Right to a wholesome environment. One of the most explicit and most cited cases in this regard is *Subhash Kumar v. State of Bihar*[14]. The Supreme Court ruled that 'Article 32 is designed for the enforcement of the Fundamental Rights of a citizen by the Apex Court', and the

10 *Convention on the Rights of the Child* and *I.L.O Convention No. 169.*

11 Article 48A, Constitution of India.

12 Art. 51A (g), Constitution of India.

13 Kootwal v. State of Rajasthan, AIR 1988 Raj. 2

14 (1991) 1 SCC 598

'Right to live is Fundamental Right under Art 21 of the Constitution and it includes the right to enjoyment of pollution free water and air for full enjoyment of life'. The Court even went that far in saying that a petition for Art.21 in connection with Art.32 can be invoked by 'social workers or journalist'. In other words, any third person, doubtful that the environmental conditions at some place are sufficient to live a life in dignity, can call upon the Courts. This decision of the Supreme Court is revolutionary, because it set a precedent. In case there is an allegation that natural resources are polluted, the High Court or Supreme Court can be induced to investigate and eventually issue a writ petition. The authorities and private persons will have to act in compliance with minimum environmental standards. Interesting to note is that the Supreme Court uses international 'soft law', in order to emphasize its decision. Hence, international environmental law, albeit vague, has an influence on the interpretation of rights through the Indian Courts. The Supreme Court has decided similarly in other cases related to the right to life.

The Constitutional right to clean and healthy environment was developed and encouraged by the Indian Judiciary from time to time. However, apart from this various international environmental principles declared legal by Stockholm and Rio Declaration were introduced and enhanced by the judiciary in India. These principles not only protected environment from depletion but also protected by fixing corporate social and legal responsibility. Some of these principles are discussed in the proceeding part of the paper.

Principle of Sustainable Development: In India, three basic elements of implementing sustainable development[15] can be identified: sustainable and equitable utilization of natural resources, integration of environmental protection and economic development, and the right to development. The definition of sustainable development in India integrates a quality of life that is economically and ecologically sustainable. In India, albeit the case law failed to produce a clear definition, it did manage to come out with an applicable definition of sustainable development. During the 1980's, most of the Indian cases[16] were concerned with the cancellation of mining leases and closure of national development projects, in order to protect the depiction of environment.

In 1994, the Supreme Court of India directly mentioned the principle of sustainable development and tried to balance the social, economic and ecological aspects.

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15 Rio Declaration, 1996- Principle-1: Human Beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

16 Sania v Kunderi, 1984 (2) Civil LJ 377 (Ker); M.C. Mehta v Union of India, AIR 1987 SC 965; Shri Sachidanand Pandy v State of West Bengal, AIR 1987 SC1109; Rural Litigation and Entitlement Kendra, Dehradun v State of Utter Pradesh, AIR 1988 SC 2187

The 1990's[17] definition of sustainable development emphasized the relationship between development and environment, and tried to maintain a balance between the two. More sophisticated challenges were made where the Indian Courts were asked to deal with polluting industries such as the leather factories, to prevent encroachment of wetlands, and to preserve forests and vegetation. It gave priority to sustainable use of the natural resources and to a right to a healthy environment for the present, and to a certain extent, to future generations. The national environmental policy and legislation reflect the concern for a balance between development, planning and environment.

Principle of Intergenerational Equity: In India, inter generational equity principle[18] has been considered as a part of achieving sustainable development. However, the nature of the right and how to achieve it has not been discussed by the Courts. Exempli gratia, in the cases dealing with reserved forests, the Court decided the case based on the need of the present generation and the rational use of natural resources. Therefore the vertical application of equity has been established[19]. Moreover, the notion of equity has been connected with the concept of public trust and depended on people's right to enjoy a healthy environment[20].

The *Vellore Citizen's Welfare Forum*[21] recites the Brundtland Commission definition of sustainable development which 'meets the needs of the present without compromising the abillty of the future generations to fulfill their own needs'. In *People United for Better Living in Calcutta v. State of West Bengal*[22], it was stated that 'The present day society has a responsibility towards

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17 V. S. Damodaran Nair v State, AIR 1996 Ker. 8; S. Jagannath v Union of India, AIR 1997 SC 811; Om Prakash Bhatt v State of Uttar Pradesh, AIR 1997 All. 259; Burrabazar Fire Works Dealers Association v Commissioner of Police, Calcutta, AIR 1998 Cal 121; Mahabir Coke Industry v Pollution Control Board, AIR 1998 Gau. 310.

18 Inter-Generational Equity Principle: The principle states that it is the right of each generation of human beings to benefit from the cultural and natural inheritance of past generations as well as the obligations to preserve such heritage for future generations. S. Divan and A. Rosencranz, Environmental Law and Policy in India, Cases, Materials and Statutes, Oxford University Press, New Delhi, 2001, p.53.

19 Vellore Citizen's Welfare Forum v Union of India, AIR 1996 SCW 3399:1996 (5) SCC 647; State of Himachal Pradesh v Ganesh Wood Products, AIR 1996 SC 149; Indian Council for Enviro- Legal Action v Uion of India
(The CRZ Notification Case), (1996) 5 SCC 281; A.P. Pollution Control Board v MV Nayudu, AIR 1999 SC 812 at 819: 1999 (2) SCC 718.

20 **United Nations Framework Convention on Climate Change, 1992,** Article 3: The parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities (entered into force on 21st March 1994).

21 (1996) 5 SCC 647

22 AIR 1993 Cal. 215

the posterity of their proper growth and development so as to allow posterity to breathe normally and hve in a cleaner environment and havc consequent fuller development.'

In *S. Jagannath v. Union of India*[23], the court while dealing with commercial shrimp farming held that a strict environmental test is required before permission is granted for the installation of such farming in fragile coastal area. It added that there must be a compulsory Environmental Impact Assessment (EIA) which would consider intergenerational equity and rehabilitation cost.

Principle of Precautionary Principle: In India, most of the cases[24] of the 1990's on environment deal with the definition of the precautionary principle[25]

Adopted to prevent the inter-jurisdictional damage, the Indian court decided that the burden of proof would shift and the allegation would require to he proved beyond reasonable doubt. Applying as part of enstomary law, the court, in some cases wanted to avoid the stringent rules and procedures of evidence and causation. In 1996, the Indian court laid down the meaning of precautionary principle (PP). It stated that environmental measures, adopted by the State Goverument and the statutory authorities, must *anticipate, prevent and attack* the causes of environmental degradation. Following the definition provided in the Rio Declaration[26], the court stated that where there are threats of serious and irreversible damage, lack of scientific certainty should not be nsed as a reason for postponing measures to prevent environmental degradation.

The court again followed the 'anticipate, prevent and attack' approach in *M.C.*

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23 (1997) 2 SCC 87

24 A.P. Pollution Control Board v MV Nayudu, AIR 1999 SC 812 at 819: 1999 (2) SCC 718; Vellore Citizen's Welfare Forum v Union of India, AIR 1996 SCW 3399:1996 (5) SCC 647.

25 Precautionary Principle: When human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm. Morally unacceptable harm refers to harm to humans or the environment that is:

- Threatening to human life or health or;
- Serious and effectively irreversible or;
- Inequitable to present or future generations or;
- Imposed without adequate considerations of human rights of those affected.

United Nations Educational, Scientific and Cultural Organization (UNESCO), The Precautionary Principle: World Commission on the Ethics of Scientific Knowledge and Technology, UNESCO Press, New York, 2005, p.14; Barton, The Status of the Precautionary Principle in Australia, Harv. Envtl. Law Review, 1998, Vol. 22, pp. 509-11.

26 Rio Declaration, 1992, Principle 15: in order to protect the environment, the precautionary principle approach shall be widely applied by states according to their capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty, shall not be used as a reason for postponing cost- effective measures to prevent environmental degradation.

Mehta Case[27]. In this case, the precautionary principle was invoked to prevent construction within one kilometre of two lakes located near Delhi and the principle was accepted as a part of the law of the land.

Thereafter, in the *Taj Trapezium Case*[28], the Supreme Court ordered a number of industries in the area surrounding the Taj Mahal to relocate or introduce pollution abatement measures in order to protect the Taj Mahal from deterioration and damage. Following the decision of *Vellore Citizen's Case* and *Indian Council for Enviro-Legal Action Case*[29], the Supreme Court described the Precautionary Principles as environmental measures which must 'anticipate, prevent and attack' the causes of environmental degradation.

In *S. Jagannath Case*[30], the precautionary approach was relied on to curtail commercial shrimp farming in India's coastal areas. The commercial user of agriculture lands and salt farms were discharging highly polluting effluents, and causing pollution of water. Normal traditional life and vocational activities of the local population of the coastal areas were being seriously hampered. In *M.C. Mehta (Tanneries) Case*[31], this principle was used when the court wanted to relocate 550 polluting tanneries operating in Calcutta.

An application of the Precautionary Principle is found in *suo motu proceedings in Re: Delhi Transport Department*, where the Supreme Court dealt with air pollution in New Delhi. In the Supreme Court's view, the precautionary principle' which is a part of a concept of 'sustainable development' has to be followed by state governments in controlling pollution. According to the Supreme Court, the State government is under a constitutional obligation to control pollution and, if necessary, by anticipating the causes of pollution and curbing the same. The Supreme Court added that principle is entrenched in the Constitution as well as in various environmental laws.

In *Th. Majra Singh v. Indian Oil Corporation*[32], it was held that the court could only examine as to whether authorities have taken all precautions with a view to see that laws dealing with environment and pollution have been given due care and attention.

In *A.P. Pollution Control Board v. Prof. M.V. Nayudu*[33], the Supreme Court commented that, although Polluter Pay is accepted as part of international

27 (1992) 3 SCC 256
28 (1997) 2 SCC 353
29 (2000) 2 SCC 293
30 (1997) 2 SCC 87
31 M.C. Mehta v. Union of India AIR 1998 SC 1037
32 AIR 1999 J&K 81
33 (1999) 2 SCC 718

customary law, it is still evolving and applies according to the situation and circumstances of each case. The Supreme Court also stated that the burden of proof in environmental cases is reversed and 'burden as to the absence of injurious effect of the proposed action is placed on those who wants to change status quo.'

Polluter Pays Principle: In India, the principle of absolute liability has been applied in pollution cases to determine environmental liability and has been applied against the public bodies. This arose from the tort concept of 'strict liability' and does not allow any exception. Number of cases[34] discussed above in various principles also highlights polluter pay principle. The courts have taken action against the Government as well as against private corporations or companies. Most of the time, it has been defined as au integral part of sustainable development. The Indian Court applied the Polluter Pays Principle (PPP)[35] in cases related to accidental pollution and environmental damage caused by industrial waste and ordered compensation for the harm caused as well as the obligation to pay for the preventive control.[36]

Hence, in the context of environment, the Supreme Court has performed a ycomau service by taking cognizance, in a uumber of cases, of various environmental problems and giving necessary directions to the Administrations. The court has thus compelled an inactive and inserts administration to make some movement towards reducing environment pollution. In this way, the court has promoted a broad social interest. For this purpose, the court has depended upon such Directive Principles as those contained in Article 47, 48A and fundamental duties contained in Article 51(A) (g) of the Constitution.[37]

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34 Indian Council for Enviro-Legal Action v. Union of India (1995) 3 SCC 77: (1995) 5 Scale 578; Pravinbhai Jashbhai Patel v. State of Gujarat (1995) 2 GLR 1210: (1995) 26LH352; Cambridge Water Co. v. Eastern Counties Leather, pl 2 WLR 53: (1994) 1 All ER 53; Burnie Port Authority v. General Jones Pty Ltd (1994) 68 Aus LJ331: Union Carbide Corp. v. Union of India (1991) 4 SCC 584; MC. Mehta v. Union of India (1987) 1 SCC 395: 1987 SCC (L&S) 37; Ballard v. Tomlinson (1885) 29 CH. D. 115: (1881-5) All ER Rep. 688.

35 Polluter Par Principle is the principle according to which the polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to the society or the exceeding of acceptance level (standard) of pollution. Glossary of Environmental Statistics, Studies in Methods, Series F, No. 67, United Nations Press, New York, 1997, p.2.

36 Rio Declaration, 1992: Principle 16: National authorities should endeavor to promote the internalizatioo of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

37 M.P.Jain, Indian Constitutional Law, Wadhwa and Company Nagpur, New Delhi, 2003, p.1330.

ENVIRONMENTAL POLLUTION AND A STUDY OF BUDA NALLAH IN THE CITY OF LUDHIANA: OBSERVATIONS, & SUGGESTIONS

"If anyone intentionally spoils the water of another ... let him not only pay damages, but purify the stream or cistern which contains the water..." ***Plato***[38]

City of Ludhiana in the State of Punjab is one of the industrially growing cities in the country. In the city of Ludhiana, the sole source of water supply is ground water. The fast growing urbanization, industrialization, and other developmental activities have brought a variable water crisis. The city has various small and large industrial units which include electroplating, heat treatment, cycle manufacturing, hosiery, machine parts, vegetable oils, dyeing process and chemical industries. These industrial units are the major source of pollution. Most of the industries are disposing their untreated industrial effluent in the immediate vicinity as they have either not installed effluent treatment plants and if installed these are not functioning properly[39]. This unsystematic disposal of industrial and solid wastes has affected the ground water quality of the area. A seasonal stream commonly known as Buda Nala runs through city of Ludhiana and drains into Satluj River. This stream used to be a fresh water channel with about 56 types of fish species prior to 1964. Now it has no fish because of the high level toxicity in the water. Once an asset to the city it is now a source of public nuisance and poses a serious health hazard. Untreated industrial and domestic sewerage of the city is emptied into the Nala.[40]

REVIEW OF LITERATURE AND RESEARCH PROJECTS ON BUDA NALA

Various studies had been conducted on the Buda Nala from time to time. All these studies have tried to highlight the pollution being caused by the wastes into the Nala. However, certain steps have been taken to eliminate the problem but nothing concrete has come out. The stream is getting polluted day by day whereby increasing the problem of pollution in the city. The review of some of the studies has been briefly discussed below.

- Mr. Gill (1974)[41] investigated the physico-chemical characteristics of the waters of Buda Nala in relation to their effect on fisheries. It was reported

38 B. Jowett, The Dialogues of Plato: The Laws, Clarendon Press: Oxford, 1953, section 485(e).

39 Ludhiana: The industrial vis-à-vis pollution capital. For more information visit, <http//:ess.co.at/GAIA/CASES/IND/LUD/LUDpollution.html>, visited (26th January, 2012).

40 A.S. Prashar, 'Ludhiana heading for a Bhopal-Like Tragedy: Punjab Rivers are now Heavily Polluted,' *The Tribune*, August 1997.

41 Ludhiana: The industrial vis-à-vis pollution capital. For more information visit, <http//:ess.co.at/GAIA/CASES/IND/LUD/LUDpollution.html>, visited (26th January, 2012).

that there was no dissolved oxygen in polluted zone, BOD ranges 90-350 PPM was high with pH 7.05 to 7.7 and specific conductivity between 0.45-1.46 micro mhos. These parameters were reported to have adverse affects on fish life. Nitrates and phosphorus were also much more than their respective permissible limits. The study reveals that discharge of raw sewage into Buda Nala had considerably increased. The presence of blue-green algae had been reported to have increased the BOD. This is making water colored, turbid, and gives disagreeable odors.

- Azad (1981)[42] studied the metal ion concentration in Buda Nala water and found the concentration of lead, cadmium, Nickel and cobalt in Nala's water to be much more than their respective permissible limits.

- Sharma (1984)[43] conducted the study on Buda Nala for seasonal population dynamics of zoo plankton in polluted water. It was reported that there was adverse affect of sewage, dairy wastes and industrial effluents on the aquatic organisms.

- Duggal and Grewal (1985)[44] compared the water qualities of Buda Nala's both upstream and downstream of city. The water quality of Nala was found to be badly impaired at downstream side because of discharge of sewage and industrial effluents from the city.

- J.P.Singh (1988)[45] on Buda Nala. It was found that the seasonal functioning of few industries varies the amount and nature of pollution load in Buda

42 *ibid.*

43 *ibid.*

44 *ibid.*

45 J.P Singh, 1988: A study was carried-out to demarcate the zone of ground water pollution along the Buda Nala. The study was aimed to predict the spread of pollutant into areas around Buda Nala through ground water. The site selected for experimental work was in downstream of Buda Nala near Haibowal colony. The very reason for this selection is that all the city drains have found their entry into the BN before it reaches Haibowal. Thus, the quality of water in this reach of BN is the worst and remains uniform. Three longitudinal site sections were considered. While selecting sampling points (hand pumps), in and around Buda Nala, care was taken so that the sampling points should fall on either side of the Nala on a perpendicular line that to on the same sub-soil water depth. Equal perpendicular distances were also covered for the analysis work carried out on either side of Nala at each section. Two sampling points for analyzing Buda Nala's water were also selected at each section. The collected samples from Buda Nala, tube-wells and hand-pumps were tested for different physical, chemical and microbiological parameters.

The conclusions drawn from the present study are: i) The concentration of most of the water quality parameters of Buda Nala exceeds the in-stream standards set for effluent discharging in rivers. ii) The water of hand pumps in the adjoining area is having higher MPN, ammoniacal nitrogen, total solids and total hardness than maximum acceptable limits for potable water.

Nala round the year. It carries polluted water from Ludhiana city and disposes 25 km away in river Satluj in a very unhygienic way. The seepage of polluted water from the Nala causes ground water pollution in the area along its stretch. The Buda Nala water when falls into the Satluj River it creates filthy environment, and causes color of river water to black.

- The quality of water in Buda Nala had also been declared unfit for irrigation by the researcher Mr. Hira, in 1989.[46]

- To study the variation in physico-chemical parameters in the water of Buda Nala vis-à-vis variation of discharge, a detailed study was undertaken by G. Singh, Civil Engineering Department. Eight sampling sites were selected along the 25km Stretch of Buda Nala. The first three sampling sites were within city limits, fourth to seventh sampling sites were at downstream of Buda Nala whereas eighth was selected at river Sutiej, one kilometer downstream from the point where Buda Nala merges into the river. All sewage drains join to Buda Nala before site four. Therefore, the four stations (fourth to seventh) were used for analyzing the data and to understand the changes in water quality. The eighth sampling site was also not a true representative of Buda Nala water as the Sutlej water mixed up in it. The data on this site was to determine the effect of Buda Nala water on the Sutlej River. The samples were collected as per 'Standard methods for the Examination of Water and Waste Water' during the three season's city witnesses. One month interval was taken to collect the waste water samples. These samples were collected each time in the morning from 8.00 A.M. to 11.00 A.M. as it was expected to have a peak flow in the stream during this time. The collected samples were analyzed for physico-chemical parameters: turbidity, pH, dissolved oxygen, BOD and ammoniacal-N within 6 hours of the collection[47]. It was analyzed that dyeing industries were the

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Thus, the ground water in nearby areas is unfit for drinking. iii) The pollution traverses from Buda Nala to the ground water on either side. Its area of influence is more on the right side than that of left, of its flow. This might be attributed to the ground water flow direction. iv) Because of perennial flow of pollutants in Buda Nala, it is found that the it has polluted the ground water upto1200 m on the right side and 250-300 m on the left. Ludhiana: The industrial vis-à-vis pollution capital. For more information visit, <http// :ess.co.at/GAIA/CASES/IND/LUD/LUDpollution.html>, visited (26th January, 2012).

46 Ludhiana: The industrial vis-à-vis pollution capital. For more information visit, <http// :ess.co.at/GAIA/CASES/IND/LUD/LUDpollution.html>, visited (26th January, 2012).

47 Summary of the Findings: i) All the parameters are at the highest level when the flow in Buda Nala is minimum in month of July and lowest in October. It may be attributed the peak running season of dyeing units before winter falls. ii) Dissolved oxygen at any site along the course of Buda Nala was absent throughout the year reflecting that the stream is highly polluted. iii) The BOD, COD and TDS have higher values in summer season as compared to rainy & winter season. iv) Self-purification mechanism does not exist in Buda

main source of pollution of Buda Nala.

The Ministry for Environment and Forests Mr. Jairam Ramesh, Member of Parliament, Mr. Manish Tewari, and Chairman Central Poliution Control Board visited the site of Buda Nala September 2010. He ordered site studies to be undertaken and a proposal for an 'In Situ Bio-Remediation Project'[48] was drawn up. The use of this technology is considered to be harmless and indigenously found in nature. No Genetically Modified Organisms would be used in the execution of this project. This is an environmentally benign process that has no harmful impact on the surrounding ecosystem including on human or animal health.[49] However, the project has not seen the light of the day, and has actually remained on paper.

The studies discussed above scientifically prove that industries are one of the major sources of pollution in Buda Nala. However, the studies fail to highlight the social implications of the pollution. Being scientific studies they fail to highlight the impact of pollution on the residents living nearby Buda Nala. The present research work is an attempt towards this direction. The researchers try to elaborate the impact of pollution on the health and overall lifestyle of people residing in the neighboring areas of Buda Nala, resulting in the infringement of fundamental rights of the residents. The study tried to re-access the causes of pollution, its social impact, political failure to curb the problem, and other observations made during the visit to Buda Nala. It concludes with certain sub-monitions.

MAIN OBJECTS OF THE RESEARCH WORK:

- To study the effect of polluted drain of Ludhiana called 'Buda Nala' on the

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Nala. The stream does not recover from pollution even at extreme downstream station and dissolved oxygen remains absent. GAIA, Ludhiana: The industrial vis-à-vis pollution capital. For more information visit, <http//:css.co.at/GAIA/CASES/IND/LUD/LUDpollution.html>, visited (26th January, 2012).

48 In Situ Bio-Remediation Project: This revolutionary method employs the use of microbes to eat away the waste component of effluents that are discharged into the water. The project will tackle the effluent load of industrial and domestic waste being emptied out into Buda Nala. By electing 'Green Bridges', that is, temporary barricades fortified with microbial consortia, the filters build will help the waters to pass. With every successive Green Bridge that the water passes through there will be expected reductions in what is known as Bio Chemical Oxygen (BoD) and Chemical Oxidation Demand (CoD) levels. These Green Bridge will be set up at intervals of 1km each or as mandated by the flow and quantum of water found in the Nala. In effect, the microbial consortia applied in the technology will 'chew away' the organic load and industrial pollutants leaving behind the clean water.

49 Ministry of Environment and Forests, Government of India, *Bio-Remediation Project to be Launched in Ludhiana*, 4th April 2011. for more information visit <http://global-4-lvs-colossus.opera-mini.net/hs46-04/13720/1/-1/moef.nic.in/press-note-launch-of-bio-remediation-projeect-ludhiana.pdf>, visited (26th January, 2012).

general public of Ludhiana living in the locality of the drain.

- To study the condition of Laborers working in the Industries along the edges of the Buda Nala.
- To study the effect of Polluted Buda Nala on the human rights of general public & industrial class.

Scope of Research Work:

- It covers approximately all the areas situated on the banks of Buda Nullah i.e. Haibowal, Chandan Nagar (Chotti Pulli & Waddi Pulli), Peeru Mohalla, Tibba Road, Bihari Colony, Geeta Colony, areas near Central Jail & Tajpur Road.
- The analysis of the present research work is based on the observational study; though questionnaires were prepared to know the views of local residents and workers from the industry. The questionnaires were basically used to make interview technique more authentic.
- The research undertook, covered total number of 40 respondents from two classes namely General Public and Industry comprising of 20 respondents each. Among the general public, the respondents were mainly shopkeepers and local residents and among the industrial class, almost all the respondents were laborers working in the Industries. Out of the total respondents covered under the research, majority were illiterates.

Analysis of the Questionnaires and Observations of the Study:

The general analyses of the questionnaires and observations made during the visit to the site are summed below:

- Majority of the population either living near the Buda Nala or working in the industry situated near it are inflicted by various diseases. Some common diseases such cold, cough, fever were found among 40%-50% of respondents, whereas critical diseases like skin problems, visual and respiratory disorders were found among 15%-20% of respondents.
- Almost 97% of the respondents were of the view that no government authority ever visited the site of Buda Nala. Moreover, they were of the view that nothing concrete has been done so far to clean the Nala by the corporation, or by any NGO, industry or even the local residents.
- The respondents either residing or working near the Buda Nala were unaware of their human right to clean environment. They showed no concern towards right to dignified life and livelihood.

- After having an interaction with the respondents and general observations the researchers concluded that the main Causes of Pollution of Buda Nala are:

1. Dyeing Industry on Tajpur Road is the main polluter of Buda Nala. There are hundreds of dyeing industries on both the banks of the drain and they throw the untreated waste into the Nala without treatment causing pollution at a large scale.

2. Another major cause of the pollution of the Buda Nala is sewage mainly from the residential areas but industry too contributes a lot to the pollution.

3. The liquid waste is not the sole pollutant. Pollution is also caused by the solid waste which chokes the drain and becomes the major cause of floods during the monsoon season.

4. There are number of dairies in Geeta Nagar at Tajpur Road which throw whole of their solid and liquid waste into the Buda Nala and it add to the pollution of the drain.

- Industry is the major cause of pollution of Buda Nala but, it is not the SOLE cause as there are various other causes such as domestic waste, waste from religious institutions, and waste of dairies from Geeta Nagar etc.

- The Water Treatment Plant which is meant to treat both Industrial Waste and Sewage is not functional, thus it is unable to prevent pollution. Apart from it the other machines meant for the cleaning of Buda Nala are not in operation and their conditions are also not good as they are rusted and need repairs. Pollution can be easily curbed to a large scale only by making this treatment plant effective.

- There is lack of individual Treatment Plants in industries which is a basic requirement and must be in operation in all the industries.

- People residing on the banks of Buda Nala are mainly affected by the pollution than the employees of the industries.

- People throw waste into the drain in spite of the warning signs on both the sides of Buda Nala.

- Foul Smell is everywhere near Buda Nala which causes a lot of trouble to the residents and employees and even cause respiratory problems to a large number of people.

- Pollution affects the public at large out of which majority is poor who do

not have any financial source to leave the place and migrate somewhere else for a better standard of living.

- Government has not taken any measures to clean the Drain. The entire fund released by various international organizations, Central Government has been misused and schemes are not efficiently implemented by the concerned.

SUB-MONITIONS

- To cover the drain with a roof is one of the immediate solutions as it would not only restrain people from throwing waste into the drain but also get them rid of the foul smell.
- To make the water treatment plant work efficiently is another basic solution to the problem which will not only treat industrial waste but also the domestic waste and will reduce the pollution to a large extent.
- To punish the people who pollute it by throwing waste which will act as a deterrent for the others and help in reducing pollution in the nearby residential areas.
- The ground water should be managed by strict rules and regulations. The use of groundwater should be periodically testes in laboratories, so that the consumption is safe and not injurious to health. The rules made in this aspect should be strictly adhered[50].

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50 **Recommendations:** 1. All the ground water extraction structures should be registered and regulated to avoid over exploitation and deterioration of ground water quality. 2. The water obtained from the ground water structures should be tested and analyzed to ensure the suitability of ground water for human consumption. 3. The ground water abstraction sources and their surroundings should be properly maintained to ensure hygienic conditions and no sewage or polluted water should be allowed to percolate directly to ground water aquifer. 4. Proper cement platforms should be constructed surrounding the ground water abstraction sources to avoid direct well head pollution. 5. The surrounding surface area of the ground water abstraction structures should be frequently chlorinated by use of bleaching power. 6. Possibilities of construction of artificial recharge structures should be explored to augment the ground water recharge. 7. The hand pumps, which have been identified as having suspected water quality should be painted red to indicate and warn the public that the water drawn from the source is not fit for human consumption. 8. In the absence of alternate safe source of water, the water with excessive undesirable constituents must be treated with specific treatment process before its use for human consumption. 9. The defluoridation treatment option (activated alumin or Nalgonda technique, domestic level) should be undertaken in ground water drawn from sources exceeding the permissible limit of 1.5 mg/L. 10. Treatment option for nitrate should be undertaken in ground water drawn from sources exceeding the permissible limit of 100 mg/L. 11. The ground water drawn from hand pumps should be properly chlorinated to eradicate the presence of bacterial

- By proper disposal of Industrial Waste, the pollution can be reduced to a great extent. As the major pollutant is the industry and by providing an alternative method of disposing waste, Buda Nala can be saved.
- Punjab Pollution Control Board must perform its duties effectively in order to, not only preserve the environment but also to make the Right to live in a Clean & Healthy Environment a living reality.
- Proper & timely cleaning of the drain can help to a great extent, which is done rarely. It must be a frequent exercise.
- Creating awareness among the general public regarding the ill-effects of pollution and changing their mindset is one of the major solutions which can ultimately lead to the lesser pollution.
- Non-Governmental Organizations have a major role to play in completing this uphill task.
- Finally, the most important way to curb this menace is the "Collective Efforts" on the part of Government, Industry & General Public, so as to make the city livable and loveable for the present and the coming generations.

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contamination. 12. The untreated sewage and sewerage flowing in various open drains are one of the causes of ground water quality deterioration. Proper underground sewage system must be laid in all inhabited areas and the untreated sewage and industrial wastes should not be allowed to flow in open drains. 13. A proper system of collection and transportation of domestic waste should be developed. Land fill site(s) should be identified and it must be scientifically designed. Ground water quality near land fill sites should be regularly monitored. 14. The mass awareness should be generated about quality of water, its effect on human health and responsibilities of public to safeguard water resources.

Status of Groundwater Quality in India Part-II (GWQS/10/2007-2008), Central Pollution Control Board, Ministry of Environment and Forests, Government of India, Delhi, 2008, p. 364.

Vulnerability of Laws relating to Sexual Harassment of Women at Workplace in India: A Critical Appraisal

Ashutosh Hajela*

'Sexual harassment' depicts a behavior of a sexual nature which is unwanted and wlnch may reasonably be expected to cause humiliation and or intimidation to the victim. It is emotionally abusive and creates an unhealthy relationship between the two sides. Sexual harassment of any kind may be witnessed by the males or the females or even the transgender. It may occur between individuals of the same gender or hetween individuals of different genders. Such au unwelcome behavior just because of the sex of a person, viewed from a commoner's view point is undoubtedly unethical and immoral prima facie and is definitely and distinctly a violation of the basic human rights of an individual and is purportedly a crime against the society by and large whether it is in a subtle, non overt form or whether it is in the crudest form.

The prime difficulty in comprehending the phenomena of sexual harassment is that harassment may be exhibited through a varied range of behaviors. It may be cases where the aecused trics to impose unnecessary familiarity with the respondent, it may be an unwelcome act not necessarily a physical onc towards the respondent, it may be actual physical advances towards the respondent, it may he anything which provides discomfort to the respondent, which makes the respondent feel humiliated. It is very clear that with the best of the efforts we cannot precisely pen down as to what conduct, act or gesture may bring the respondent in a state of discomfort and humiliation; what can be put down in black and wlnte is only clear cut instances of harassment which are supposed to he objectionable by a reasonable man of the society. As such what is cognizable is the only and the very fact of the complainant having been put in a state of despair, helplessness, disgust and humiliation by some act or gesture of the accused. Here comes in picture the handicap attached to the rule giver who has necessarily to draw a balance between the general rule of freedom and co existence on one sido and the sensibilities of a particular gronp on the other side and if he fails to draw this fine and delicate balance, the policy or rule thus

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declared shall be definitely tilted towards one side which, in turn, will lead to an unrest in the society by and large.

Right to livelihood is a basic right[1] to be provided for and to be safeguarded by the State by virtue of our Constitutional provisions and judicial decisions. Article-19(1)(g) of the Constitution of India guarantees to every citizen freedom to practice any profession, or to carry on any occupation, trade or business.

As such this becomes the liability of the state to ensure that there remains a healthy, conducive and productive environment at all the workplaces for the well being of all the employees. Regarding the workplaces, the growing concern now days is that we are witnessing a gradual degradation of professional ethos and values amongst the workers.

What is seemingly the most unfortunate development in the modern day society is that we are losing out on our sexual integrity and propriety. We are constantly coming across cases of the more disturbing sexual harassment incidents at the workplaces even when we tend to be more educated now, even when we tend to be more careers oriented now and are more ambitious in our career prospects.

The infamous news of a law Intern hurling allegations of sexual harassment by a Supreme Court Judge[2] old enough to be her grandfather, the news item about TEHELKA editor[3], a seasoned and senior journalist allegedly assaulting a female staffer in a lift etc., are bringing India's image down. Similarly we are coming across cases where in men[4] are complaining of being harassed by female colleagues and bosses[5].

The Indian society had been applying its mind and has been responding to the stimuli provided by increasing cases of sexual harassment at workplaces for a considerable amount of time.

The society has abhorred the very idea of defiling the modesty of women and causing disrespect to womanhood in any manner whatsoever. The fact that the Indian society is very sensitive towards protecting the modesty and dignity of

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1 Article 39 a Constitution of India

2 http://www.indianexpress.com/news/justice-ganguly-named-by-law-intern-in-sexual-harassment-case/1201136/ last visited on 04.12.2013

3 http://in.reuters.com/article/2013/11/28/india-sexualviolence-editor-idINDEE9AR07S20131128 last visited on 04.12.2013

4 Tables turn: Men harassed:Published: 14th August 2013 09:04 AM http://newindianexpress.com/cities/bangalore/Tables-turn-Men-harassed/2013/08/14/article1732962.ece last visited on 04.12.2013

5 Adam, it's madam: Published 31st March 2013 http://www.telegraphindia.com/1130331/jsp/7days/ story 16729862.jsp#.Up7LsdKBk7o last visited on 04.12.2013

women is amply proved by having the provisions to the tune of section 354[6], 509[7] along with other provisions under the Indian Penal code and the Apex court of the country also trying its level best to protect the same through its decisions. The role of the Supreme Court of India is to be applauded in the case of Rupan Deol Bajaj[8] wherein the petitioner, an IAS officer lodged a complaint against Mr.KPS Gill, Director General of Police, Punjab of intimidating her, slapping on her posterior and thereby outraging her modesty in full public view wherein the plea taken by Gill of the matter being a trivial matter by virtue of Section 95, I.P.C. was turned down by the Supreme Court ruling that where the modesty and dignity of women is concerned it cannot be a trivial matter for the purpose of Section 95[9] of IPC. The apex court of the country again responded very clearly and strongly against the increasing episodes of sexual harassment of women at workplaces in the celebrated judgment in Vishaka V. State of Rajasthan[10], finding the incompetence of the present civil and criminal laws of the country to address the problems being faced with the working women. The Court is to be appreciated with the most extreme respect for coming up with a draft of guidelines on the subject matter wherein it tried to provide a working definition for sexual harassment and the mechanism for dealing with and disposing off such matters. Again in Apparel Export Promotion Council V. A.K. Chopra[11], the Supreme Court came heavily setting aside the order of the High Court in a matter dealing with the sexual liarassment of an employee by a senior wherein the HC liad ruled that the respondent had tried to molest the complainant and not actually molested her and that the respondent had not managed to make even the slightest physical contact with the lady and consequently ruling that such an act on the part of the respondent could not be met with his dismissal from the services. The Apex Court ruled that the conduct of the Senior Officer towards his junior female employee was wholly against moral sanctions, decency and was offensive to her modesty. The Court

6 Section 354.
Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, "shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine" shall be substituted

7 Section 509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

8 Mrs. Rupan Deol Bajaj & Another v. Kanwar Pal Singh Gill & Another Air 1996 SC 309

9 Section 95 of Act causing slight harm: Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

10 (1997) 6 SCC 241

11 AIR 1999 SC 625

further ruled that any reduction in the sentence would be a retrograde step and is bound to have a demoralizing effect upon the women employees and reiterated that any sympathy or mercy in such cases is misplaced and restored the dismissal of the respondent from the services.

However, incidentally or deliberately, the common view point of the Indian society is that it is only the man who is the perpetrator when it comes to sexual harassment and it is the woman in every case who is the susceptible creature. The society feels that the men cannot be sexually harassed and even if we concede to the idea we feel that the men enjoy 'it'. The very fact of the ideology is well reflected in the cool response displayed by the Ministry of Women and Child Development, Government of India in not making the recent Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 gender neutral. The Indian society is quite reluctant to digest the idea that even men can be victims of feminine sexual aggression. The society, the legislative mood of an anti-male stance may turn out to be counterproductive if not today may be tomorrow by definite means. We are still happily continuing with the traditional ideology of man being the perpetrator in every case and women bearing the most passive role by going ahead with the idea of Adultery[12] coined under the Indian Penal Code, 1860 wherein the law attaches nor the least penalty to the wife in an adulterous relation presuming her to have been forced into such union due to one or the other reasons and her act is not supposed to be culpable by any stretch of imagination. The provision under Section 497 of the Indian Penal Code specifically mentions that the 'wife' in an adulterous relation shall not be punishable as an abettor. With the same hangover now we are gifted with a new legislation meant to tame the growing menace of sexual harassment of women at workplace which also does not, by any way of imagination, even try to attach the slightest degree of contributory role on the part of the fairer sex in such incidents. There is an apprehension which needs to be given due care and attention that the proposed law might endanger the overall workplace harmony. In a far more competitive era than ever before, there might spring up frivolous complaints merely from professional rivalries and jealousies and the law might be used or misused to serve one's own vested interests or even to settle professional or even personal scores. The legislature can't underestimate such propositions even if the probability of the same remains low in its zeal to create a safe environment for women at the workplaces and if it does so it shall be definitely failing in its duty to draw a

12 Section 497. Adultery. -- Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

balance between the competing interests of the society.

The Act, which received the presidential assent in April, 2013 and which is yet to be notified speaks of sexual harassment[13] as any unwelcome act or behavior in the nature of a physical contact or advance or making sexually coloured remark or showing pornography etc., 'whether directly or by implication'. The use of the words 'by implication' even though used to provide strength to the complainant in cases difficult to be proved by way of non availability of evidence are probably prone to be put to misuse by some frivolous complaint makers. The Act gives an exhaustive definition of 'workplace'[14] to include governmental organizations, local authorities, co-operative societies, private sector organizations, nongovernmental organizations, educational organizations, entertainment services, hospitals and even a dwelling place or a house. The section stretches the definition of the workplace to include 'any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such Journey' which again is somewhere outside the purview of the employer who may be held accountable for an untoward incident which thus happens to the victim. The Act provides a maximum period of three months[15] (subject to the power of condoning of delay left to the Internal Committee or the Local Committee) for the victim to make a written complaint. Again the power of condoning of delay though is definitely required to be bestowed upon the authority(s), may be put to misuse. The Act, then speaks of settling the matter between the aggrieved women and the respondent through conciliation[16]which reflects a very retrograde provision keeping in mind the severity of the act being violative of some body's basic human right of dignity.

The Act, then talks of providing punishment[17] for false or malicious complaints and false evidence given by the complainant by way of departmental proceedings under the service rules. The provision itself may dissuade a complainant from coming forward by a mere presumption of an action contemplated against her. On the other side, the proviso to the section empowers the complainant by stating that a mere inability to substantiate the complaint or provide adequate proof need not attract action against her. This may go against the right of the respondent who definitely runs the risk of losing his reputation by a mere allegation coming from a woman in a society which is more sensitive towards the females and presumes men to be at a fault possibly at every juncture of time. To add to the

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13 Section 2 n, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

14 Section 2 o,

15 Section 9,

16 Section 10,

17 Section 14

problems, we are countered by the way such incidents are publicized by the media houses where such allegations which may or may not prove to be true do have cascading effects upon the respondent(s).

The Act again spells very clearly the prohibition[18] that has been imposed on publication of the contents of the complaint, the identity and addresses of the aggrieved women, the witnesses and the respondent to the public, press and media in any manner which may depict the process to be a completely opaque process: the complainant may not get justice, the respondent may be unnecessarily victimized and penalized, conciliation may be achieved by way of manipulations and above all there would be no check whether of media or any person.

As far as the penalty[19] under the Act is concerned, the same will fail to create any deterrence.

A critical evaluation of developments in the recent infamous episodes of Justice (Retd.) A.K. Ganguly and Tarun Tejpal forces us to re-look and think of the efficacy of the legislations that have been gifted to us by the overzealous Legislature in their attempt to provide a safe environment to women and also the way such cases are put to trial by our executive machinery.. Going by the Tarun Tejpal case, Tejpal has been allegedly accused[20] of sexually assaulting a female journalist more than once at a function in Goa and the story thereof came into limelight because of certain e-mails that got leaked somehow. The irony stands in the point that the respondent in this case happens to be the father of the complainant's friend and he was seen as a paternal figure who liad worked with the father of the complainant. The respondent is accused of having violated his position of trust in relation to the complainant and what is more unfortunate is that the Respondent Journalist himself had launched crusades against the sexual harassment of women by way of his hold over the Art of Journalism. It was an occasion for the host of TEHELKA's Think Festival with an intellectual gathering where the alleged most un intellectual cause of action took birth and culminated in the slapping of serious charges upon Tarun Tejpal which do find mention in Sections 341[21], 342[22], 354A[23]and 375[24] of the Indian Penal Code. The alleged sexual

18 Section 16

19 Section 26

20 http://ibnlive.in.com/news/the-complete-email-trail-of-the-tarun-tejpal-sexual-assault-case/436601-3.html last visited on 10.12.2013

21 Wrongful Restraint (Punishment)

22 Wrongful Confinement (Punishment) (*ii*) a demand or request for sexual favours; or (*iii*) showing pornography against the will of a woman; or (*iv*) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

23 354A. (1) A man committing any of the following acts -
(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

24 375. A man is said to commit "rape" if he- (*a*) penetrates his penis, to any extent, into

harassment of the lady by the respondent, if proved true, is definitely no case to be treated with any sort of lenient action but here the slapping of charges of 'rape' and the same being upheld by a Goa Court[25] demand an introspection of the over enthusiastic Legislature[26] which has very actively modified the basic structure of the definition of rape earlier to be found in Section 375 of I.P.C., 1860. The Legislature, now has included the act of a man, who "applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person", to be an act of "rape" for the purpose of Section 375 of I.P.C. and this happens to be punishable with a imprisonment ranging from seven years to imprisonment for life.[27] Further in case of the offence being repeated on the same women by a person who is in a position of trust or authority[28] towards the woman, he shall be awarded rigorous imprisonment ranging from ten years to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life[29]. The clause (d) under S.375 I.P.C. carries a provision which is difficult when put to the proof part of it by way of medical evidence and may be put to misuse by vexatious complainants. The an amended Section 375 insisted on penetration[30] to be an essential ingredient of the offence of rape which now stands omitted and anything short of penetration failed to fall under the category of 'rape' and the gravity of the offence was to be decided by the court; if any modification was required that could have been brought in Section 354 and the penalty provisions therein only rather than redefining the very ingredients of rape in toto. The Legislature has, unfortunately, stretched its arms too far in its zeal to protect the modesty of women and the provisions thus added may cause inconvenience and hardships to the male counterparts. If Farukh Abdullah reacts[31] to the proposition by saying that "the situation is such that men are afraid to even talk to women", his apprehension, even though mismatched

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the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (*b*) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (*c*) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (*d*) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person....

25 http://www.ndtv.com/article/india/tehelka-case-prima-facie-evidence-to-show-rape-said-judge-as-she-rejected-tarun-tejpal-s-bail-plea-452954 last visited on 10.12.2013

26 The Criminal Law (Amendment) Act, 2013 w.e.f 03.02.2013 available at http://indiacode.nic.in/acts-in-pdf/132013.pdf last visited on 10.12.2013

27 Section 376(1) IPC

28 Section 376(2)f

29 Section 376(2)

30 Unamended Section 375 I.P.C. Explanation.– Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

31 http://www.asianage.com/india/farooq-abdullah-afraid-women-351 last visited on 10.12.2013

with the time of his utterance of the statement, is not ill founded.

Another glimpse of the developments in the indictment of Justice (Retd.) A.K. Ganguly in the sexual harassment of a Law Intern again points the way in which the society, the common man, the media and in this case the Hon'ble Supreme Court[32], itself, responds to allegations leveled against the respondents and specially the high profile ones. The Supreme Court took an active and immediate cognizance of the newspaper reports talking about the allegations leveled by a Law Intern about 'sexual harassment by a recently retired Supreme Court Judge' and constituted a Committee consisting of three sitting Judges of the Court to ascertain the truth of the allegations. With the least of delay the committee submitted its finding of the Judge in question being Mr. Justice A.K. Ganguly and further stated that " the statement of the complainant both written and oral prima facie disclosed an act of unwelcome behavior (unwelcome verbal/non verbal conduct of sexual nature) by Mr. Justice (Retd.) A.K. Ganguly with her in a room in Hotel Le Meridien on 24.12.2012 approximately between 8:00 P.M. to 10:30 P.M."[33]

The Supreme court after this indictment of the Judge in question, proceeded to say that "considering the fact that the sais intern was not an intern on the roll of the Supreme Court and that the concerned Judge had already demitted office on account of his superannuation on the date of the incident, no further action is required by this Court". Here the very episode of the SC taking cognizance of the issue, setting up of a three member panel, the Panel's handling of the issue and ultimately abruptly distancing itself from the issue after naming and indicting the Judge in question is subject to numerous questions. The onus has now been put on the complainant to file a F.I.R against the Judge for further action to take place in the case. The action of the Supreme Court in this case amply portrays that the Judge in question has been proved guilty by its findings and his image has already been painted in black by none other than the Apex Court itself without even having a proper and registered complaint against him. The question to ponder over at this juncture of time is whether the accused judge, in this case, will receive a fair trial, supposing that a proper trial starts in the due course of time when the Apex Court itself has pre judged the issue and jumped to a conclusion. There is no doubt not the slightest need to exhibit any degree of lenience towards the accused in such cases but is not the accused entitled to a fair trial in such cases and is he not entitled to receive a just and fair reaction coming from the society. Is it fair that the media, the society itself conduets the

32 http://articles.timesofindia.indiatimes.com/2013-12-06/india/44862243_1_justice-ganguly-law-graduate-retired-judge last visited on 11.12.2013

33 http://indiatoday.intoday.in/story/ak-ganguly-law-intern-sexual-harassment-no-action-required-says-supreme-court/1/328020.html last visited on 11.12.2013

trial of the accused in such cases and becomes judgmental and decisive about some one's act and character in a fraction of a moment? Are we not defying the basic principle of the Criminal Jurisprudence that a person is presumed to be innocent till his charges are proved beyond reasonable doubt? Do we not cause an un reparable damage to the reputation and character of an accused person by acting too pro maturely and what is the state of affairs in case the allegations turn out to be false at which point the Media houses suddenly lose interest in following up the matter and a similar impulse is generated within the otherwise over enthusiastic members of our society. The emergent need of the hour is that we should critically assess the gravity of the situation and should move ahead with mature, calculated and meticulously planned steps rather than coming up with reforms bulging to grave and sudden provocations.

Sexual harassment has been a problem in the Indian society and the Indian women have undoubtedly been quite vulnerable to the same. There was definitely a need of having a strong legislative measure to curb the evil and the adoption of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is a welcome step. However, the moot point for consideration is whether in its zeal to equip the women with a safe and conducive working environment, the Legislature has not created grounds for the man to be trapped in the very wide and open ended domain of 'sexual harassment' even extending to lurid stares, unsavory remarks or jokes or gestures which might be perceived and projected as sexual gestures and thus being discriminatory towards the rights of man. The legislature has to strike a proper balance between the compelling need of having a strong law with a vigilant eye upon women safety and dignity and the corresponding rights with the man too in the society

Environment and Corporate Social Responsibility: A Constitutional Perspective

Dr. Bhavish Gupta* & Dr. Meenn Gupta**

ABSTRACT

From the lanes of villages to the metropolitan cities, around the globe, development has a hazardous effect on the nature that has nurtured us with utmost care, caution and affection. The inquisitive, innovative and keen attribute of human beings has lead to a life full of luxuries bestowed by nature. With the industrialization clubbed with technological advancement has shown the way to the establishment of string of industries in the various parts of the country. They owe a duty not to poison our water and food, not to pollute our rivers, beaches and air, not to allow their workplaces to endanger the lives and safety of their employees and the public, and not to sell commodities, or provide transport that will kill or injure people in return of the services they provide to the society. This article will provide the legal and ethical measures to curtail the emerging environmental hassles by the taking a key note on the corporate social responsibility in the light of the provisions of the Constitution of India and to solve the entangled puzzle of the safe and healthy environment and the legal application for enforcing this liability on corporate world to protect the environment, highlighting on the 'principle of sustainable development'. It is the high time for the industrialists to think above the profit line and accept their responsibility to take note of the catalyst vital for upholding the environment.

[I] INTRODUCTION

"If people destroy something replaceable made by mankind, they are called vandals; if they destroy something irreplaceable made by God, they are called developers." — *Joseph Wood Krutch*

The most noteworthy incident persuading every phase of existence had been the industrial revolution that fashioned the modern world. In the last two hundred

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years, the accomplishments attained by the human civilization in terms of material escalation are proportionately to a large extent greater than the material expansion made in any other era. The tree of development has awarded so many human friendly technologies which designed a variety of transformations ranging from the trimming down the physical labour to curtailing the enormous stretch of landmass and the whole humanity can be unfolded with a single click. However, for all these accomplishments, the cost paid by the humans is also beyond their reach.

Now, the state parties are under an obligation to implement innovative guidelines and program to give effect to the tailored theory of development. The governments have increasingly become aware of the significance of ensuring a union of developmental and environmental issues. The term "Environment" includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.[1] This has even become an advanced political issue in many countries because the atmosphere is so subtle that a minor irrevocable smash up may result in cascading effects that may end up triggering more damage than the yield one obtained from the primary trifling damage.

Article 14[2], 19 (6)[3] and 21[4] of the Constitution of India deals with the right to equality, freedom of expression and right to life and personal liberty respectively. All these rights are secured to the people of India under the Constitution of India particularly in Part III dealing with Fundamental Rights. The judiciary's dynamic interpretation of fundamental rights have regulated into the rights to a healthy environment. The judiciary has viewed the human rights on one hand and the environmental protection on the other hand as the two faces of the same coin. The judiciary as a guardian of Fundamental Right has protected the right of each individual in relation to environment under Article 21 of the Constitution.

[II] IMPACT OF INDUSTRIALISATION ON ENVIRONMENT - NEED OF CORPORATE SOCIAL RESPONSIBILITY

With the industrialization clubbed with technological advancement has shown the

1 Section 2, The Environment (Protection) Act, 1986

2 Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

3 Article 19 (6): State is empowered to make any law imposing in the interests of the general public, reasonable restrictions on the exercise of freedom to practice any profession, or to carry on any occupation, trade or business guaranteed by (1) (g). Article 19 (1) (g) - All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business.

4 Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by Law.

way to the establishment of string of industries in the various parts of the country. The distinguishing facet of this epoch of industrialization is about the setting up of manufacturing units which paved path for the unprecedented rise in pollutants released by these industries and swift exploitation of the nature's bounties which is the main cause of every turmoil related with environment existing in the present era. This new trend has brought in drastic shift in the question of accountability. As new question, which arises revolves around the liability of this business class who are driven with their profit earning motives and end up contributing towards the destruction of the environment. The death-defying activities of corporations have time and again resulted in loss of life and property, apart from the degradation of environment, the evidence can be drawn from the instances like:

1. **In M.C. Mehta v. Union of India**[5]: The Supreme Court was dealing with claims arising from the leakage of Oleum gas on 4th & 6th December, 1985 from one of the units of Shriram Foods & Fertilizers Industries, in the city of Delhi, Belonging to Delhi Cloth Mills Limited. As a Consequence of it several persons died. The action was brought through a writ petition under Article 32 of the Constitution by way of public Interest litigation. The Supreme Court took a bold decision and evolved the rule of *'Absolute Liability'* and declared that the new rule was not subject to any of the exceptions.

2. **In Indian Council for Enviro-Legal action v. Union of India**[6]: The Supreme Court followed its earlier decision in M.C. Mehta v. Union of India and laid down the principle of "Polinter Pays" apart from also the principle of absolute liability recognized in Oleum Gas Leak case. In the above case, there was environment pollution caused in Bichhri village and other adjacent villages, on account of production of 'H' acid and the discharges from the Sulphuric Acid plant of the respondents. A writ petition was filed before the Supreme Court by way of Public Interest Litigation The court gave the order to attach the Factories, Plant, Machinery and other immovable assets and the amount so determined and recovered was ordered to be utilized by the Ministry of Environment & Forest and Government of India for carrying out all the remedial measures.

3. **The Bhopal Gas Leak Disaster Case**[7]: The **Bhopal disaster**, also referred to as the **Bhopal gas tragedy**, was a gas leak incident in India, considered the world's worst industrial disaster. It occurred on the night of

5 AIR 1987 SC 1086
6 AIR 1996 SC 1446
7 AIR 1990 SC 273

2–3 December 1984 at the Union Carbide India Limited (UCIL) pesticide plant in Bhopal, Madhya Pradesh. Over 500,000 people were exposed to methyl iso-cyanate gas and other chemicals. The toxic substance made its way in and around the shanty towns located near the plant. Estimates vary on the death toll. The official immediate death toll was 2,259. The government of Madhya Pradesh confirmed a total of 3,787 deaths related to the gas release. Others estimate 8,000 died within two weeks and another 8,000 or more have since died from gas-related diseases. A government affidavit in 2006 stated the leak caused 558,125 injuries including 38,478 temporary partial injuries and approximately 3,900 severely and permanently disabling injuries. So far as the legal position is concerned in M.C. Mehta v. Union of India, *the Supreme Court laid down the rule of 'Absolute Liability' so that nobody could escape the liability on the ground of sabotage, which it was trying to plead as a defense.* The Supreme Court also observed that the principle laid down in **M.C. Mehta v Union of India**[8], that in toxic tort action, the damages to be awarded should be proportional to the economic superiority of the offender cannot be applied to the settlement arrived at in the preset case. Further the A.P. High Court in **T. Damodar Rao v. S.O., Municipal Corporation, Hyderabad**[9] laid down that right to live in healthy environment was specially declared to be part of Article 21 to the Constitution.

4. **Vellore Citizen's Welfare Forum v. Union of India**[10], the petitioner, Vellore Citizens Welfare Forum. Filed a writ petition by way of Public Interest Litigation drawing the attention of the courts towards the poliution caused by enormous discharge of untreated effluents by the tanneries and other industries in the state of Tamil Nadu. The Supreme Court held that such industries though are of vital importance to the development of Country but they cannot be allowed to destroy the ecology, degrade the environment unless they set up pollution control device.

The kind of environmental issues that have been brought to the court include[11] –

- River Pollution- by tanneries, untreated sewage
- Soil & ground water damage, e.g. in the Bicchri industrial pollution Case
- Indiscriminate mining

8 AIR 1987 SC 1086
9 AIR 1987 A.P. 171
10 (1996) 5 SCC 650
11 http://www.ielrc.org/activities/conference_0402/Assets/kl/040226_UshaRamanathan.pdf, Visited on 9-8-2013

- Protection of Forests
- Destroying of parks & sanctuaries
- The preservation of monuments of archaeological and historical significance, and their protection from vandalism and industrial pollutants.
- Automobile Pollution.
- Industrial Effluents.

The Judicial prescription includes[12]:

- The remedial measures that clean-up technology may offer
- Application of the polluter pays principle
- The imposition of pollution fine
- Revision of environmental standards applicable in Indian conditions, for instance where automobiles were ordered to confirm to Euro standards, or in the conversion of commercial vehicles to CNG, a less polluting fuel.

The present era looks forward for the appropriate mechanism for the linking of social accountability and corporate responsibility with the conservation and protection of physical environment. This calls for the foundation of a positive affiliation involving corporate responsibility and its policy performance for guarding the environment.

This endorsement of liability on corporation is the twentieth century marvel. The basic aim or object of the corporate social responsibility is to give the responsibility on the companies to give positive impact on environment, consumers, employees, communities, etc through their business. This new outlook came into picture in India with Bhopal Gas Tragedy.

Since then, various such instances showed up wherein lives and environment were put to danger due to the profit aimed methodology adopted by the capitalists. This state of affairs saw a alteration when the Supreme Court in Indian Council for **Environment Legal Action and others v. Union of India[13]**, manifested 'the principle of Polluter Pays' wherein the person who is found at fault for defiling the environment, need to make payments to invalidate the situation. Accordingly, the governmental agencies played an indispensable role for the creation of policies and also for the implementation of such policies.

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12 Supra note 13, p 4

13 (1996) 3 SCC 212

[III] THE FOUR PHASES OF CORPORATE SOCIAL RESPONSIBILITY (CSR) DEVELOPMENT IN INDIA:

The history of CSR in India has its four phases which run parallel to India's historical development and has resulted in different approaches towards CSR. However the phases are not static and the features of each phase may overlap other phases.

The First Phase

In the first phase charity and philanthropy were the main drivers of CSR. Culture, religion, family values and tradition and industrialization had an influential effect on CSR. In the pre-industrialization period, which lasted till 1850, wealthy merchants shared a part of their wealth with the wider society by way of setting up temples for a religious cause Moreover, these merchants helped the society in getting over phases of famine and epidemics by providing food from their godowns and money and thus securing an integral position in the society. With the arrival of colonial rule in India from 1850s onwards, the approach towards CSR changed. The industrial families of the 19th century such as Tata, Godrej, Bajaj, Modi and Birla were strongly inclined towards economic as well as social considerations. However it has been observed that their efforts towards social as well as industrial development were not only driven by selfless and religious motives but also influenced by caste groups and political objectives[14].

The Second Phase

In the second phase, during the independence movement, there was increased stress on Indian industrialists to demonstrate their dedication towards the progress of the society. This was when Mahatma Gandhi introduced the notion of "trusteeship", according to which the industry leaders had to manage their wealth so as to benefit the common man. "*I desire to end capitalism almost, if not quite, as much as the most advanced socialist. But our methods differ. My theory of trusteeship is no make-shift, certainly no camouflage. I am confident that it will survive all other theories.*" This was Gandhi's words which highlights his argument towards his concept of "trusteeship". Gandhi's influence put pressure on various Industrialists to act towards building the nation and its socio-economic development. According to Gandhi, Indian companies were supposed to be the "temples of modern India". Under his influence businesses established trusts for schools and colleges and also helped in setting up training and scientific institutions. The operations of the trusts were largely in line with Gandhi's reforms which

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14 Chahoud, Dr. Tatjana; Johannes Emmerling, Dorothea Kolb, Iris Kubina, Gordon Repinski, Catarina Schläger (2007). Corporate Social and Environmental Responsibility in India - Assessing the UN Global Compact's Role

sought to abolish untouchability, encourage empowerment of women and rural development.

The Third Phase

The third phase of CSR (1960–80) had its relation to the element of "mixed economy", emergence of Public Sector Undertakings (PSUs) and laws relating labor and environmental standards. During this period the private sector was forced to take a backseat. The public sector was seen as the prime mover of development. Because of the stringent legal rules and regulations surrounding the activities of the private sector, the period was described as an "era of command and control". The policy of industrial licensing, high taxes and restrictions on the private sector led to corporate malpractice. This led to enactment of legislation regarding corporate governance, labor and environmental issues. PSUs were set up by the state to ensure suitable distribution of resources (wealth, food etc.) to the needy. However the public sector was effective only to a certain limited extent. This led to shift of expectation from the public to the private sector and their active involvement in the socio-economic development of the country became absolutely necessary. In 1965 Indian academicians, politicians and businessmen set up a national workshop on CSR aimed at reconciliation. They emphasized upon transparency, social accountability and regular stakeholder dialogues. In spite of such attempts the CSR failed to catch steam.

The Fourth Phase

In the fourth phase (1980 until the present) Indian companies started abandoning their traditional engagement with CSR and integrated it into a sustainable business strategy. In 1990s the first initiation towards globalization and economic liberalization were undertaken. Controls and licensing system were partly done away with which gave a boost to the economy the signs of which are very evident today. Increased growth momentum of the economy helped Indian companies grow rapidly and this made them more willing and able to contribute towards social cause. Globalization has transformed India into an important destination in terms of production and manufacturing bases of TNCs are concerned. As Western markets are becoming more and more concerned about and labor and environmental standards in the developing countries, Indian companies who export and produce goods for the developed world need to pay a close attention to compliance with the international standards.

The outlook of the citizens transformed around the globe and today, they look forward to take stringent measures to punish the persons guilty for irresponsibly taking initiatives without any proper measures to safeguard the environment. This new uproar enabled the governments to take initiatives and as a result, a number

of countries have developed Corporate Social Responsibility policies or guidance documents that outline their approach to Corporate Social Responsibility. India has a widespread environmental management system with a comprehensive set of environmental laws, specific statutory directives, regulatory instruments, and institutional frameworks to implement and enforce environmental policy objectives but these laws are not meeting with the goals and aspirations with which it was passed[15].

[IV] NATIONAL INSTRUMENTS GOVERNING CORPORATE SOCIAL RESPONSIBILITY

A) The Environment Protection Act, 1986[16] is the most important and primary Act which deals with the provisions concerning rules for protection of the Mother Nature. With the increasing industrialization & the tendency of the majority of industries to congregate in areas which are already heavily industrialized, the problem of tlic pollution was started to be felt in the country. Since the sixties concern over the state of environment has grown the world over. There has been substantive decline in environment quality due to increasing poliution, loss of vegetal cover and biological diversity, excessive concentrations of harmful chemicals in the ambient atmosphere and in food chains, growing risks of environmental accidents and threats to life support systems. Tlie decisions which were taken at the United Nations Conference on the Human Environment held in Stockholm iu June, 1972 were based on the world community's resolve to protect and enhance the environmental quality. While participating in the said Conference Government of India strongly voiced the environmental concerns. Although several measures had been taken for environmental protection both before and after the Conference it was found necessary to enact a comprehensive law on the subject to implement the decisions of the Conference. Accordingly the Environment (Protection) Bill was iutroduced in the Parliament.

B) The Hazardous Wastes (Management and Handling) Rules, 1989- the Central Government in July, 1989 issued the first comprehensive rules to deal with the toxic problem. Wherein, it ensures a systematic regulation of hazardous wastes, which are mostly by-products of different industries and doesn't deal with the radioactive wastes, wastes discharged from ships, waste water and exhaust gases which are regulated under the Water Act and Air Act. Accordingly, tlie government has mandated that no person without authorization may receive, treat, collect, transport, store or dispose of hazardous wastes. One noteworthy aspect is that it prohibits the import of hazardous wastes into India for dumping and disposal, which became applicable since January 2000. Moreover, it provided

15 Supra note 16, p 6.

16 Act No. 29 of 1986

for provisos to regulate tlic manufacture, use, import, export and storage of hazardous micro-organisms and genetically engineered cells were issued under the Environment Protection Act in December, 1989.

Responsibility of the occupier for handling of wastes

1. The occupier generating hazardous wastes listed in column(2) of the Schedule in quantities equal to or exceeding the limits given in column(3) of the said Schedule, shall take all practical steps to ensure that sucli wastes are properly handled and disposed of without any adverse effects which may result from such wastes and the occupier shall also be responsible for proper collection, reception, treatment, storage and disposal of these wastes either himself or through the operator of a facility.

2. The occupier or any other person acting on his behalf who intends to get his hazardous waste treated by the operator of a facility under sub-rule (1) shall give to the operator of a facility, such information as may be specified by the State Pollution Control Board.

C) Tlie Companies Act, 1956[17]- Section 217 of the Act stipulates that the Board of Directors Report ueed to possess information on conservation of energy. It must include energy conservation measures taken; if any, impact of the measures taken above for reduction of energy consumption and consequent impact on tbe cost of production of goods.

D) Indian Factories Act, 1948[18] **(Amended in 1987)** - There are no clearly distinct channel for public disclosure. Ideally, every factory in India is required to submit reports to their relevant state governments in the format mcutioned under the Act. It covers information relating to labor and employment, working hours, accidents, health and safety.

E) Corporate Responsibility for Environmental Protection (CREP), 2003: CREP is a charter promoted by tlie Central Poliution Control Board of India for Commitment and voluntary initiatives of industry for responsible care of the environment for building a partnership for pollution control. It is an initiative which reqnires compliance by leading resource intensive industries. Tlie Ministry of Environment & Forest has launched the Charter on "Corporate Responsibility for Environmental Protection (CREP)"in Marcli 2003 with the purpose to go beyond the comphance of regulatory norms for prevention & control of pollution through varions measures including waste minimization, in-plant process control & adoption of clean technologies. Tlie Charter has set targets concerning conservation of water, energy, recovery of chemicals, reduction in pollution,

17 Act No.I of 1956

18 Act No. 63 of 1948

elimination of toxic pollutants, process & management of residues that are required to be disposed off in an environmentally sound manner. The Charter enlists the action points for pollution control for various categories of highly polluting industries. The Task Force was constituted for monitoring the progress of implementation of CREP recommendations/ action points.[19]

F) The Public Liability Insurance Act, 1991[20]- With the growth of hazardous industries, risks from accidents processes and operations, not only to the persons employed in such undertakings but also to the public who may be in the vicinity, have increased. The people who are affected by accidents in the hazardous installations are, very often, economically weaker sections and suffer great hardships because of delayed relief and compensation. While the workers and employees of hazardous installations are protected under Separate laws, members of the public are not assured of any relief except through long legal process. To ameliorate the sufferings of members of the public due to accidents which take place in hazardous installations it was found essential to provide for mandatory Public Liability Insurance. To achieve this objective the Public Liability Insurance Bill was introduced in the Parliament.

[V] MEASURES FOR EFFECTIVE IMPLEMENTATION OF CORPORATE SOCIAL RESPONSIBILITY

The sector is facing a major backlash due to sustainability crisis. The social and economic disparity between the rich and the poor continue to exist. The major focus areas need to include education, health, livelihood creation, skill development, and empowerment of weaker sections of the society. This gap needs to be bridged at the earliest subsequently only the people may possibly consider further than the means to satisfy their desire and need for food. The step towards this dream is by creating unfair schemes for the benefit of the needy to fulfill the concept of Welfare state as enshrined in our Constitution. The following steps could be taken to improve the conditions:-

- All the reports that require the institutions to suggestions and measures taken for the implementation of Corporate Social Responsibility and other eco – friendly initiatives need to be made available to the public domain so that there can be social auditing of their activities rather than docking it up in the lockers.
- It is essential for companies to adopt a long-term approach rather than sticking to short-term methods for the eco – friendly measures adopted by

19 http://www.cpcb.nic.in/divisionsofheadoffice/pci3/Important_projects.pdf, visited on 7-8-2013

20 Act No. 6 of 1991.

them. Furthermore, the corporations could involve employees to gain more positive implementation of their programs.

- It's rather more important to monitor activities and work in close liaison with implementation procedure to ensure that the initiative delivers the desired outcome. The institutions could even tie up with varied NGOs working with the same motto.
- Ideally, CSR policy should function as a built-in, self-regulating mechanism in which companies would monitor and ensure their support to law and ethical standards. The challenge is to apply fundamental business principles to make Corporate Social Responsibility focused on what really matters. And it could be achieved by conceutrating on priority based decisious and spectal attention needs to be paid to the resource allocation.

In the era of globalization, liberalization and privatization, the companies need to accept the schemes keeping in minding their responsibilities derived by this newly developed tlieory. The nation exists to serve human beings so all the entities have an obligation towards the society. The prior to the evolution of Corporate Social Responsibility, the business motive is to rear more and more profit but now it is to maintaiu the middle path i.e. to do business and establish measures to save the environment from any harm.

[VI] CONSTITUTIONAL PROVISIONS

To comply with the principles of the Stockholm Declarations adopted by the International Conference on Human Environment, the Government of India, by the Constitution 42nd Amendment Act, 1976 made the express provision for the protection and promotion of the environment, by the introduction of Article 48-A and 51-A (g) which form part of the Directive Principles of State Policy and the Fundamental Duties respectively. The amendment provided for the following:

(I) **Article 48-A:** Protection and improvement of environment and safeguarding of the forests and wildlife, "The State shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of the country."[21]

(II) **Article 51-A (g):** "It shall he the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for living creatures."[22]

Thus the Indian Constitution makes two fold provisions:

- On one hand, it gives direction to the State for tlie protection and improvement of environment.

21 The Constitution (42nd Amendment) Act, 1976, Section 10 (w.e.f. 3.1.1977)

22 By the Constitution (42nd Amendment) Act, 1976, Section 11 (w. e. f. 3. 1.1977)

- On the other hand, the citizens liave a constitutional duty to protect and improve their natural environment.

Seventh Schedule of the Constitution[23]:

a) Entry 17-A, providing for forests. Because the subject of the forest originally was in the State List as entry 19, this resulted into no uniform policy by the State so as to protect the forests. By placing the item 'Forest' now in the Concurrent List by the entry 17-A, along with the State, Parliament has acquired a law making power. Because of the above change, in order to have a uniform policy on the forest management the Government of India in the year 1980 set up the Ministry of Environment and Forests. By virtue of this change Parliament also enacted, the central legislation, i.e., Forest Conservation Act, 1980, which was amended in 1988. The Government also adopted the new National Forest Policy in 1988 with a twin object, one to protect the forests and another to consider the needs of the forest dweller.

b) Entry 17-B, for protection of wild animals and birds. Similarly the insertion of the entry 17-B in the Concurrent List has empowered the Parliament to enact a law with a view to protect wild animals and birds. Although we had a comprehensive legislation in the form of a Wildlife Protection Act, 1972, the 42nd Amendment has considered the wildlife along with forests. India has also formulated National Action Plan for the Protection of wildlife.

c) Entry 20-A, providing for population control and family planning. The uew entry 20-A in the Concurrent List empowers the Parliament to regulate the population explosion one, of the prime cause of the environment pollution. By these changes, legally and constitutionally it has become possible to take a uniform action in the matters of proper management of the environment.

ELEVENTH SCHEDULE OF THE CONSTITUTION[24]:

This uew Schedule is added by the constitution 73rd Amendment Act, 1992, whicli received the assent of the President on 20th April 1993. This schedule has 8 entries (2, 3, 6, 7, 11, 12, 15, and 29), providing for environmental protection and conservation. This Schedule assigns the functions of soil conservation, water management, social and farm forestry, drinking water, fuel, and fodder, etc. to the Panchayats with a view to environment management.

TWELFTH SCHEDULE OF THE CONSTITUTION[25]:

The entry number 8 of this Schedule added to the constitutional text by the 74th

23 Article 246 of the Constitution of India

24 Article 243- G of the Constitution of India

25 Article 243- W of the Constitution of India

Amendment Act, 1992, which received the assent of the President on 20th April 1993, provided for the Urban Local bodies, with the function of protection of environment and promotion of ecological aspects to them. This Schedule commands the urban local bodies such as municipalities to perform the functions of Protection of environment and promotion of ecological aspects.

CONCLUSION

The recent economic meltdown reminds us of the damage caused by the uncontrolled private economic independence blended along with irresponsible behavior of the corporate world. Through the years, the corporate entities have redefined their role in this multifarious society. From a raw idea of 'profit maximization', its objective was changed to 'profit optimization'. This change can mainly be attributed to the identification of challenges posed by the various social and economic concerns. The viability and sustainability of such enterprises were questioned. This cynicism could be marked as the beginning of the theory of "Corporate Social Responsibility".

India in the global level has emerged as a global leader with regards to knowledge and in creating an intellectually high and socially sound society even on a limited basis. This development can be mainly attributed to highly qualified research foundations and their deep commitment towards problems in the system. Article 47[26] of the Constitution also commands the State to improve the standard of living and public health.

Article 21[27] of the Constitution gives the right to get pollution free water & air. Article 51-A[28] of the Constitution of India says that it shall be the duty of every citizen of India to protect the environment. Concern for social and environmental development should be made a part of every corporate entity through its inclusion in the annual agenda backed by strong and genuine programs. It's up to the lobbying groups and governmental agencies to convince the corporate power houses to come forward and take up the challenge by making them aware of the associated advantages that these companies stand to gain from Corporate Social Responsibility.

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26 Duty of the State to raise the level of nutrition and the standard of living and to improve public health.
- The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

27 Article 21 of the constitution says, "No person shall be deprived of his life or personal liberty except according to the procedure established by Law.

28 Article 51-A (g) says that, "to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have a compassion for living creature".

The argument that Corporate Social Responsibility is not the area of concern of business corporations, and that it is only for individuals and governments reasoning that it is the returns to the shareholders that matter does not stand in the modern world. This microscopic view needs to be altered as gone are those days where a sector was depend on a single enterprise limited to the borders of that country. The holistic objective must be to achieve the macro-economic goals such as achieving public welfare and sustainability of environment.

The underlying thought conveyed by this article on the corporate responsibility exploring on the various mediums of harmonious remedial measure to solve the entangled puzzle of the safe and healthy environment and the legal application for enforcing this liability on corporate world to protect the environment, highlighting on the 'principle of sustainable development' and the 'polluter pays principle. The issues like protection of the environment cannot be left untouched for another generation, as every passing moment is extinguishing the life force of our environment. This damage is caused due the human intervention and hence its remedy, also need to formulated and implemented by the humans. The goal of CSR is to embrace responsibility for the company's actions and encourage a positive impact through its activities on the environment, consumers, employees, communities, stakeholders and all other members of the society and this can only be achieved with the companies accepting their responsibilities towards the society. Fortunately, most corporations have optimistically responded with well thought-out Corporate Social Responsibility policies and are beginning to make the little changes even though, we are far from our set goal as initiation is consuming all the time.

Crime and Criminology in India

Debajit K. Sarmah*

ABSTRACT

Criminology attempts to interpret criminal behavior and it offers peaceful solutions to the problems of crime in society. The domain is premised on scientific and humanistic understanding of society and individual in a conflict situation.

Modern thinking and reasoning about crime in India has progressively evolved from the time of *Dharmasastras* to the stage of codification of laws during the colonial period. In every stage of progression the parallel developments in Criminology shaped the basic philosophies and ideologies behind criminal justice administration. Yet criminology as a specialized domain was introduced much later in India. In the present state of affairs in the country there is a remarkable shift in addressing the underlying causes behind crimes rather than its manifestations. This paper is an enumeration of crime and criminology in Indian context.

INTRODUCTION

Crime in society is an inevitable reality and a global phenomenon. In every phase of human civilization crime existed, though different in nature and intensity. In modern societies worldwide there are new forms of crimes emerging with the advancement of technology and *modus operandi*. Looking back it is interesting to note that in Europe for instance, crime and criminal behavior had been explained for over thousand years by spiritualistic notions before the advent of modern age. Central to the spiritualistic thought was *demonology*, where it was proposed that criminals were possessed by demons that forced them to do wicked things beyond their control and restraint.

Foucault for instance provides an account of a public execution reserved for the greatest of all crimes under the *French ancient regime, regicide*:

"The flesh will be torn from the breasts, arms, thighs and calves with red hot pincers, his right hand, holding the knife with which he committed the said

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parricide, burnt with Sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and Sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire." [1] St Thomas Aquinas (1225-74), an influential theologian, had argued that there was a god given 'natural law' based on morality and faith which impelled people to do good rather than evil. Those who committed crime violating the criminal law were not criminals by all considerations but also sinners going against the God-given 'natural law'.

HISTORICAL OVERVIEW OF CRIME AND PUNISHMENT IN INDIA

Ancient Period (1000B.C.-A.D. 1000): In early societies in India the victim of crime had himself retaliated for the harm caused to him through revengeful methods as there was no State or other authority. Individual revenge came to be replaced by group revenge as the man soon realized the importance of living in group/community for their basic survival. Group life further gave way to the formulation of behavioral norms and set of common rules to be followed by all members in group. Such ground norms also defined inappropriate social behavior and prescribed sanctions/punishments for causation of the same. *Dharma* or Law (in its natural and un-codified form) was nothing but a refined version of ground norms which governed the affairs of people in society. While dharma or a god fearing attitude to do wrong to fellow human beings continued to regulate social conduct during the early times of ancient India, however, actual law and order situation started decorating soon thereafter. The strong began tyranny and domination over the weaker sections of society for selfish interests in the absence of any central authority to protect the interests of all sections of society. The Institution of 'Kingship' was the natural progression in the midst of such anarchy that was caused by deviation of people from the path of *dharma*, righteous conduct. There was a something called in classical language as *Arajakata*, refers to the condition when *matsyanyaya* or the law of the fish prevail when the strong swallow the weak without either any guilt of conscience or societal punishment. [2]That was in fact the beginning of the process of the formation of 'State' where king's paramount duty was to protect and preserve the *'raj dharma* 'i.e to enforce the law and punish those who violated it. This System later came to be known as the Criminal Justice System in India.

Medieval Period (A.D.1206-1757): Islamic law or *Shara* was followed by all the Sultans and Mughal Emperors during the medieval period and the Islamic criminal law as applied in India, was supposed to have been defined once for all

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1 Foucault, M.: *Discipline and Punish the Birth of the Prison*. London: Allen Lane,1977

2 Ananta K. Giri: *"Rethinking Systems as Frames of Coordination: Dialogical Inter subjectivity and the Creativity of Action."* Man & Development March, 2000

in the *Quran*. Under the Islamic criminal law the offences were classified under three heads, namely, crimes against God, crimes against the State, and crimes against Private Individuals.

Hence all crimes were not considered injurious to the State as was the case under the Hindu criminal law. Crimes against God and the State were treated as offences against public morals. Other crimes were treated as offences against the individuals; it was for the private persons to move the State machinery against such offences and the State would not *suo-motu* take cognizance of the same. The punishments for various offences were classified into four broad categories, viz (a) *kisa,* i.e. retaliation which meant in principle, life for life and limb for limb; (b) *diya* meant blood money being awarded to the victim or his heirs; (c) *hadd* inflicted on persons who committed offences against God; (d) *tazeer, i.e.* punishment for the cases not falling under *hadd* and *kisa*. The punishment which fell in this category consisted of imprisonment, corporal punishments and exile or any other humiliating treatment.

The classical law of India, transformed through the passage of time, continued for many centuries and when Muslims began their rule in India it found Islamic law in its neighborhood. But the Muslim rule did not alter the fundamental structures of classical law of India. The Islamic law was applied only to the believers, while Hindus were ruled by the *Dharmasastras*.

Colonial India (1757-1947): The British after assuming power in India found the then prevailing criminal justice administration defective and therefore decided to bring about drastic changes in it. Lord Cornwallis made detailed studies of the existing conditions of the criminal justice administration. He introduced many reforms to revamp the whole system. Lord Hastings took special interest in reorganizing the police force to deal with the criminals and maintain law and order in the country. Lord Bentinck created the post of District and Sessions Judge and abolished the practice of *sati*. In 1843, Sir Charles Napier introduced a police system on the lines of Royal Irish Constabulary. He created the post of Inspector-General of Police to supervise the police in the whole province. Subsequently, the Indian Police Act of 1861 was enacted on the recommendations of a Commission which studied the police needs of the Government. They codified the existing laws; established the High Courts and Prisons Laws.

Warren Hastings, the first Governor General of Bengal, and scholars of the Early British India who had much more respect for the native Indian tradition known as orientalists, wanted the new laws to be in tune with the rules of the *Dharmasastras*. Whereas, others such as Thomas Macaulay and James Mill, who were influenced by the contemporary regnant ideology of utilitarianism were much more in favor of a formal law in the line of English Law. Finally it was the

ideologies of persons like Macaulay and James Mill which influenced in the making of criminal laws in India like the Indian Penal Code in 1864.[3]

SCIENTIFIC STUDY OF CRIME

Not only what the crime is but why the crime is, the study of criminology helps in understanding various ways in which the nature of crime and criminal behavior has been interpreted by the mainstream theoretical approaches. Criminology is the scientific study of the causes and prevention of criminal behavior, informed by normative, legal and philosophical perspectives on empirically verifiable facts. In 1924, Edwin Sutherland defined Criminology as "the body of knowledge regarding crime as a social phenomenon that includes within its scope the process of making laws, of breaking laws, and of reacting toward the breaking of laws." The genesis of criminology lies in its mother discipline, sociology, however it has since developed refined approach and methods of thinking about crime and criminal behavior which are specialized in nature. Criminology involves the inputs from all basic disciplines in social and behavioral sciences in explaining the problem of and response to crime.[4] Considering the cross-disciplinary complexities of the phenomenon of crime, criminology gradually developed as an inter-disciplinary domain and Criminologists are drawn from a wide range of disciplines including law, economics, history, psychiatry, psychology, political science and sociology. No Criminal Justice System in the world today can operate without the support of criminology. Unfortunately, when we look at the Indian Criminal Justice System reforms we find that criminological understanding of crime in India is still in a very nascent stage and not adequate attention being given to its importance.

Apart from examining the major ideas on crime to be found in the classics of criminology and in contemporary thought, Penological and Victimological perspectives of crime also became part Criminology.

GROWTH OF CRIMINOLOGY

The evolution of the study of crime can be traced back to the Classical School of Criminology and it was *Cesare Beccaria(1738-1794)* in Italy and *Jeremy Bentham(1748-1832)* in Britain writing in the late eighteenth century who established the essential components of the Classical Criminology. Classicalism perceived every criminal conduct as freely willed; men by nature, self seeking and liable to commit crimes; consensus in society to protect private property and personal welfare; contract with state to preserve peace within consensus; prerogative of state to deter criminals by punishment; punishments to be tested in

3 See, Dr. Dalbir Bharti: *The Constitution and Criminal Justice Administration.* APH Publishing Corporation, Delhi, 2002

4 Jatar D. P.; *'Teaching and Research in Criminology in India'*, The Indian Journal of Criminology, Vol-7, No-2, 1979

the touchstone of utility. Neo-Classicists such as *Rossi (1787-1848),Garraud (1849 1930)* and *Joly (1839– 1925)* modified the central tenets of pure Classical theory by revising the doctrine of free will without avoiding it by including factors such as the age of the criminal, mental culpability of the offender, child offenders etc. The same was done with the objective of punishment to be appropriate with the kind of criminal who deserved it.

The enduring influence of the Classical school is evident in the legal doctrine that emphasizes conscious intent or choice, for example, the notion of *mens rea* or the guilty mind. hi sentencing principles, for example, the idea of oulpability or responsibility; and in the structure of punishment, for example, the progression of penalties according to the seriousness of the offence or what is more commonly known as the 'sentencing tariff'. Philosophically, the ideas of the Classical school are reflected in the contemporary 'just deserts' approach to sentencing. This involves four basic principles. First, only a person found guilty by a court of law can be punished for a crime. Second, anyone found to be guilty of a crime must be punished. Third, punishment *must not be more* than a degree commensurate to – or proportional to – the nature or gravity of the offence and culpability of the offender. Fourth, punishment *must not be less* than a degree commensurate to – or proportional to – the nature or gravity of the offence and culpability of the criminal.[5]

Packer observes that the whole contemporary criminal justice system is founded on a balance between the competing value systems of *due process* and *crime control*. The former maintains that it is the purpose of the criminal justice system to prove the guilt of a defendant beyond a reasonable doubt in a public trial as a condition for the imposition of a sentence. It is based on an idealized form of the rule of law where the state has a duty to seek out and punish the guilty but must prove the guilt of the accused .Central to this idea is the presumption of innocence until guilt is proved. A due process model, on the other hand, requires and enforces rules governing the powers of the police and the admissibility and utility of evidence. There is recognition of the power of the state in the application of the criminal law but there is a requirement for checks and balances to be in place to protect the interests of suspects and defendants. The use of informal or discretionary powers is seen to be contrary to this tradition.[6]

'To the Classicalists, the criminal justice system was perceived as a system of freely chosen contracts between men and liberal society. Deviations from these laws provided the criminologists criteria for identifying deviant men, the pathological

5 Roger Hopkins Burke: *An Introduction to Criminological Theory*, Third Edition, Willian Publishing,U.K.2009

6 Packer, H.: *The Limits of the Criminal Sanction*. Stanford, CA: Stanford University Press.1968

individuals in a more or less perfect society. Under the influence of classicalism, Bentham advocated a comprehensive Code of universal applicability, taking a reductionist view of human behavior and public policy that propagated 'enlightened despotism'. Unlike Bentham and Mill, Macaulay who followed libertarian Whig realized the dangers of arbitrary powers and the values of gradualism. However, Macaulay did derive full advantage from Bentham's theory of jurisprudence and Science of Legislations as well as legislative absolutism '[7] The Indian Penal Code of 1864 was enacted at the time when classicalism as a philosophical doctrine was prevalent. Therefore the influence of this school of criminology cannot be undermined in the making of the fundamental substantive penal code in India.

CRIMINOLOGY AS A SCHOLASTIC DOMAIN

The UNESCO Report in 1957 on the University Teaching of Sciences: Criminology. By the International Society of Criminology, Paris: This particular report of the university teaching of criminology was part of the ambitious program devoted to the teaching of Social Sciences proposed by the General Conference of UNESCO in May and June of 1950 at the time of its Fifth Session. Prepared by Denis Carroll of London and Jean Pitadel of Paris the Report categorically mentions as below:

"This synthetic science aims at reducing crime and working on the theoretical level to reach this practical goal, it proposes a complete study of crime and the criminal, crime being envisaged not as a judicial abstraction but as a human act, a natural and social fact. The method of observation and experiment should be carried out in the atmosphere of a veritable social cline".

The above Report provided a necessary impetus to the formal university teaching of Criminology in India and in the world. The second important development that can be cited here is *The Canadian Committee Report (1956)*: A Committee to Inquire into the Principles and Procedures followed by the Remission Service of the Department of Justice of Canada was set-up headed by *Gerald Fauteux*, a Supreme Court judge in the year 1953.In 1956, the committee submitted its Report. Although its mandate was to report on conditional release (Parole Services), the committee went far beyond that to look at the entire system of corrections. The Committee made 44 recommendations of which eight were specifically about parole. The basic theme of the report was preventive justice.

Fauteux believed that *'the community could best defend itself against criminals by meting out justice in a way that prevented offenders from committing any*

7 See, Prof. B.B. Pande in his Presidential Address in the 36 All India Criminology Conference of the ISC on 'Rethinking Criminal Justice in the 21st Century', NLU, Delhi 2013

further offences. To do this, the court had to make the sentence fit the criminal as well as the crime. The report recommended that all inmates be automatically considered for parole on the merits of their individual cases.'

This Report is a milestone in professional approach to crime-control.

Given its inter-disciplinary content, Criminology is taught as part of Law, Sociology, Justice Studies, Criminal Justice Administration, Criminology and Criminal Justice, Police Sciences, Social Work etc. world wide. In the early years of tha development of Criminology in India, sociologists specially belonging to Lucknow school led by Prof. Shushil Chandra did several sociological studies on deviance and delinquency. Subsequently, many departments of sociology in the northern and western India have made scores of works in this area. Particularly, Prof. J. J. Panakal provided much impetus to criminology in the western India. A social work perspective was added to criminology during this period. Influenced by studies in psychology of crime in the west, psychologists in India have attracted to this area and resultantly many studies in criminal psychology were conducted in the southern India (led by Prof. T. E. Shanmugam) and in rest of the country.[8]

EMERGING CONCERNS FOR INDIAN CRIMINOLOGY

Apart from the problem of increase in crime rate and low conviction rate, the Indian state is confronted with the situation wherein terrorism is posing significant challenge on the western frontier and insurgency on the eastern frontier. in addition, menace of Maoist violence is one of the biggest challenges the country is facing as regards to internal security along with Religious Fundamentalism. Internal Security is the foremost concern before Indian criminology today. In this regard, Prof. B.B. Pandey in his Presidential Address in the 36 All India Criminology Conference of the ISC on 'Rethinking Criminal Justice in the 21st Century' said and I quote here:

'In the pre 1980s period the Indian criminological thinking was deeply inspired by the pro-constitutional due process and humanist values that got amply reflected in the criminal policy and measures aimed at reform and rehabilitation of even the worst criminals (the Code of Criminal Procedure,1973 that provides for the rights of the accused, right to pre sentence hearing and rehabilitative sentencing and the reform philosophy enshrined in the All India Committee of Jail Reforms, 1980-83 are the best examples). But in the 1990s period things changed drastically. In particular crimes such as transnational terrorism and extremism, mega economic scams and growing collusiveness of the privileged classes and politically engineered communal and caste riots of vast magnitude changed the very perception of

8 See, Prof. G. S. Bajpai, Criminology: An Appraisal of Present Status and Future Directions.

the crime and dynamics of addressing it.'

hi line with the above thinking we may say that Criminology in India at large need to expand its horizons from merely studying crime and punishment to analyzing Justice, Peace and Development in the changed socio-political and economic scenario. In fact in its essence the present Human Rights Movement in the world is a culmination of the quest for peace initiated during the first and second world wars. Moreover, the UN Charter which India has ratified long ago, is a reflection of its commitment towards achieving peace and human rights together as it's preamble also mentions that "in the equal rights of men and women and of nations large and small, and *to practice tolerance and live together in* peace with one another as good neighbours, and to unite our strength *to maintain international peace and security*".

More budgetary allocation for criminological teaching, research and action in India is the second concern. Criminological understanding is still not adequate in India and the debate surrounding criminal justice reform has failed to develop a criminological understanding of crime in India and its relationship with other social, economic and political factors. The infamous *Nirbhaya case* on December 16,2012 in Delhi which had triggered a review of the existing juvenile law in specific and criminal law in general is a case in hand. The Criminal Law (Amendment) Act,2013 in the aftermath of the incident on the recommendation of the Justice Verma Committee Report was welcomed but criminological research findings are yet to find prominence in similar policy level documents such as the Justice Verma Committee Report. One may very well argue that there has been no empirical evidence to prove that changing law would bring down the crime rate in society.

The submissiou of the reports by the Committee on Reforms of Criminal Justice System headed by Justice Malimath (2003) and the Committee on Draft National Policy on Criminal Justice headed by Dr. N.R. Madhava Menon (2007) has framed recent efforts towards criminal justice reform in India. Despite the introduction of fast track courts in 2000 (following the recommendation of the Eleventh Finance Commissiou) and plea bargaining (Criminal Law Amendment Act, 2005) in recent years the problems of delay, cost and inequity persist in the criminal justice system. This is a common concern before every person related with the Criminal Justice Administration including practitioners, academic and researchers engaged with Criminology.

CONCLUSION

Criminology is an expanding domain and academic discipline which originated in western world and eventually was introduced in Indian Higher Education. Like many other disciplines it has its own advantages and disadvantages owing to its

western-origin. However considering the crime reality in India which has unique etiology and context, there is enough scope for developing the area of Criminology to new heights. Human Resource for imparting training and teaching of Criminology is abysmally low in India despite the fact that the subject is part of UGC recommended course curriculum for Law as well as Social Sciences apart from being a core area in the training of Police, Judicial Officers, Jail Officers as well other Criminal Justice functionaries. There is in the past few years a growing concern among the Indian intelligentsia as well those related with Criminal Justice Administration to look for solutions at the level of underlying causes of crime as well as prevention rather than in litigation. Criminology can contribute towards that direction.

People's Union for Civil Liberties & Another v. Union of India[1]

Dr. Vijay Saigal*

In a democracy election provide the basis of people's choice and representation. Elections demonstrate that political power derives from the people and is held in trust for them; and that it is to the people that politicians must account for their actions. In the last resort only the possibility of being turned out of office ensures that those elected fulfil their trust and maintain the standard of public office and guarantees those changes in the personnel and policies of government that changing circumstances require.

In *Indira Nehru Gandhi v. Raj Narain*[2], Khanna J. held that democracy postulates that there should be periodic elections where the people should be in a position to re-elect their old representatives or change the representatives or elect in their place new representatives. It was also held that democracy can function only when elections are free and fair and the people are free to vote for the candidates of their choice. In this present case Supreme Court very clearly laid down that

"Democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country... For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values, who win elections on a positive vote.... Free and fair elections is a basic structure of the Constitution and necessarily include within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections."[3]

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1 Writ Petition (Civil) No. 161 of 2004, decided on 27th September, 2013.

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2 1975 Supp. (1) SCC198

3 Supra note 1 at 42-45. See also Mohinder Singh Gill and Another v. Chief Election Commissioner, New Delhi and Others, (1978) 1 SCC 405; Kihoto Hollohon v. Zachilhuhe and Others, 1992 Supp (2) SCC 641

THE ISSUES

The "NOTA" case as is popularly known, examined the following issues-

1. Whether there is any doubt or confusion with regard to the right of a voter.
2. Whether the present writ petition under Article 32 is maintainable.
3. Whether the secrecy of right to vote only extended to electors who actually cast their vote.

CONTENTION OF THE PETITIONER

1. That the rules 41(2) & (3) and 49-O of the Conduct of Election Rules, 1961 violate the Secrecy of voting which is fundamental to the free and fair elections and is required to be maintained as per Section 128 of the Representation of the Peoples Act, 1951 and Rules 39 and 49-M of the Conduct of Election Rules, 1961.
2. That non-maintenance of Secrecy of voting is violation of the Right to Secrecy and is ultra vires to Conduct of Election Rules, 1961 and also violate Articles 19(1)(a) and Article 21 of the Constitution of India besides International Covenants.

RELIEF PRAYED FOR BY THE PETITIONERS

(i) Declaring that Rules 41(2) & (3) and 49-O of the Conduct of Election Rules, 1961 are ultra vires and unconstitutional to the extent they violate secrecy of vote;

(ii) Direct the Election Commission under the existing Representation of People Act, 1951 and the Conduct of Election Rules, 1961 and/ or under Article 324 to provide necessary provision in the baliot papers and the voting machines for protection of right not to vote and to keep the exercise of such right secret.

CONTENTION OF THE RESPONDENTS

1. That the present writ petition under Article 32 is not maintainable on the ground that Riglit to vote is not a fundamental right but is a statutory right.
2. That the right of secrecy has been extended to only those voters who have exercised their right to vote and the same, in no manner, can be extended to those who have not voted at all.
3. That section 2 (d) of the Representation of People's Act, 1951 specifically defines 'election' to mean an election to fill a seat, it cannot be construed

as an election not to fill a seat.

Relevant provisions of the Representation of Peoples Act, 1951 and the Conduct of Election Rules, 1961 relied upon by the Hon'ble Court.

Sections 79(d) and 128 of the Representation of Peoples Act read as under:

Section 79(d)—"electoral right" means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election.

Section 128 - Maintenance of secrecy of voting—

(1) Every officer, clerk, agent or other person wlio performs any duty in connection with the recording or counting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (except for some purpose authorized by or under any law) communicate to any person any information calculated to violate such secrecy:

Provided that the provisions of this sub-section shall not apply to such officer, clerk, agent or other person who performs any such duty at an election to fill a seat or seats in the Council of States.

(2) Any person who contravenes the provisions of subsection (1) shall be punishable with imprisonment for a term which may extend to three months or with fine or with both."

RULES 39(I), 41, 49-M AND 49-O OF THE RULES READ AS UNDER

Rule 39: Maintenance of secrecy of voting by electors within polling station and voting procedure.—

(1) Every elector, to whom a ballot paper has been issued under rule 38 or under any other provision of these rules, shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter lay down.

Rule 41: Spoilt and returned ballot papers.—

(1) An elector who has inadvertently dealt with his ballot paper in such manner that it cannot be conveniently used as a ballot paper may, on returning it to the presiding officer and on satisfying him of the inadvertence, be given another ballot paper, and the ballot paper so returned and the counterfoil of such baliot paper shall be marked "Spoilt: cancelled" by the presiding officer.

(2) If an elector after obtaining a ballot paper decides not to use it, he shall

return it to the presiding officer, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked as "Returned: cancelled" by the presiding officer.

(3) All ballot papers cancelled under sub-rule (1) or sub rule (2) shall be kept in a separate packet.

Rule 49M: Maintenance of secrecy of voting by electors within the polling station and voting procedures:

(1) Every elector who has been permitted to vote under rule 49L shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

(2) Immediately on being permitted to vote the elector shall proceed to the presiding officer or the polling officer in charge of the control unit of the voting machine who shall, by pressing the appropriate button on the control unit, activate the balloting unit; for recording of elector's vote.

(3) The elector shall thereafter forthwith—

(a) Proceed to the voting compartment;

(b) Record his vote by pressing the button on the balloting unit against the name and symbol of the candidate for whom he intends to vote; and

(c) Come out of the voting compartment and leave the polling station.

(4) Every elector shall vote without undue delay.

(5) No elector shall be allowed to enter the voting compartment when another elector is inside it.

(6) If an elector who has been permitted to vote under rule 49L or rule 49P refuses after warning given by the presiding officer to observe the procedure laid down in sub-rule (3) of the said rules, the presiding officer or a polling officer under the direction of the presiding officer shall not allow such elector to vote.

(7) Where an elector is not allowed to vote under sub-rule (6), a remark to the effect that voting procedure has been violated shall be made against the elector's name in the register of voters in Form 17A by the presiding officer under his signature.

Rule 49-O. Elector deciding not to vote. If an elector, after his electoral roll number has been duly entered in the register of voters in Form 17A and has

put his signature or thumb impression thereon as required under sub-rule (1) of rule 49L, decide not to record his vote, a remark to this effect shall be made against the said entry in Form 17A by the presiding officer and the signature or thumb impression of the elector shall be obtained against such remark."

RELEVANT INTERNATIONAL PROVISIONS RELIED UPON BY THE HON'BLE COURT

Article 21(3) of the Universal Declaration of Human Rights, 148 and Article 25(b) of the International Covenant on Civil and Political Rights, 1966.

"**21(3)** The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

"**25.** Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) *** *** ***;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors?"

ARTICLES 19(I) (A) AND 21 OF THE CONSTITUTION OF INDIA RELIED UPON BY THE HON'BLE COURT

"**19 - Protection of certain rights regarding freedom of speech, etc**

(1) All citizens shall have the right-

(a) to freedom of speech and expression;

21 - Protection of life and personal liberty—No person shall be deprived of his life or personal liberty except according to procedure established by law."

From the above provisions, it is clear that in case an elector decides not to record his vote, a remark to this effect shall be made in Form 17-A[4] by the Presiding Officer and the signature or thumb impression of the elector shall be obtained against such remark.

DECISION ON ISSUE NUMBER 1 AND 2

An objection was raised with regard to the maintainability of the Writ Petition under Article32 on the ground that the right claimed by the petitioners is not a fundamental right as enshrined in Part III of the Constitution.

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4 See Rule 49L, Conduct of Election Rules, 1961

It was the specific stand of the Union of India that right to vote is not a fundamental right but merely a statutory right. Further it was the categorical objection of the Union of India that inasmuch as the writ petition under Artiele 32 would lie to this Court only for the violation of fundamental rights and since the right to vote is not a fundamental right, the present Writ Petition under Artiele 32 is not maintainable.[5]

The Hon'ble Court made reference to the decisions in *Kuldip Nayar*[6], *Association for Democratic Reforms*[7] and *People's Union for Civil Liberties*.[8]

In ***People's Union for Civil Liberties***[9], a three-Judge Bench comprising M.B Shah, P. Venkatarama Reddi and D.M. Dharmadhikari, J.J. expressed separate but concurring opinions.

Reddi, J made an observation as to the right to vote being a Constitutional right if not a fundamental right whicli reads as under:

"97. In *Jyoti Basu v. Debi Ghosal*[10] this Court again pointed out in no uncertain terms that:

8 "a right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple a statutory right."

With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Artiele 326, the right has been shaped by the statute, namely, R.P. act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple. Even with this clarification, the argument of the learned Solicitor General that the right to vote not being a fundamental right, the information which at best facilitates meaningful exercise of that right cannot be read as an integral part of any fundamental right, remains to be squarely met...."[11]

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5 N.P Ponnuswami v. Returning Officer, 1952 SCR 218; Jamuna Prasad Mukhariya v. Lachhi Ram, 1955(1) SCR 608; University of Delhi v. Anand Vardhan Chandal (2000) 10 SCC 648; K. Krishna Murthy (Dr.) v. Union Of India,(2010) 7 SCC 202

6 Kuldip Nayar & Ors v. Union of India & Ors (2006) 7 SCC 1

7 Union of India v. Association for Democratic Reforms &Another (2002) 5 SCC 294

8 People's Union for Civil Liberties v. Union of India, (2003) 4 SCC 399

9 Ibid

10 1982(3) SCR 318

11 Supra note 8 at 460

Further, Reddi, J., held as under:-

"(2) The right to vote at the elections to the House of the People or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(a). The casting of vote in favor of one or the other candidate marks the accomplishment of freedom of expression of the voter."[12]

Furthermore, Reddi, J., held as under:-

"...Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favor of one or the other candidate tantamount to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1) (*a*) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom..."[13]

Similarly, Shah J. held as under:-

"...However, voters' fundamental right to know the antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from statutory rights, he is having fundamental rights conferred by the Constitution..."[14]

Dharmadhikari, J. held as under:-

"...This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a voter which is to be regulated by statutory law on the election like the RP Act..."[15]

In succinct, the ratio of the judgment is that though the right to vote is a statutory right but the decision taken by a voter after verifying the credentials of the candidate either to vote or not is his right of expression under Article 19(1)(a) of the Constitution.

As a result, the judgments in *Association for Democratic Reforms* and *People's Union for Civil Liberties* have not disturbed the position that right to vote is a statutory right.

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12 Ibid at 474
13 Ibid at 460
14 Ibid at 453
15 Ibid at 476

In view of the whole debate of whether these above decisions were overruled or discarded because of the opening line of *Kuldip Nayar* which reads as under:-

"We do not agree with the above submission. It is clear that a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression, while reiterating the view in *Jyoti Basu* v. *Debi Ghosal* that a right to elect, fundamental though it is to democracy, is neither a fundamental right nor a common law right, but pure and simple, a statutory right".[16]

After a careful perusal of the verdicts in *Kuldip Nayar, Association for Democratic Reforms* and *People's Union for Civil Liberties*, the court was of considered view that *Kuldip Nayar does* not overrule the other two decisions rather it only reaffirms what has already been said by the two aforesaid decisions. The said paragraphs recognize that right to vote is a statutory right and also in *People's Union for Civil Liberties* it was held that "a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression". Therefore, it cannot be said that *Kuldip Nayar* has observed anything to the contrary i.e., "we do not agree with the above submissions..." the Court was of the opinion that this line must be read as a whole and not in isolation. The contention of the petitioners in *Kuldip Nayar* was that majority view in *People's Union for Civil Liberties held* that right to vote is a Constitutional right besides that it is also a facet of fundamental right under Article 19(1) (a) of the Constitution. It is this contention on which the Constitution Bench did not agree too in the opening line and thereafter went on to clarify that in fact in *People's Union for Civil Liberties,* a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression. Thus, there is no contradiction as to the fact that right to vote is neither a fundamental right nor a Constitutional right but a pure and simple statutory right.

The Court further held that the decision taken by a voter after verifying the credentials of the candidate either to vote or not is a form of expression under Article 19(1) (a) of the Constitution. The fundamental right under Article 19(1) (a) read with statutory right under Section 79(d) of the Representation of Peoples Act is violated unreasonably if right not to vote effectively is denied and secrecy is breached. This is how Articles 14 and 19(1) (a) are required to be read for deciding the issue raised in this writ petition. The casting of the vote is a facet of the right of expression of an individual and the said right is provided under Article 19(1) (a) of the Constitution of India (Vide: *Assoeiation for Democratic Reforms* and *People's Union for Civil Liberties).* Therefore, any violation of the said rights gives the aggrieved person the right to approach this Court under Article 32 of the Constitution of India. In view of the above said decisions as well as the

16 Supra note 6 at 121.

observations of the Constitution Bench in *Kuldip Nayar*, a *prima facie* case exists for the exercise of jurisdiction under Article 32.

DECISION ON ISSUE NO.3

As to the question of extension of principle of secrecy of ballot to those voters who decide not to vote, the Union of India contended that principle of secrecy of ballot is extended only to those voters who have cast their votes in favor of one or the other candidates, but the same, in no manner, can be read as extended to even those voters who have not voted in the election, Further, the principle of secrecy of ballot pre-supposes validly cast vote and the object of secrecy is to assure a voter to allow him to cast his vote without any fear and in no manner it will be disclosed that in whose favor he has voted or he will not be compelled to disclose in whose favour he voted.

The pith and substance of the argument is that secrecy of ballot is a principle which has been formulated to ensure a voter (who has exercised his right to vote) that in no case it shall be known to the candidates or their representatives that in whose favor a particular voter has voted so that he can exercise his right to vote freely and fearlessly. The stand of the Union of India is that the principle of secrecy of ballot is extended only to those voters who have cast their vote and the same in no manner can be extended to those who have not voted at all.

The Hon'ble Court referring to Section 128 of the RP Act and Rule 39 of the Rules paid reliance on the decision in *S. Raghbir Singh Gill* v. *S.Gurcharan Singh Tohra and Others*[17] wherein it was held:

"14...Sectecy of ballot can be appropriately styled as a postulate of constitutional democracy. It enshrines a vital principle of parliamentary institutions set up under the Constitution. It sub serves a very vital public interest in that an elector or a voter should be absolutely free in exercise of his franchise untrammeled by any constraint, which includes constraint as to the diselosure. A remote or distinct possibility that at some point a voter may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise. Therefore, it can be said with confidence that this postulate of constitutional democracy rests on public policy."[18]

Further, the Hon'ble Court relied upon Lily *Thomas* v. *Speaker, Lok Sabha*[19], wherein the Court held that

17 1980 Supp SCC 53.
18 Ibid at 65.
19 (1993) 4 SCC 234.

"voting is a formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question" and that "right to vote means right to exercise the right in favor of or against the motion or resolution. Such a right implies right to remain neutral as well".[20]

It is clear from the statutory provisions that secrecy of casting vote is duly recognized and is necessary for strengthening democracy.

Laying emphasis on the importance of secrecy of vote the Hon'ble Court quoted with approval paragraph Nos. 441, 442 and 452 to 454 of the decision of the Constitution Bench in *Kuldip Nayar*[21] and are extracted herein below:

"441.Voting at elections to the Council of States cannot be compared with a general election. In a general election, the electors have to vote in a secret manner without fear that their votes would be disclosed to anyone or would result in victimization. There is no party affiliation and hence the choice is entirely with the voter. This is not the case when elections are held to the Council of States as the electors are elected Members of the Legislative Assemblies who in turn have party affiliations.

442. The electoral systems world over contemplate variations. No one yardstick can be applied to an electoral system. The question whether election is direct or indirect and for which House members are to be chosen is a relevant aspect. All over the world in democracies, members of the House of Representatives are chosen directly by popular vote. Secrecy there is a must and insisted upon; in representative democracy, particularly to the upper chamber, indirect means of election adopted on party lines is well accepted practice.

452. Parliamentary democracy and multi-party system are an inherent part of the basic structure of the Indian Constitution. It is the political parties that set up candidates at an election who are predominantly elected as Members of the State Legislatures. The context in which general elections are held, secrecy of the vote is necessary in order to maintain the purity of the electoral system. Every voter has a right to vote in a free and fair manner and not disclose to any person how he has voted. But here we are concerned with a voter who is elected on the ticket of a political party. In this view, the context entirely changes.

453. That the concept of "constituency-based representation" is different from "proportional representation" has been eloquently brought out in United Democratic Movement v. President of the Republic of South Africa where the question before the Supreme Court was: whether "floor crossing" was fundamental to the Constitution of South Africa. In this judgment the concept of proportional

20 Ibid at 238.

21 Supra note 6.

representation vis-à-vis constituency-based representation is highlighted...

454. The distinguishing feature between "constituency based representation" and "proportional representation" in a representative democracy is that in the case of the list system of proportional representation, members are elected on party lines. They are subject to party discipline. They are liable to be expelled for breach of discipline. Therefore, to give effect to the concept of proportional representation, Parliament can suggest "open ballot". In such a case, it cannot be said that "free and fair elections" would stand defeated by "open ballot". As stated above, in a constituency-based election it is the people who vote whereas in proportional representation it is the elector who votes. This distinction is indicated also in the Australian judgment in R. v. Jones. In constituency based representation, "secrecy" is the basis whereas in the case of proportional representation in a representative democracy the basis can be "open ballot "and it would not violate the concept of "free and fair elections", which concept is one of the pillars of democracy."[22]

From the above discussion in the cited paragraphs it is clear that in direct elections to Lok Sabha or State Legislatures, maintenance of secrecy is a must and is insisted upon all over the world in democracies where direct elections are involved to ensure that a voter casts his vote without any fear of being victimized if his vote is disclosed.

Therefore, in view of the cases referred, the policy is clear that secrecy principle is integral to free and fair elections which can be removed only when it can be shown that there is any conflict between secrecy and the "higher principle" of free elections. The instant case concerns elections to Central and State Legislatures that are undoubtedly "constituency based". No discernible public interest shall be served by disclosing the elector's vote or his identity. Therefore, secrecy is an essential feature of the "free and fair elections".[23]

Right to vote as well as right not to vote have been statutorily recognized under Section 79(d) of the RP Act and Rules 41(2) & (3) and 49-O of the Rules respectively. Whether a voter decides to cast his vote or decides not to cast his vote, in both cases, secrecy has to be maintained, It cannot be said that if a voter decides to cast his vote, secrecy will be maintained under Section 128 of the RP Act read with Rules 39 and 49M of the Rules and if in case a voter decides not to cast his vote, secrecy will not be maintained. Therefore, a part of Rule 49-O read with Form 17-A, which treats a voter who decides not to cast his vote differently and allows the secrecy to be violated, is arbitrary, unreasonable and

22 Ibid at pp.143, 153-157

23 The Law Commission of India, in its 170th Report relating to Reform of the Electoral Laws has recommended for implementation of the concept of negative vote and has also pointed out its advantages.

violative of Article 19 and is also *ultra vires* Sections 79(d) and 128 of the RP Act.

A positive 'right not to vote' is a part of expression of a voter in a parliamentary democracy and it has to be recognized and given effect to in the same manner as 'right to vote'. A voter may refrain from voting at an election for several reasons including the reason that he does not consider any of the candidates in the field worthy of his vote. One of the ways of such expression may be to abstain from voting, which is not an ideal option for a conscientious and responsible citizen. Thus, the only way by which it can be made effectual is by providing a button in the EVMs to express that right. This is the basic requirement if the lasting values in a healthy democracy have to be sustained, which the Election Commission has not only recognized but has also asserted.

In India, elections traditionally have been held with ballot papers. From 1998 onwards, the Electronic Voting Machines (EVMs) were introduced on a large scale. Formerly, under the ballots paper system, it was possible to secretly cast a neutral/negative vote by going to the polling booth, marking presence and dropping one's ballot in the ballot box without making any mark on the same. However, under the system of EVMs, such secret neutral voting is not possible, in view of the provision of Rule 49B of the Rules and the design of the EVM and other related voting procedures. Rule 49B of the Rules mandates that the names of the candidates shall be arranged on the balloting unit in the same order in which they appear in the list of contesting candidates and there is no provision for a neutral button.

Rule 49-O of the Rules provides that if an elector, after his electoral roll number has been entered in the register of electors in Form 17-A, decides not to record his vote on the EVM, a remark to this effect shall be made against the said entry in Form 17-A by the Presiding Officer and signature/thumb impression of the elector shall be obtained against such remark. As is apparent, mechanism of casting vote through EVM and Rule 49-O compromise on the secrecy of the vote as the elector is not provided any privacy when the fact of the neutral/negative voting goes into record. Rules 49A to 49X of the Rules come under Chapter II of Part IV of the Rules. Chapter II deals with voting by Electronic Voting Machines only. Therefore, Rule 49-O, which talks about Form 17-A, is applicable only in cases of voting by EVMs. The said Chapter was introduced in the Rules by way of an amendment dated 24.03.1992. Voting by ballot papers is governed by Chapter I of Part IV of the Rules. Rule 39 talks about secrecy while voting by ballot and Rule 41 talks about ballot papers. However, as said earlier, in the case of voting by ballot paper, the candidate always had the option of not putting the cross mark against the names of any of the candidates and thereby record his disapproval for all the candidates in the fray. Even though such a ballot paper

would be considered as an invalid vote, the voter still had the right not to vote for anybody without compromising on his/her right of secrecy. However, with the introduction of EVMs, the said option of not voting for anybody without compromising the right of secrecy is not available to the voter since the voting machines did not have 'None of the Above' (NOTA) button. In order to rectify this serious defect, on 10.12.2001, the Election Commission addressed a letter to the Secretary, Ministry of Law and Justice stating, *inter alia*, that the "electoral right" under Section 79(d) includes a right not to cast vote and sought to provide a panel in the EVMs so that an elector may indicate that he does not wish to vote for any of the aforementioned candidates. The letter also stated that such number of votes expressing dissatisfaction with all the candidates may be recorded in a result sheet. However no action was taken on the said letter dated 10.12.2001. The Election Commission has further pointed out that in the larger interest of promoting democracy, a provision for "**None of the Above**" or "NOTA" button should be made in the EVMs/ballot papers. It is also highlighted that such an action, apart from promoting free and fair elections in a democracy, will provide an opportunity to the elector to express his dissent/disapproval against the contesting candidates and will have the benefit of reducing bogus voting.

In order to protect the right in terms of Section 79(d) and Rule 49-O, viz., "right not to vote", the Court was of the view that it is competent/well within its power to issue directions that secrecy of a voter who decides not to cast his vote has to be protected in the same manner as the Statute has protected the right of a voter who decides to cast his vote in favour of a candidate. Further the Court is also justified in giving such directions in order to give effect to the right of expression under Article 19(1) (a) and to avoid any discrimination by directing the Election Commission to provide NOTA button in the EVMs.

Further, the Hon'ble Court opined that, we should also appreciate that the election is a mechanism, which ultimately represents the will of the people. The essence of the electoral system should be to ensure freedom of voters to exercise their free choice. Article 19 guarantees all individuals the right to speak, criticize, and disagree on a particular issue. It stands on the spirit of tolerance and allows people to have diverse views, ideas and ideologies. Not allowing a person to cast vote negatively defeats the very freedom of expression and the right ensured in Article 21 i.e., the right to liberty.

Eventually, voters' participation explains the strength of the democracy. Lesser voter participation is the rejection of commitment to democracy slowly but definitely whereas larger participation is better for the democracy. But, there is no yardstick to determine what the correct and right voter participation is. If introducing a NOTA button can increase the participation of democracy then, in our cogent view, nothing should stop the same. The voters' participation in the election is

indeed the participation in the democracy itself. Non-participation causes frustration and disinterest, which is not a healthy sign of a growing democracy like India.

DECISION OF THE COURT

The Court held that Rules 41(2) & (3) and 49-O of the Rules are *ultra vires.* Section 128 of the RP Act and Article 19(1)(a) of the Constitution to the extent they violate secrecy of voting and directed the Election Commission to provide necessary provision in the ballot papers/EVMs and another button called "None of the Above" (NOTA) may be provided in EVMs so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to vote while maintaining their right of secrecy. Besides, the Court also directed the Election Commission to undertake awareness programs to educate the masses.

CONCLUSION

Democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country. The 'Fair' denotes equal opportunity to all people. Universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for these millions of individual voters to go to the polls and thus participate in the governance of our country. For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values, who win the elections on a positive vote. Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate.

Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. The Court was of considered view that in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfill one of its objective, namely, wide participation of people.

Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative

of Article 14. Thus, secrecy is required to be maintained for both categories of persons.

Giving right to a voter not to vote for any candidate, while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that is being put up by the political parties. When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity.

The fact that in the existing system a dissatisfied voter ordinarily does not turn up for voting which in turn provides a chance to unscrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one. Furthermore, a provision of negative voting would be in the interest of promoting democracy as it would send clear signals to political parties and their candidates as to what the electorate think about them.

The voting machines in the Parliament have three buttons, namely, AYES, NOES, and ABSTAIN. Therefore, it can be seen that an option has been given to the members to press the ABSTAIN button. Similarly, the NOTA button being sought for by the petitioners is exactly similar to the ABSTAIN button since by pressing the NOTA button the voter is in effect saying that he is abstaining from voting since he does not find any of the candidates to be worthy of his vote.

The mechanism of negative voting, thus, serves a very fundamental and essential part of a vibrant democracy.

Intercession of Judiciary of India in execution of Foreign Arbitrated Awards: Case Comment on BALCO Judgment

Dr. Monika Bhardwaj*

"Doubtless you begin to understand how disagreeable it is to me to do a thing arbitrarily, when it is unsatisfactory to others associated with me"[1]
Abraham Lincoln

In India, Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the Arbitration and Conciliation Act, 1996 (The Indian Act). All Arbitrations emanate from an Arbitration Agreement between the parties, by way of which they refer all their existing or future disputes to Arbitration. There are two types of arbitration domestic arbitration and international arbitration. Domestic Arbitration takes place in India when the arbitration proceedings, the subject matter of the contract and the merits of the dispute are all governed by Indian Law, or when the cause of action for the dispute arises wholly in India or where the parties are otherwise subject to Indian jurisdiction. International Arbitration can take place either within India or outside India in cases where there are ingredients of foreign origin relating to the parties or the subject matter of the dispute. The law applicable to the conduct of the arbitration and the merits of the dispute may be Indian Law or foreign law, depending on the contract in this regard, and the rules of conflict of laws. The most significant contribution of 1996 Act is the categorical definition of international commercial arbitration.

International commercial arbitration[2] is an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is:

An individual who is a national of, or habitually resident in or any country other than India, A corporate body which is incorporated in any country other than

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1 Abraham Lincoln (1809-1865), Collected works of Arbitration law,, vol,4, p.394, Rutgers University Press (1953, 1990)

2 Sec 2(1)(f) of The Arbitration and Conciliation Act, 1996

India, A company or an association or a body of individuals whose central management and control is exercised in any country other than India, The government of foreign country. Arbitration can take place in India in accordance with the same procedure as domestic arbitration. Arbitration becomes 'international' when at least one of the parties involved is resident or domiciled outside India or the subject matter of the dispute is abroad. In International arbitration the law applicable may be the Indian Law or a foreign law, depending on the terms of contract in this regard and the rules of conflict of laws.

The question of the applicability of the provisions of Part I of the (Indian) Arbitration & Conciliation Act, 1996 to arbitration proceedings having their seat outside India was considered by the Constitution Bench of the Apex Court of India in the case of *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc*, Civil Appeal No. 7019 of 2005.

In a landmark decision on 6 September 2012, a specially constituted five-member bench of the Indian Supreme Court overturned a decade-old line of precedents that had controversially given the Indian courts long-arm jurisdiction to intervene even in arbitrations seated outside India.

Bharat Aluminium Co Ltd v Kaiser Aluminium Technical Service Inc (*BALCO*),[3] which overruled the Supreme Court's much criticized decision in *Bhatia International v Bulk Trading SA*[4] (*Bhatia International*), has been widely welcomed by the Indian and international arbitration communities as a step that has piloted a much-needed course correction in the evolution of arbitration jurisprudence in India. *Bharat Aluminum Company v Kaiser Aluminum Technical Services*[5], (BALCO judgment) concluding that the Indian courts would not have jurisdiction with respect to arbitrations with 'seat outside India', either for the purposes of granting interim relief or with respect to entertaining a challenge to foreign arbitral awards in India.)

With this decision, the Supreme Court of India has revisited the permissible extent of judicial intervention in foreign arbitrations and reinforced the fundamental principles of territoriality and party autonomy. Moreover, it has given credence to the Statement of Objects and Reasons of the Arbitration and Conciliation Act 1996 (the 1996 Act), one of the objectives of which is 'to minimize the supervisory role of courts in the arbitral process'.)

The Supreme Court has held that Part I of the 1996 Act will henceforth not be applicable to any international commercial arbitration having 'seat outside India'

3 (2012) 9 SCC 649

4 (2002) 14 SCC 105

5 *Supra 3*

irrespective of whether or not Part I has been expressly or impliedly excluded by (the parties. This decision has thereby overruled, prospectively, the earlier decisions in *Bhatia International v Bulk Trading SA & Another* [2002] and *Venture Global Engineering v Satyam Computer Services Ltd & Another*[6].)

HISTORY OF THE CASE

Companies investing in India that want to avoid the delays plaguing the Indian court system routinely agree to international arbitration in other countries. However, the Indian courts have become notorious for intervening in such arbitrations.

In the BALCO judgment, the Constitutional Bench observed that the 1996 Act is an integrated legislation, governing both the laws relating to domestic arbitration and the enforcement of foreign arbitral awards in India based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (the model law), which aims to make arbitration an effective and expeditious means of commercial dispute resolution. Resolution of disputes through arbitration was not unknown in India even in ancient times.

Simply stated, settlement of disputes through arbitration is the alternative system of resolution of disputes whereby the parties to a dispute get the same settled through the intervention of third party. The role of the court is limited to the extent of regulating the process. During the ancient era of Hindu Law in India, there were several machineries for settlement of dispute between the parties. These were known as Kulani (village council), Sreni (corporation) and Puga (assembly) . The resolution of disputes through the Panchayats was a different system of arbitration subordinate to the courts of law.[7] The arbitration tribunal in ancient period would have the same status of Panchayat in modern India. The ancient system of Panchayat has been given due statutory recognition through the various Panchayat Acts subsequently followed by Panchayati Raj Act, 1994, It has now been constitutionally recognized in Article 243 of the Constitution of India.[8]

The first Indian Act on Arbitration law came to be passed in 1899 known as Arbitration Act, 1899. It was based on the English Arbitration Act, 1899. Then came the Code of Civil Procedure, 1908. Schedule II of the Code contained the provisions relating to the law of Arbitration which were extended to the other parts of British India. Thereafter the Arbitration Act, 1940 was enacted to consolidate and amend the law relating to arbitration. This Act empowered the Courts to modify the Award (section 15), remit the Award to the Arbitrators for

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6 (2002)4 SCC 105

7 See P.V Kane History of Dharamshastra, vol. III p.242

8 BALCO Case, Para 32

reconsideration (section 16) and to set aside the Award on specific grounds (section 34).[9]

The disastrous results which ensued from the abuse of the 1940 Act are noticed by this Court in the case of *Guru Nanak Foundation v M/s Rattan Singh & Sons*[10] Justice D.A. Desai speaking for the court expressed the concern and anguish of the court about the way in which the proceedings under the 1940 Act, are conducted and without an exception challenged in Courts. His Lordship observed:

"Interminable, time consuming, complex and expensive court procedures impels jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without the exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity ,at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decision of the Courts been clothed with 'legalese' of unforeseeable complexity. This case amply demonstrates the same."

Besides it difficulties were also faced in the International sphere of Trade and Commerce. With the growth of International Trade and Commerce, there was an increase in disputes arising out of such transactions being adjudicated through Arbitration. One of the problems faced in such Arbitration, related to recognition and enforcement of an Arbitral Award made in one country by the Courts of other countries. This difficulty was sought to be removed by various International Conventions. The first such International Convention was the Geneva Protocol on Arbitration Clauses, 1923, popularly referred to as " the 1923 Protocol". The 1923 Protocol sought to make arbitration agreements and arbitration clauses in particular enforceable internationally. It was also sought to ensure that Awards made pursuant to such arbitration agreements would be enforced in the territory other than the state in which they were made. The 1923 Protocol proved to be inadequate. It was followed by the Geneva Convention on the execution of Foreign Arbitrated Awards, 1927 and is popularly known as the "Geneva Convention" of 1927. India became a signatory of both. It was felt that there were limitations in relation to their fields of application. Under the 1927 Geneva Convention a party in order to enforce the Award in the country of an origin was obliged to seek a declaration in the country where the arbitration took place to

9 BALCO Case, Para 34

10 1981 (4) SCC634

the effect that the Award was enforceable. Only then could the successful party go ahead and enforce the Award in the country of origin. This led to the problem of "double *exequatur*", making the enforcement of arbitral awards much more complicated. In 1953 the International Chamber of Commerce promoted a new treaty to govern International Commercial (ICC) Arbitration. The proposals of ICC were taken up by the United Nations Economics Social Council. This in turn led to the adoption of the convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York in 1958, popularly known as New York Convention. The New York Convention is an improvement on the Geneva Convention of 1927. It provides for a much more simple and effective method of recognition and enforcement of foreign arbitral awards. It gives much wider effect to the validity of arbitration agreements. The Convention came into force on 7th June , 1959. Thus prior to the enactment of the Arbitration Act, 1961, the law of Arbitration in India was contained in the Protocol and Convention Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act,1961. There were no further amendments in the aforesaid three Acts. Therefore, it was generally felt that the arbitration laws in India had failed to keep pace with the developments at the International level.[11]

The 1996 Act was introduced to remedy the limitations of the then prevailing Arbitration Act 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act,1961.

The 1996 Act is divided into three parts:

Part I deals with arbitrations which have their seat in India,

Part II pertains to recognition and enforcement of foreign arbitral awards in India, and

Part III deals with conciliation.

The spheres of operation of Parts I and II were traditionally regarded as being distinct and mutually exclusive. However, the Supreme Court of India in *Bhatia International*[12] ruled that:)

'Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions.'

The rationale behind *Bhatia International* was that subsection 2(2) of the 1996 Act, which provides that Part I 'shall apply where the place of arbitration is in India', was merely a clarificatory and inclusive provision. The Supreme Court in

11 BALCO Case, Para 36

12 *Supra 6*

Bhatia International was also of the view that the parties would he without remedy if Part 1 was held not to (be applicable to foreign seated arbitrations in relation to the property or asset located in India.)

Relying upon the principles in *Bhatia International*, the Supreme Court in the case of *Venture Global*[13] held that unless Part I was specifically excluded, either expressly or impliedly, a foreign award can be challenged in India under s34 in Part I of the 1996 Act. These decisions almost annulled the established principles of territoriality enshrined in the model law and were criticized for judicial intervention in foreign arbitrations. While some viewed the judgments to be progressive and relief oriented, others felt that the decisions (were embraced too eagerly and, in fact, opened floodgates for intervention from Indian courts even in foreign seated arbitrations.

The correctness of the aforesaid decisions was referred to the Constitutional Bench of the Supreme Court of India.

THE ISSUES

The main issues addressed in the BALCO judgment are:)

1. What is meant by the Place of arbitration as found in sub section2(2) read with sub section2(4), 2(5), 2(7) and 20 of the 1996 Act?
2. What is the meaning of the words 'under the law of the country under which the award was made' enshrined in section 48 of the 1996 Act and Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) ?)
3. Does section 2(2) bar the application of Part 1 of 1996 Act to arbitrations where the place is outside India?)
4. Does Part 1 apply at all stages of an arbitration, ie, pre-, during and post-stages of the arbitral proceedings, in respect of all arbitrations, except for the areas specifically falling under Parts II and III of the 1996 Act ?[14])
5. Whether a suit for preservation of assets pending an arbitration proceeding is maintainable?

ARGUMENTS ON BEHALF OF APPELLANTS

Stalwarts, like Soli Sorabjee and C.A. Sundaram, had appeared for the appellant in this case. It was argued on behalf of the appellant that the omission of the word "only" was intentional and, while putting this argument, Soli Sorabjee quoted

13 2008(1) Scale 214

14 On the basis of the findings on the issues given in the judgment

the following:

"....the doctrine of ironing out the creases does not justify the substitution of a new jacket in place of the old, whose creases were to be ironed out."[15]

No doubt, the doctrine, which was made while explaining the difference between Arbitration Act and UNCITRAL Model Law on International Commercial Arbitration (1985 Model Law), has some force. It was essentially argued that court cannot supply words to the text of a statue. Though this concept of 'not supplying the omitted word' was accepted, it was applied only to reject the argument of the appellant. The appellants raised the following arguments:[16]

1. The omission of the word "*only*" signified the intent of the Indian Parliament to deviate from the territorial approach such that it intended for Part I to apply even to arbitrations seated outside India. The appellants argued that Part I and Part II were not mutually exclusive. Furthermore, it was also argued that the Indian Arbitration Act had not "*adopted or incorporated the provisions of the Model Law*" but had merely "*taken [the Model Law] into account*". In this respect, the omission of the word "*only*" was deliberate and "*clearly indicated that the Model law had not been bodily adopted by the Indian Arbitration Act*".

2. Restricting the operation of Part I only to arbitrations which take place in India would lead to reading words into or adding words to various provisions contained in the Indian Arbitration Act.

3. Restricting the operation of Part I would also render certain provisions sections 2(5), 2(7) and 20) redundant.

4. A reading of the word "*place*" should be consistent in both sections 2(2) and 20. Insofar as Section 20 states that parties are free to agree on a place of arbitration outside India, it was argued that there could be Part I arbitrations conducted outside India.

5. Section 27 of the 1996 Act, which deals with the assistance of court in taking evidence, is another indicator to support the applicability of Part I to the arbitration held ontside India.

6. If Part I was only to apply to arbitrations in India, then the words in section 28(1) "*where the place of arbitration is situated in India*" would be unnecessary and should instead be read as Parliament's intention to give Part I extra-territorial effect.

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15 See BALCO Case, para 78

16 See BALCO Case, para 15 and 17

7. The same phrase only qualifies subsection (1) of section 28 and does not qualify subsection (3). Accordingly, section 28(3) was intended to apply to foreign arbitrations so long as parties chose the Indian Arbitration Act as the law of the arbitration. This could only be the case if Part I applies to such arbitrations.

8. It was argued that, like Section 11, there is no provision in Part II for the appointment of arbitrator under Section 45 of the 1996 Act, when parties are not able to agree on such an appointment. Hence, Part I is applicable to Part II as well. According to the counsel, this proposition finds support in the non-obstante clause of the Section 45, i.e., ""notwithstanding anything contained in Part I or in the Code of Civil Procedure".

9. Section 48(1)(e), though dealing with enforcement of awards, necessarily recognizes the jurisdiction of courts in two countries to set aside the award, namely, the courts of the country in which arbitration takes place and the country under the law of which the award was made.

10. Parties to a foreign arbitration would be left without a remedy if the Indian courts were not permitted to assert jurisdiction over a foreign arbitration and thereby grant interim relief in aid of that arbitration.

JUDGMENT AND REASONING

The judgment in detail analyses, the provisions of various sections in the Act and applicability of Part I of the Act to international commercial arbitrations. Some significant issues dealt with in the judgment are as follows:

1. In absence of the word 'only' in section 2(2) of the 1996 act, it was contended that although Part I shall compulsorily apply if the place of arbitration is in India, it does not mean that Part I will not apply if place of arbitration is not in India. The Supreme Court of India held that the omission of the word "only" did not mean that the Indian Parliament consciously decided to depart from the territorial criterion. Just because the Indian Parliament did not chose to adopt the Model Law wholesale did not mean that it had departed from the territorial criterion.[17]

The Supreme Court considered that on a plain reading of section 2(2), it was clear that Part I was limited in its application to arbitrations which take place in India.

The Supreme Court of India considered that in light of the legislative history of the Indian Arbitration Act, the omission of the word "only" was not material.

17 See BALCO Case , para 60

First, the use of the word "only" would have been superfluous[18] and would only have been necessary if certain exceptions under the Model Law were incorporated into the Indian Arbitration Act. Since none of those exceptions were adopted, the phrase would have been redundant.

The scheme of the Indian Arbitration Act made it abundantly clear that the territorial principles, accepted in the UNCITRAL Model Law, had been adopted by the Act[19]. In this respect, the Supreme Court held that the UNCITRAL Rules adopted a strict territorial principle.[20]

The Supreme Court rejected the argument that the Indian Arbitration Act does not make the seat of the arbitration the so-called centre of gravity of the arbitration. The Supreme Court recognized the distinction between the seat of the arbitration and a convenient venue to hold the hearings. In this respect, "the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments i.e. the New York Convention and the UNCITRAL Model Law.

Finally, there were other countries which had dropped the word "only" from their domestic arbitration statute , for e.g. the Swiss Private International Law Act 1987 and the UK Arbitration Act 1996.[21]

2. The Supreme Court considered that there was no conflict between the various subsections of section 2. The appellants argued that Section 2(4) makes Part I applicable to "every arbitration" under any other enactment and therefore made it applicable to arbitrations wherever held, whether in India or outside India. The Supreme Court considered this argument "devoid of merit".[22]

The Supreme Court held that Section 2(4) makes Part I applicable to "every arbitration under any other enactment for the time being in force and Section 2(5) reads, "Subject to the provisions of sub-section (4), and save insofar as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto," are not inconsistent with section 2(2) of the 1996 Act as section 2(4) and 2(5) have to be read in the light of section 2(2) and have to be construed as referred to all arbitrations held in India.

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18 BALCO Case, para 68

19 BALCO Case, PARA 39

20 See Paragraphs 72 to 80 of the Report of the UNCITRAL on the work of its 18th Session in Vienna from 3rd to 21st June, 1985.

21 *id*, Para 71, 72, 74 & 77.

22 *Id* Para 82, 84

3. Section 2(7) states that "an arbitral award made under this Part shall be considered as a domestic award". In the view of the Supreme Court, this did not "relax the territorial principle and certainly did not introduce the concept of a delocalized arbitration into the Arbitration Act" . The Supreme Court considered that the true purpose of this provision was not to extend the jurisdiction of Part I of the Indian Arbitration Act to a foreign arbitration, but to draw a distinction between awards under Part I (domestic awards) and Part II (foreign awards) .[23]

The Supreme Court also considered that section 2(7) was enacted to prevent a situation where two foreign parties arbitrated in India under a foreign arbitration act and sought to claim that their award was a "non-domestic" award for the purposes of enforcing that award as an award under Part II as opposed to Part I.[24]

4. The Supreme Court of India disagreed on the appellants argument regarding the concept of party autonomy and jurisdiction in sections 2(1)(e), section 20 and section 28 read with section 45 and section 48(1)(c) made the jurisdiction of the Indian Arbitration Act subject-centric as opposed to seat-centric.

With respect to section 2(1)(e) which defines "Court" i.e. the courts with "jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit", it was argued that this definition "would necessarily mean that two foreign parties, in order to resolve a dispute arising outside India and governed by foreign law cannot invoke jurisdiction of an Indian Court by simply choosing India as the seat of arbitration".

The Supreme Court took the view that the term "subject matter of the arbitration" ought not to be confused with "subject matter of the suit". In this regard, its purpose was to identify the courts with supervisory jurisdiction over the arbitration proceedings. Section 2(1)(e) was meant to give jurisdiction to more than one court i.e. the courts where the cause of action is located and the courts where the arbitration takes place would both have jurisdiction over the parties. Without section 2(1)(e), the courts where the arbitration takes place would not have jurisdiction over the arbitration.

Furthermore, section 2(1)(e) was a purely jurisdictional provision which "can have no relevance to the question whether Part I applies to arbitrations which take place outside India" .

In respect of the arguments relating to section 20, which involved parties' choice of the place of arbitration, the Supreme Court considered that it did "not support

23 Para 88 of BALCO Case.

24 *Id* 94

the submission of the extra-territorial applicability of Part I". According to section 20 :-

(i) The parties are free to agree on the place of arbitration.

(ii) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(iii) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, good or other property."

Section 20 had to be read in light of the territorial limitation in section 2(2). Specifically, the use of the phrase "place" in section 20(3) should be read as a reference to venue and not the seat of arbitration. Whilst parties may choose to have the venue of their hearings at a convenient location outside of India, this would not change the seat of the arbitration which would still be India.[25]

5. The Supreme Court held that section 28 was a conflict of law provision which draws a distinction between domestic arbitrations, international arbitrations seated in India and foreign arbitrations and their applicable conflict of laws rule. The phrase "where the place of arbitration is situated in India" is therefore "not indicative of the fact that the intention of Parliament was to give an extra-territorial operation to Part I of the Indian Arbitration Act" . In this way the Court clarified that the objective of section 28 of the 1996 Act is to contrast the substantive law that may be applicable in purely domestic arbitrations to those applicable in International commercial arbitration.

6. Part I of the Indian Arbitration Act deals with Indian arbitrations and Indian awards while Part II deals with foreign awards. The appellants sought to argue that some of the provisions contained in Part II would indicate that Part I would not be limited to arbitrations which take place in India. It was also argued that Part II was not a complete code as it relies on provisions in Part I. Finally, it was submitted that if Part I only applied to arbitrations within India, then the Indian courts would be precluded from granting any interim or interlocutory relief under section 9 in aid of foreign arbitrations.

The Supreme Court disagreed that (i) there was any overlap of the provisions in Part I and Part II; and that (ii) the provisions in Part II were supplementary to Part I. Rather, the Supreme Court held that there was a "complete segregation between the two parts". The Supreme Court drew a distinction between, on the

25 See Para 95-100 of BALCO Case.

one hand, its supervisory jurisdiction as the court of the seat of the arbitration in Part I, and on the other, its jurisdiction as the enforcement court under Part II.

7. Section 45 provides that, "Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

The appellants argued that the underlined words in section 45 "necessarily indicated that provisions of Part I would apply to foreign seated arbitration proceedings". The Supreme Court explained that this simply gave the Indian courts power to refer parties to arbitration when these parties had made an arbitration agreement referred to in section 44. It held that the appellants' confusion of the appellants stemmed from the phrase "judicial authority" which was "not a recognition by the Parliament that Part I would apply to international commercial arbitrations held outside India". Instead, the phrase was merely "a legacy from the 1940 Act, which covered purely domestic arbitrations, between two or more Indian parties, within the territory of India". The Supreme Court also recognized that section 45 was perhaps superfluous in light of section 19 which was to the same effect, but considered that this in and of itself was insufficient to "alter the scope and ambit of the field of applicability of Part I to include international commercial arbitrations, which take place out of India". In any event, the previous versions of the UK Arbitration Act 1950 and 1975 had similar provisions.

8. Section 48 of Part II of the Indian Arbitration Act and in particular 48(1)(e) grants the Indian court's jurisdiction and discretion to refuse to set aside a foreign award where "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". The equivalent ground can be found at Article V(1)(e) of the New York Convention as well as Article 36(1)(a)(v) of the Model Law.

The Supreme Court held that,

"the provision sets out the defenses open to the party to resist enforcement of a foreign award. The words 'suspended or set aside', in Clause (e) of Section 48(1) cannot be interpreted to mean that, by necessary implication, the foreign award sought to be enforced in India can also be challenged on merits in Indian Courts. The provision merely recognizes that courts of the two nations which are competent to annul or suspend an award. It does not ipso facto confer jurisdiction on such Courts for the annulment of an award made outside the country. Such jurisdiction has to be specifically provided, in the relevant national legislation of

the country in which the Court concerned is located. So far as India is concerned, the [Indian Arbitration Act] does not confer any sueh jurisdiction on the Indian Courts to annul an international commercial award made outside India ".

The Supreme Court also held that the jurisdiction for the Indian courts to annul or set aside an award is foand in section 34. Section 34 is under Part I of the Indian Arbitration Act and is therefore only applicable to awards made in India. To decide otherwise would be to incorporate section 34 into Part II of the Indian Arbitration Act and therefore contrary to the Indian Parliament's intention to confine section 34 to arbitrations and their awards held and made within India.

The Supreme Court also pointed out the mischief that would occur if there were concurrent jurisdictions to set aside awards and noted that it "would be a recipe for litigation and confusion". Here, they pointed to the Venture Global case which "epitomized the kind of chaos which would be created by two court systems, in two different countries, exereising concurrent jurisdiction over the same dispute".

EFFECT OF BALCO JUDGMENT

In holding that the Indian eourts cannot set aside arbitral awards made, or otherwise intervene in arbitrations seated, outside India, the Supreme Court has firmly signaled that the Indian courts will give effect to party autonomy and efficacy to the parties' choice of a foreign seat. There are, however, two important consequences of the decision of which contracting parties should take note.

I) In the light of the law laid down by the Supreme Court, it will he difficult to obtain interim measures of protection from the Indian courts in the case of arbitrations seated ontside India. This could prove to be a significant handicap, especially if there is a need to preserve assets or prevent the alteration of the *status quo* in India pending the making of an arbitral award. The Court recognized that there exists a void in the arbitration regime in this regard. It concluded, however, that the gap in the law was an issue for Parliament and not the courts to address. It is,of course, possible for a party to obtain interim measures from the arhitral tribunal or the courts of the arbitral seat, but it would likely encounter significant challenges in enforcing any such orders in India in the absence of an international convention or the application of the 2006version of the UNCITRAL Model Law. It is hoped that legislative amendment will rectify this anomaly, but until such time, contracting parties should be conscious of this angle when selecting a seat of arbitration.

2) The Supreme Court in *BALCO* decided that its judgment would have *prospective effect* and thus apply only to arbitration agreements executed after 6 September 2012. By its terms, therefore, the judgment will not

affect arbitration agreements executed before 6 September 2012,in which case the law as stated in *Bhatia International* will continue to apply. The cryptic reason given by the Court to justify this approach was that it was necessary "to do complete justice". However, given that the court took note of the adverse fallout of its decision in *Bhatia International* and held that Indian courts had no jurisdiction under the scheme of the 1996 Act to intervene in arbitrations seated outside India, it is rather curious how it could justify continued judicial interventionism in the case of arbitration agreements entered into before 6 September 2012. If *Bhatia International* were indeed wrongly decided, a position which the Supreme Court has now accepted, the overruled judgment ought not to have been allowed to continue to operate in relation to agreements which will undoubtedly generate arbitrations for years to come.[26]

CONCERN OF THE SUPREME COURT REGARDING REMEDY OF INTERIM RELIEF

In relation to the grant of interim reliefs, it is widely known that, while several countries exclude applicability of their domestic arbitration laws to foreign arbitrations, they still permit the parties to obtain interim relief from local courts irrespective of the seat of arbitration[27]. However, for all international arbitration agreements signed after 6 September 2012, the parties will no longer be permitted to approach the Indian courts for interim reliefs. It is pertinent to note that even the Ministry of Law and Justice, proposed amendments to the 1996 Act, recognizing that, while the interference of Indian courts should be reduced, the parties may require to obtain interim relief, and proposed that Part I of the 1996 Act would not apply where the seat of arbitration was outside India (except for S.9 for interim measures and S.27, which deals with assistance given to the court in taking evidence). However, the BALCO judgment ousts the Indian court's jurisdiction completely in foreign-seated arbitrations.)

The BALCO judgment is clearly a signal to the legislature to consider extending interim protection to foreign arbitrations, without encouraging unwarranted interference with the arbitral process. Therefore, in light of the above visible lacunas, which still persist with respect to interim protections, it is expedient that the parliament addresses the difficulty with suitable amendments to the 1996 Act.)

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26 See Piloting a Much-Needed Course Correction: T he Decision of the Indian Supreme Court in BALCO v Kaiser Aluminum, Asian Dispute Review, July ,2013

27 The English Arbitration Act 1996 empowers English courts to grant interim reliefs in foreign-seated arbitrations. The arbitration laws of Hong Kong, the Netherlands and Singapore are similar in this respect as well

SCOPE FOR BRIGHTER FUTURE FOR ARBITRATION IN INDIA

Besides these wrinkles , *BALCO* portends a brighter future for arbitration in India. The judgment is likely to be welcomed by the international arbitration community. It seems to restore the original intention of the Act and provides much needed certainty for those involved in Indian- related commercial contracts where arbitration is provided as the method of dispute resolution.[28] Whilst a number of decisions of the Indian Supreme Court in the last decade have cast a shadow over its arbitration-friendly credentials, *BALCO* signals a welcome course correction. By overruling *Bhatia International* and *Venture Global*, the Indian Supreme Court has shown its keenness to direct the development of Indian law into a pro arbitration path.

The main consequence of this judgment will be to insulate arbitrations seated outside India from unwelcome interference by the Indian courts. Notably, the Indian courts will no longer be able to consider challenges to foreign awards. This will reduce the scope for purely tactical challenges by a losing party and also considerably speed up the timelines associated with enforcing a foreign award in India. Indian arbitration jurisprudence is now aligned with the position prevalent in most other arbitration-friendly jurisdictions and is poised to develop further on a pro arbitration trajectory. Overall this is a positive development which should strengthen the Indian arbitration regime and put India on the map of arbitration friendly nations.

28 *Supra 26*

"Christian Medical College, Vellore & Others v. Union of India: An Appraisal"

Dr. Satish Chandra* & Dr. Ashish Kumar Srivastava**

Christian Medical College, Vellore & Others v. Union of India And Others T.C.(C) No.98 Of 2012 Civil Original Jurisdiction, decided on 18/07/2013[1] by Chief Justice of India, Altamas Kabir & Justice Vikramajit Sen, wherein more than 150 writ petitions were heard and decided together.

FACTUAL MATRIX

Four notifications, two dated 21.12.2010 and the other two dated 31.5.2012, were issued by the Medical Council of India and the Dental Council of India deriving its authority under section 19A, 20 of Medical Council of India Act, 1956 and entry 66 of List I. These notifications basically provided for one all Indian level Entrance test (NEET) for medical aspirants. The justification of NEET is to minimize the difficulties of the aspirant of medical course who has to fill multiple entrance forms and take multiples entrance tests by providing him single window entrance for all types of admission to all types of medical colleges aided, unaided by government.

FACTS IN ISSUE

The four aforesaid Notifications have been challenged on several grounds mostly by minority religious institution including Christian Medial College, Vellore. The major areas of Challenges to the aforesaid Notifications are:

(i) whether the powers of the Medical Council of India and the Dental Council of India to regulate the process of admissions into medical colleges and institutions run by the State Governments, private individuals (aided and unaided), educational institutions run by religious and linguistic minorities, in the guise of laying down minimum standards of medical education, as provided for in Section 19A of the Indian Medical Council Act, 1956, and under Entry 66 of List I of the Seventh Schedule to the Constitution, are invalid?

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1 www.judis.nic.in.

(ii) whether the introduction of one National Eligibility-cum-Entrance Test (NEET) offends the Fundamental right guaranteed to any citizen under Article 19 (1) (g) of the Constitution to practise any profession or to carry on any occupation. trade or business?

(iii) Whether NEET violates the rights of religious and linguistic minorities to establish and administer educational institutions of their choice, as guaranteed under Article 30 of the Constitution?

(iv) Whether subordinate legislation, such as the right to frame Regulations, flowing from a power given under a statute, can have an overriding effect over the fundamental rights guaranteed under Articles 25, 26, 29(1) and 30 of the Constitution?

(v) Whether the exclusion of Entry 11 from the State List and the introduction of Entry 25 in the Concurrent List by the Constitution Forty Second (Amendment) Act, 1976, makes any differenee as far as the Regulations framed by the Medical Council of India under Section 33 of the 1956 Act and those framed by the Dental Council of India under Section 20 of the Dentists Act, 1948, are concerned, and whether such Regulations would have primacy over State legislatiou on the same subject?

(vi) Whether the aforesaid questions have been adequately answered in T.M.A. Pai Foundation v. State of Karnataka [(2002) 8 SCC 481], and in the subsequent decisions in Islamic Academy of Education v. State of Karnataka [(2003) 6 SCC 697], P.A. Inamdar v. State of Maharashtra [(2005) 6 SCC 537] and Indian Medical Association v. Union of India [(2011) 7 SCC 179]? And

(vii) Whether the views expressed by the Constitution Bench comprised of Five Judges in Dr. Preeti Srivastava v. State of M.P. [(1999) 7 SCC 120] have any impact on the issues raised in this batch of matters?

CONTENTION OF PETITIONERS

The main contention of petitioner is that it being a minority institute has got a right to establish and administer educational institute. Right to administer include taking admission, reserving seats for minority and One Common Entrance by MCI in the form of NEET violates its fundamental rights guaranteed under Articles 25, 26, 29 and 30.

CONTENTION OF RESPONDENTS

The respondents are of the view that Notifications of MCI and DCI is *intra vires* as the Entry 66 of List I of Seventh Schedule authorizes the Central Government

to maintain Standard in professional courses such as medicine. Medical Council of India is authorized by its section19A, 20 and 33 to lay down rules and regulation to maintain the minimum standards of medical professional courses under the Medical Council of India Act, 1956. Their exercise of power under the said Act is an act of delegation by the delegatee.

Providing NEET is very helpful for the poor students as it would enable him single window entrance exam for admission in various medical colleges across India and therefore helpful in saving time and money.

RATIO

The apex court while examining the above questions keenly observed its decisions in St. Xavier, T.M. Pai, Unni Krishnan, Islamic Academy of Education. P.A. Inamdar and rendered this watershed judgment. The apex court has in this case crucially examined the periphery of Article 19 (1) (g) in terms of opening minority educational institution, article 25, 26, 29 and 30 in terms of religious minorities and their fundamental right to open and administer educational institution. The court has also examined the state's and central powers to interfere in the administration of these minority religious educational institution.

Supreme Court while examining the aforementioned crucial issues made an attempt to find out all the decisions of it on the issues. In 1993, an attempt was made by the Government of Tamil Nadu to interfere with the admission process in the institution by a letter dated 7th May, 1993, directing the Petitioner to implement the scheme framed by this Court in the case of Unni Krishnan v. State of U.P. [(1993) I SCC 645], insofar as the undergraduate course in Nursing was concerned. The Petitioner-institution filed Writ Petition No.482 of 1993 before this Court challenging the State Government's attempts to interfere with the admission process of the institution as being contrary to and in violation of the rights guaranteed to it under Article 30 of the Constitution. In the pending Writ Petition, various interim orders were passed by the Constitution Bench of this Court permitting the institution to take resort to its own admission procedure for the undergraduate course in the same manner in which it had been doing in the past. The said Writ Petition was heard in 2002, along with the T.M.A. Pai Foundation case (supra), wherein eleven questions had been framed.

While hearing the matters, the Chief Justice in T.M. Pai formulated five issues to encompass all the eleven questions, on the basis of which the hearing was conducted, and the same are extracted below:

1. Is there a fundamental right to set up educational institutions and, if so, under which provision?

2. Does Unni Krishnan case [(1993) 4 SCC 111] require reconsideration?

3. In case of private institutions (unaided and aided), can there be government regulations and, if so, to what extent?

4. In order to determine the existence of a religious or linguistic minority in relation to Article 30, what is to be the unit - the State or the country as a whole?

5. To what extent can the rights of aided private minority institutions to administer be regulated?"

Out of the eleven questions framed by the Bench, Questions 3(b), 4 and 5(a) are extremely relevant for deciding the questions raised in the Writ Petition filed by the Petitioner-institution. For the sake of reference, the said three Questions are extracted herein below:

Q3. (b) To what extent can professional education be treated as a matter coming under minorities rights under Article 30?

Q4. Whether the admission of students to minority educational institutions, whether aided or unaided, can be regulated by the State Government or by the University to which the institution is affiliated?

Q5. (a) Whether the minority's rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students?"

Supreme Court while making an attempt to find out answers of these questions made certain legal findings:

Petitioners submitted that the answer given by the Eleven-Judge Bench to the first Question is that Article 30(1) re-emphasizes the right of religious and linguistic minorities to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Article 30.

The answer to the second Question is that, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards, admission of students to unaided minority educational institutions cannot be regulated by the State or University concerned. Petitioners pointed out that a note of caution was, however, introduced and it was observed that the right to administer, not being an absolute right, there could be regulatory measures for ensuring proper educational standards and maintaining the excellence thereof, particularly in regard to admissions to professional institutions. It was further held that a minority institution does not cease to be so, when it receives grant-in-aid and it would, therefore, be

entitled to have a right to admit students belonging to the minority group, but at the same time it would be required to admit a reasonable number of non-minority students so that rights under Article 30(1) were not substantially impaired and the rights of a citizen under Article 29(2) of the Constitution were not infringed. However, the concerned State Governments would have to notify the percentage of non-minority students to be admitted in the institution. Amongst students to be admitted from the minority group, *inter se* merit would have to be ensured and, in the case of aided professional institutions, it could also be submitted that in regard to the seats relating to non-minority students, admission should normally be on the basis of the common entrance test held by the State agency, followed by counseling wherever it exists.

In reply to the third Question, it was held that a minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure would have to be fair and transparent and the selection of students in professional and higher educational colleges should be on the basis of merit. The procedure selected for admission by the minority institution ought not to ignore the merit of students for admission while exercising the right to admit students by the colleges aforesaid, as in that event, the institution will fail to achieve excellence. The said procedure should not amount to maladministration.

Some of the issues decided in the T.M.A. Pai Foundation case came up for clarification in the Islamic Academy of Education case (supra) and for further interpretation in P.A. Inamdar's case (supra), before a Bench of Seven-Judges, wherein the Petitioner-Association was duly represented. The Hon'ble Judges reiterated the views expressed in the T.M.A. Pai Foundation case that there cannot be any reservation in private unaided institutions, which had the right to have their own admission process, if the same was fair, transparent, non-exploitative and based on merit. To dilute the effect of this judgment the amendment in Article 15 by adding clause 5 was done. Petitioner referred to paragraph 125 of the judgment in P.A. Inamdar's case (supra), which is relevant for our purpose, and reads as follows:

"125. As per our understanding, neither in the judgment of Pai Foundation [(2002) 8 SCC 481] nor in the Constitution Bench decision in Kerala Education Bill [1959 SCR 995] which was approved by Pai Foundation, is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalization of seats which has been specifically disapproved in Pai Foundation [(2002) 8 SCC 481]. Such

imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution of India. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit."

Supreme Court after making a rational basis with the help of aforementioned cases came back to issues in the instant case. Despite the various issues raised in this batch of cases, the central issue relates to the validity of the amended Regulations and the right of the MCI and the DCI there under to introduce and enforce a common entrance test, which has the effect of denuding the State and private institutions, both aided and unaided, some enjoying the protection of Article 30, of their powers to admit students in the M.B.B.S., B.D.S. and the Postgraduate Courses conducted by them. There is little doubt that the impugned Notifications dated 21.12.2010 and 31.5.2012, respectively, and the amended Regulations directly affect the right of private institutions to admit students of their choice by conducting their own entrance examinations, as they have been doing all along.

Answering the first question the Supreme Court held that notifications of MCI and DCI are invalid. The rationale of the decision in the words of Supreme Court, *"Attractive though it seems, the decision taken by the MCI and the DCI to hold a single National Eligibility-cum- Entrance Test to the M.B.B.S., B.D.S. and the Postgraduate courses in medicine and dentistry, purportedly with the intention of maintaining high standards in medical education, is fraught with difficulties, not the least of which is the competence of the MCI and the DCI to frame and notify such Regulations. The ancillary issues which arise in regard to the main issue, relate to the rights guaranteed to citizens under Article 19(1) (g) and to religious and linguistic minorities under Article 30 of the Constitution, to establish and administer educational institutions of their choice. In the instant case, it is not a case of consultation, but a case of inputs being provided by the State Governments in regard to the Regulations to be framed by the MCI or the DCI. An invalid provision cannot be validated simply by acting on the basis thereof."*

The four impugned Notifications dated 21.12.2010 and 31.5.2012 make it clear, in no uncertain terms, that all admissions to the M.B.B.S. and the B.D.S. courses and their respective Post-graduate courses, shall have to be made solely on the basis of the results of the respective NEET, thereby preventing the States and their authorities and privately-run institutions from conducting any separate examination for admitting students to the courses run by them. Although, Article 19(6) of the Constitution recognizes and permits reasonable restrictions on the right guaranteed under Article 19(1) (g), the course of action adopted by the MCI and the DCI would not, in our view, qualify as a reasonable restriction, but would amount to interference with the rights guaranteed under Article 19(1)(g) and, more particularly, Article 30, which is not subject to any restriction similar to Article 19(6) of the Constitution.

Of course, over the years this Court has repeatedly observed that the right guaranteed under Article 30, gives religious and linguistic minorities the right to establish and administer educational institutions of their choice, but not to mal-administer them and that the concerned authorities could impose conditions for maintaining high standards of education, such as laying down the qualification of teachers to be appointed in such institutions and also the curriculum to be followed therein. The question, however, is whether such measures would also include the right to regulate the admissions of students in the said institutions.

The aforesaid issues have been considered and answered by this Court in the Ahmadabad St. Xavier's College Society case, St. Stephen's College case, Islamic Academy case, P.A. Inamdar's case and exhaustively in the T.M.A. Pai Foundation case (supra). Can, therefore, by purporting to take measures to maintain high educational standards to prevent maladministration, the MCI and the DCI resort to the amended MCI and DCI Regulations to circumvent the judicial pronouncements in this regard? The answer to such question would obviously have to be in the negative. The Supreme Court has consistently held that the right to administer an educational institution would also include the right to admit students, which right, in our view, could not be taken away on the basis of Notifications issued by the MCI and the DCI which had no authority, either under the 1956 Act or the 1948 Act, to do so. The MCI and the DCI are creatures of Statute, having been constituted under the Indian Medical Council Act, 1956, and the Dentists Act, 1948, and have, therefore, to exercise the jurisdiction vested in them by the Statutes and they cannot wander beyond the same. Of course, under Section 33 of the 1956 Act and Section 20 of the 1948 Act, power has been reserved to the two Councils to frame Regulations to carry out the purposes of their respective Acts. It is pursuant to such power that the MCI and the DCI has framed the Regulations of 1997, 2000 and 2007, which set the standards for maintaining excellence of medical education in India.

The right of the MCI and the DCI to prescribe such standards has been duly recognized by the Courts. However, such right cannot be extended to controlling all admissions to the M.B.B.S., the B.D.S. and the Postgraduate Courses being run by different medical institutions in the country. At best, a certain degree of control may be exercised in regard to aided institutions, where on account of the funds being provided by the Government, it may have a say in the affairs of such institutions.

These questions have already been considered and decided in the T.M.A. Pai Foundation case, wherein, it was categorically held that the right to admit students being an essential facet of the right of a private medical institution, and, in particular, minority institutions which were unaided, non-capitation fee educational institutions, so long as the process of admission to such institutions was transparent and merit was adequately taken care of, such right could not be interfered with. Even with regard to aided minority educational institutions it was indicated that such institutions would also have the same right to admit students belonging to their community, but, at the same time, it should also admit a reasonable number of nonminority students which has been referred to as the "sprinkling effect" in the Kerala Education Bill case.

Answering the second question the Supreme Court held that, "*The rights of private individuals to establish and administer educational institutions under Article 19(1) (g) of the Constitution are now well-established and do not require further elucidation. The rights of unaided and aided religious and linguistic minorities to establish and administer educational institutions of their choice under Article 19(1)(g), read with Article 30 of the Constitution, have come to be crystallized in the various decisions of this Court referred to hereinabove, which have settled the law that the right to admit students in the different educational and medical institutions is an integral part of the right to administer and cannot be interfered with except in cases of maladministration or lack of transparency. The impugned Regulations, which are in the nature of delegated legislation, will have to make way for the Constitutional provisions. The freedom and rights guaranteed under Artieles 19(1)(g), 25, 26 and 30 of the Constitution to all citizens to practise any trade or profession and to religious minorities to freedom of conscience and the right freely to profess, practise and propagate religion, subject to public order, morality and health and to the other provisions of Part III of the Constitution, and further to maintain institutions for religious and charitable purposes as guaranteed under Articles 25 and 26 of the Constitution, read with the rights guaranteed under Article 30 of the Constitution, are also well-established by various pronouncements of this Court. Over and above the aforesaid freedoms and rights is the right of citizens having a distinct*

language, script or culture of their own, to conserve the same under Article 29(1) of the Constitution."

Answering the third question the Supreme Court held that, *"Nowhere in the 1956 Act nor in the MCI Regulations, has the Council been vested with any authority to either conduct examinations or to direct that all admissions into different medical colleges and institutions in India would have to be on the basis of one common Notional Eligibility-cum-Entrance Test, thereby effectively taking away the right of the different medical colleges and institutions, including those run by religious and linguistic minorities, to make admissions on the basis of their own rules and procedures. Although, respondent contended that Section 33(l) of the 1956 Act entitles the MCI to make regulations regarding the conduct of professional examinations, the same, in our view, does not empower the MCI to actually hold the entrance examination, as has been purported to be done by the holding of the NEET. The power to frame regulations for the conduct of professional examinations is a far cry from actually holding the examinations and the two cannot be equated, as suggested by respondent. The right of the MCI to frame Regulations under Entry 66, List I, does not take us anywhere, since the freedoms and rights sought to be enforced by the Petitioners flow from Articles 19(1) (g), 25, 26, 29(1) and 30 of the Constitution which cannot be superseded by Regulotions framed by a Statutory authority by way of delegated legislation. The fact that such power was exercised by the MCI and the DCI with the previous approval of the Central Government, as contemplated under Section 33 of the 1956 Act and under Section 20 of the 1948 Act, would not bestow upon the Regulations framed by the MCI and DCI, which are in the nature of subordinate legislation, primacy over the Constitutional provisions indicated above."*

lu view of the rights guaranteed under Article 19(1) (g) of the Constitution. the provisions of Article 30 should have been redundant, but for the definite object that the framers of the Constitution had in mind that religious and linguistic minorities should have the fundamental right to preserve their traditions and religious beliefs by establishing and administering educational institutions of their choice. There is no material on record to even suggest that the Christian Medical College, Vellore, or its counter-part in Ludhiana, St. John's College, Bangalore, or the linguistic minority institutions and other privately-run institutions, aided and unaided, have indulged in any malpractice in matters of admission of students or that they had failed the triple test referred to in P.A. Inamdar's case. On the other hand, according to surveys held by independent entities, CMC, Vellore and St. John's Medical College, Bangalore, have been placed among the top Medical Colleges in the country and have produced some of the most brilliant and dedicated

doctors in the country believing in the philosophy of the institutions based on Christ's ministry of healing and caring for the sick and maimed.

Although, there is some difference of opinion as to the right to freedom of religion as guaranteed under Article 25 of the Constitution being confined only to individuals and not organizations in regard to religious activities, Article 26(a) very clearly indicates that subject to public order, morality and health, every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes. The emphasis is not on religious purposes alone, but extends to charitable purposes also, which would include the running of a hospital to provide low-cost, but efficient medical care to all, which the CMC, Vellore, and other private missionary hospitals of different denominations are doing. So long as a private institution satisfies the triple test indicated in P.A. Inamdar's case, no objection can be taken to the procedure followed by it over the years in the matter of admission of students in to its M.B.B.S. and Post-graduate courses in medicine and other disciplines. Except for alleging that the admission procedure was controlled by the Church, there is nothing even remotely suggestive of any form of maladministration on the part of the medical institutions being run by the Petitioner Association.

As far as private unaided professional colleges are concerned, the majority view was that it would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. In that context, it was suggested that it would be permissible for the University or the Government at the time of granting recognition, to require a private unaided institution to provide for merit-based selection, while, at the same time, giving the management sufficient discretion in admitting students, which could be done by reserving a certain percentage of seats for admission by the management out of those students who had passed a common entrance test held by itself, while the rest of the seats could be filled up on the basis of counseling by the State agency, which would take care of the poorer and backward sections of society. However, as far as the aided private minority institutions are concerned, the inter-play between Article 30 and Article 29(2) of the Constitution was taken note of in the majority decision and after considering the various decisions on the said issue, including the decision in D.A.V. College v. State of Punjab [(1971) 2 SCC 269] and the Ahmadabad St. Xavier's College Society case, reference was made to the observations made by Chief Justice Ray, as His Lordship then was, that, in the field of administration, it was not reasonable to claim that minority institutions would have complete autonomy. Checks on the administration would be necessary in order to ensure that the administration was efficient and sound and would serve the academic needs of the institution. Reference was also made to the concurring judgment of Khanna, J., wherein the learned Judge, *inter alia*, observed

that the right conferred upon religious and linguistic minorities under Article 30 is to establish and administer educational institutions of their choice. Administration connotes management of the affairs of the institution and such management must be free of control so that the founders or their nominees could mould the institution as they thought fit and in accordance with the ideas of how the interest of the community in general and the institution in particular would be best served. The learned Judge was of the view that the right of the minorities to administer educational institutions did not prevent the making of reasonable regulations in respect of such institutions, but such regulations could not impinge upon the minority character of the institution and a balance had to be maintained between the two objectives - that of ensuring the standard of excellence of the institution and that of preserving the right of minorities to establish and administer their educational institutions.

While answering question as to whether the admission of students to minority educational institutions, whether aided or unaided, can be regulated by the State Government or by the University to which the institution is affiliated, the learned Judges held that admission of students to unaided minority educational institutions, namely, schools and under-graduate colleges, cannot be regulated by the State or the University concerned, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards. The learned Judges further held that the right to admit students, being an essential facet of the right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the University may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions was on a transparent basis and merit was adequately taken care of. The learned Judges went on to indicate that the right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it was more so in the matter of admissions to professional institutions.

In answering as to whether the rights of minorities to establish and administer educational institutions of their choice would include the procedure and method of admission and selection of students, the learned Judges held that a minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent and the selection of students in professional and higher educational colleges should be on the basis of merit and even an unaided minority institution should not ignore the merit of the students for admission while exercising its right to admit students to professional institutions. On the question whether the rights of minority institutions regarding admission of students and to lay down the procedure and method of admission would be affected, in any way, by receipt of State aid, the learned

Judges were of the view that while giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe conditions in that regard, without, however, affecting the right of such institutions to actually admit students in the different courses run by them. These answers have been handmade and picked from T.P. Pai case and affirms its relevance au utility.

CONCLUDING OBSERVATION

The apex court lucidly summarized its decisions by making a sane concluding observation. In the words of the Supreme Court, *"What can ultimately be culled out from the various observations made in the decisions on this issue, commencing from the Kerala Education Bill case (supra) to recent cases, is that admissions to educational institutions have been held to be part and parcel of the right of an educational institution to administer and the same cannot be regulated, except for the purpose of laying down standards for maintaining the excellence of education being provided in such institutions. In the case of aided institutions, it has been held that the State and other authorities may direct a certain percentage of students to be admitted other than by the method adopted by the institution. However, in cases of unaided institutions, the position is that except for laying down standards for maintaining the excellence of education, the right to admit students into the different courses could not be interfered with. In the case of aided minority institutions, it has been held that the authority giving aid has the right to insist upon the admission of a certain percentage of students not belonging to the minority community, so as to maintain the balance of Article 19(2) and Article 30(1) of the Constitution. Even with regard to unaided minority institutions, the view is that while the majority of students to be admitted should be from the minority community concerned, a certain percentage of students from other communities should also be admitted to maintain the secular character of education in the country in what has been described as a "sprinkling effect".*

OBITER

The court in its obiter has very accurately observed about the futility of NEET in a pluralistic society like India. In the words of apex court, *"Apart from the legal aspects, which have been considered at length, the practical aspect of holding a single National Eligibility-cum-Entrance Test needs to be considered. Although, it has been submitted by the learned Additional Solicitor General that a single test would help poor students to avoid sitting for multiple tests, entailing payment of fees for each separate examination, it has to be considered as to who such poor students could be. There can be no controversy that the standard of education all over the country is not the*

same. Each State has its own system and pattern of education, including the medium of instruction. It cannot also be disputed that children in the metropolitan areas enjoy greater privileges than their counter-parts in most of the rural areas as far as education is concerned, and the decision of the Central Government to support a single entrance examination would perpetuate such divide in the name of giving credit to merit. In a single window competition, the disparity in educational standards in different parts of the country cannot ensure a level playing field. The practice of medicine entails something more than brilliance in academics, it requires a certain commitment to serve humanity. India has brilliant doctors of great merit, who are located mostly in urban areas and whose availability in a crisis is quite uncertain. What is required to provide health care to the general masses and particularly those in the rural areas, are committed physicians who are on hand to respond to a crisis situation. Given the large number of people who live in the villages in difficult conditions, the country today has more need of such doctors who may not be specialists, but are available as general physicians to treat those in need of medical care and treatment in the far flung areas of the country, which is the essence of what was possibly envisaged by the framers of the Constitution in including Article 30 in Part III of the Constitution. The desire to give due recognition to merit is laudable, but the pragmatic realities on the ground relating to health care, especially in the rural and tribal areas where a large section of the Indian population resides, have also to be kept in mind when policy decisions are taken in matters such as this. While the country certainly needs brilliant doctors and surgeons and specialists and other connected with health care, who are equal to any in other parts of the world, considering ground realities, the country also has need for "barefoot doctors", who are committed and are available to provide medical services and health care facilities in different areas as part of their mission in becoming doctors."

VERDICT

In the light of our aforesaid discussions and the views expressed in the various decisions cited, we have no hesitation in holding that the "Regulations on Graduate Medical Education (Amendment) 2010 (Part II)" and the "Post Graduate Medical Education (Amendment) Regulation, 2010 (Part II)", whereby the Medical Council of India introduced the single National Eligibility-cum- Entrance Test and the corresponding amendments in the Dentists Act, 1948, are *ultra vires* the provisions of Articles 19(1)(g), 25, 26(a), 29(1) and 30(1) of the Constitution. since they have the effect of denuding the States, State-run Universities and all medical colleges and institutions, including those enjoying the protection of the above provisions, from admitting students to their M.B.B.S., B.D.S. and Post-graduate

courses, according to their own procedures, beliefs and dispensations, which has been found by this Court in the T.M.A. Pai Foundation case (supra), to be an integral facet of the right to administer. In our view, the role attributed to and the powers conferred on the MCI and the DCI under the provisions of the Indian Medical Council Act, 1956, and the Dentists Act, 1948, do not contemplate anything different and are restricted to laying down standards which are uniformly applicable to all medical colleges and institutions in India to ensure the excellence of medical education in India. The role assigned to the MCI under Sections 10A and 19A (1) of the 1956 Act vindicates such a conclusion. As an off-shoot of the above, we also have no hesitation in holding that the Medical Council of India is not empowered under the 1956 Act to actually conduct the NEET.

A Treatise on the Right to Information Act[1]

Prof. M.K. Balachandran*

Transparency is the bulwark of good governance. The main object of the Right to Information Act is to promote transparency and accountability in the working of every public authority. The Act which was enacted in 2005 is the ultimate outcome of the judicial pronouncement holding *the Right to know* a fundamental right. It has become a powerful tool in the hands of the citizens to ensure transparency in the functioning and activities of the Government. Obviously, the Act did not have smooth sailing and had to confront opposition from vested interests whenever an uncomfortable decision was handed down by the competent authority under the Act. The concerted move to exempt file noting from the ambit of the Act and the recent unanimous decision of the political parties to keep themselves out of the RTI are examples. However, despite all these, the Act survived and has succeeded in exposing corruption, nepotism and maladministration in public life through coordinated efforts of the social activists, NGOs and the media.

The book under review, *A Treatise on the Right to Information Act*, is not yet another publication on the subject but is a comprehensive, well-researched work on RTI authored by Dr. Anshu Jain, who has been actively monitoring the growth of information rights in India, and has contributed several articles and addressed various seminars on the subject. It is published by the Universal Law Publishers which has received a well-deserved approbation from no less a personality than Mr. Justice V.R. Krishna Iyer as "the daring publisher", who has been "progressive in venturing to bring out rare legal literature of avant garde character", and has enriched the corpus juris of India.

The Foreword to the book is written by Mr. Justice Dipak Misra, Judge Supreme Court of India who has observed that the book is "a work of study as well as intellectual freshness". In view of this observation and a careful evaluation of the content of the book one tends to think that it is a strong contender to be included *in the legal literature of avant garde character.*

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1 Dr. Anshu Jain, *2014* Edition, Universal Law Publishing Co., Pvt. Ltd., New Delhi, pp. XXVII + 572

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The author has painstakingly explained the latest developments in law by incorporating the recent judicial pronouncements on the subject. She has analyzed the provisions of the Act and the Judgments with a view to identifying the loopholes and has suggested improvements and modifications in the Act. One of the important factors that distinguishes the present book from others is that the study is a combination of empirical, non-doctrinal mode of research based on field work through personal interviews and administering of questionnaires among the various stakeholders such as information commissioners, judges, lawyers, academicians, eminent scholars and even the common people who have invoked the provisions of the Act, successfully or otherwise. The author has also included in the book a review of the existing literature and an exhaustive bibliography consisting of books, journals, periodicals, news paper reports and web sources. There is also a detailed list of the recommendations made by the Administrative Reforms Commission and the Government's decision on each one of them in a tabular form.

The book contains nine chapters followed by a long list of annexure. It starts with an introductory chapter followed by eight chapters dealing with international conventions, the global perceptive, the historical background that led to the passing of the Act, its salient features, the role and responsibilities of the information commissions and the ambit and amplitude of the law. The last two chapters deal with the challenges and suggestions for the better implementation of the Act.

The author has explained in detail the positive achievements as well as the obstacles and impediments in its effective implementation. She has highlighted the lack of awareness about the existence of the Act, the *modus operandi* of getting information and the difficulty in having easy access to information, the lack of publicity by the concerned departments, the poor quality of information provided in a number of cases, misuse of the RTI by vested interests, blackmailing of officers, non designation of RTI functionaries, threat from corrupt officials and lack of security for whistle blowers. One may find it difficult to agree with the observation that "the RTI Act appears somewhat utopian in nature so far as the socio-economic defenseless poor illiterate masses are concerned," as in many cases the provisions of the Act are invoked by the people across the social strata of the society including the poor and weaker sections of the society. At the same time one may fully agree with the author that there are obstacles and impediments in its implementation.

With a view to improving the functioning of the Act, the author has suggested *inter alia*, periodic review of the law regular monitoring by civil society, maximum disclosure and minimum exemption, preventive measures against misuse of RTI, inclusion of private sector also within the ambit of the Act, attitudinal change,

political and administrative support and entry in the annual confidential report of RTI performance.

It may, however, be mentioned that the appendices to the book contain a long list of as many as 74 Bills, Acts, Rules, Regulations and Notifications of the various states and other organizations including Lok Sabha and Rajya Sabha Secretariats covering more than 320 pages in a book of 572 pages -- more than half the size of the book. Many of these documents are either outdated or irrelevant and add only to the number of pages without any value addition to the subject matter of the book. At the same time, some of the relevant documents such as the Right to Information Rules made by the states like Delhi, Kerala, M.P., T.N. and U.P. under the 2005 Act do not find a place in the list.

One fails to understand the relevance of incorporating the Right to Information Bills (3 Bills) drafted before the Central Act came into force in 2005, the state Acts (9 Acts) enacted before 2005 and the Rules (3 Rules) made there under. Some of them relate to as back as 1997 (the TN & Goa RTI Acts, 1997 and the Rules made there under). Since no purpose will be served by the inclusion of such irrelevant and outdated documents, their deletion may make the cost of the book affordable to the students and the common man who may be wanting to keep it as a ready reference whenever situation demands.

Nevertheless, the book is a well researched piece of work based on field study and personal interviews of the various stake-holders covering a detailed analysis of the provisions of the Act as well as relevant judicial pronouncements including the latest ones till the date of its publication. It contains a detailed account of the achievements so far and road-map for the future containing suggestions for improvement. The overview of the existing literature and the exhaustive bibliography enhanced the quality and utility of the book as it will facilitate further research on the subject.

The book may be a welcome addition to the law school libraries as well as the personal libraries of judges, lawyers, academicians, law offices, scholars, students and NGOs.

Legal Language and Legal Writing[1]

Prof. (Dr.) R. L. Koul*

In a welcome departure from the usual writing, the author in his book deals with the challenges faced by students pursuing Legum Baccalaureus (LL.B) in studying the subject like "Legal Language & Legal Writing". The author has been teaching this subject in absence of any readymade material as a challenge. Being aware that law is both a product of and dependent on language, therefore, there seems a mutual reflection of law and language. At the same author is conscious that legal language does not require the teaching rules of English grammar in a way making the law students Slaves of grammar. Authors concern is towards professional efficiency which in his view depends upon communication skill to a substantial extent and as such the law student ought to be well conversant with the legal terminology.

For convenient understanding, the book is divided into ten logical Chapters with Preface in the beginning and Subject Index at the last. Thus the reader gets glimpse into plain English (lingua franca) concerning legal language, legal vocabulary, integration of law, language, human values and professional ethics. In addition, book covers law language and legal essays, legal language and prepositions, besides, legal language and comprehension.

The book actually starts with Introduction covering the meaning of legal language, relationship between law and languages as seen interdependent and independent, abuse of legal language, use of Latin words, French origin of legal vocabulary and role of legal language etc. The second Chapter deals with "PLAIN ENGLISH THE LINGUA FRANCA OF LEGAL LANGUAGE" and covers English language followed in India, progressive nature of plain legal language, and like other content. The Chapter third deliberates upon "LEGAL LANGUAGE AND COMMUNICATION" and takes care of issues like imperishable and immutable relationship between legal language and communication. Communication is an important source of interaction with some examples like that of American President

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1 Thoroughly Revised and Updated Text Book on Legal Language and Legal Writing, Second Edition (2013) by Prof. Dr. K.L. Bhatia, Published by Universal Law Publishing Co. New Delhi

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Barack Obamas speech as 44th President of the United States of America[2]. The section also suggests useful readings like that of Professor Thane Rosenbaums[3] "The Myth of Moral Justice," Writings of Nani A. Palkiwala[4]". The Chapter also provides instances of Idiomatic comparisons and is concluded by quoting Sri Aurobindo [5].

In its onward passage, the Chapter four is captioned as "LEGAL LANGUAGE AND LAWMEN: LAW PROFESSOR, LAWYER AND JUDGE" .The Chapter strives to explain the language of law professor who makes lawmen- lawyer, law researchers. The Lawmen in authors view are consumers of legal language. Their linguistic habits enhance a sense of self esteem and belonging. The social and linguistic processes of a law professor carry impact on law students in socio-legal training. The chapter gives references to various writings, besides to a judgment of the Hon'ble Supreme Court in the matter of State of Kerala Vs N.M. Thomas[6] . The fifth chapter is devoted to Legal Writing with nine components like an overview, persuasive & expositor, role of law professor, plagiarism and copy right, plagiarism against copy right, analysis of case law, components of case brief, analysis of statutes and the chapter in last deals with book review. Likewise chapter sixth deals with integrating law, language and professional ethics taking care of human values in the lawyering profession.

The long and lengthiest chapter seventh covers more than three hundred pages providing enough space for legal vocabulary which includes law, language and literature .The chapter widely deals with "English Legal Terminology : A Lexicon of Legal Terms followed the world over", "Legal Glossary : English Legal Terms Explained in Detail Followed Globally". The countries prominently mentioned being Australia, Austria, Canada, Denmark, Estonia, Italy, India, Mexico, Netherlands, Nigeria, United Kingdom, England & Wales, France, Germany, Japan, Scotland, United States. The legal terminology amoug others being Abandonment, Affray, Bail, Beneficiary, Champerty & Maintenance, Coercion, Conviction, Double Jeopardy etc. etc in total numbering more than five hundred words with meaning thereto and appropriate case law where needed. References to the Dictionaries are apparent .The chapter satisfies the requirement expected by law students and teachers from the book. This chapter at last provides Law Latin/French Terminology [7]and finally Idioms and Phrases[8]. In authors view the

2 Page 37 of the Book under review

3 Page 42 of the referred Book

4 Page 42 -44 of the referred Book

5 Page 50 of the referred Book

6 State of Kerala Vs N.M. Thomas AIR 1978 SC 490

7 Page 381 of the Book under review

8 Page 396-415 of the referred Book

understanding of Legal words and phrases in the right perspective is imperative for lawmen. Using plain English language does not mean to avoid the use of such technical terms. Wonderfully colorful legal phrases expressions, maxims and words describe particular legal concepts which should not get rid of. Mention to rules of interpretation in general and with references to Mimansa in particular is welcome. In short, chapter can be considered as life[9]breath of the book and a novelty to relish.

The Law Language and Legal Essays are also provided in separate chapter eight[10]. It deals with more than forty topics. It is the concern of author that law students must strive to write essays on the topics referred in the book with sufficient bibliography. The book deliberates in brief with the referred essays leaving bibliography and other details for the students to ponder over. The idea and frame work of the essays is appreciable. The ninth chapter of the book deals with "LEGAL LANGUAGE AND PREPOSITIONs" with three sub headings like Prepositions, Alternative words & Matching Correct Meaning to Legal Words, rightly deliberated by the author that use of inappropriate prepositions is a fertile source of error. The use of inappropriate legal words changes the sense of communication. The chapter is easy understandable. Matching correct meaning to legal words, providing alternate words and use of prepositions with appropriate sentences is expected to develop interest in students in ascertaining the minor mistakes with major consequences. In the last chapter ten[11], author has dealt with Legal Language and Comprehension and additionally provides model paragraphs /passages as exercises. In this way the book titled as "Legal Language and Legal Writing " is completed in ten Chapters with Index at the last .

To conclude, it is the belief of author that the language in which law is learned is the language of law, and as such is the legal language concerning law. The book offers an insight into legal language and legal writing. Being fresh in approach it makes good and valuable reading inter-alia for law students and teachers alike.

9 Page 77 of the referred Book

10 Pages 416-450 of the referred Book

11 Pages 482-515 of the Book under review providing 10 model Paragraphs/Passages.

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Printed by K. S. Enterprises, Delhi