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CONTENTS

Negotiation of Tax Treaties in Compliance of International Conventions and Domestic Laws

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ABSTRACT

The Paper aims to reconcile the principles of interpretation of tax treaties. The Tax Treaties lays down a basis for understanding and applying International Tax Concepts. If the two contracting countries do not arrive at the same conclusion with regard to the tax rights under the treaty essence of treaty may be lost. The tax authorities of the world are collectively represented by the Organization for Economic Cooperation and Development ("OECD") and the United Nations ("UN"). The conventions announced by these organisations generally address such discrepancies. The efficiency the treaty approach, however, depends on common and workable interpretations of the treaty terms.

Tax treaties are treaties between states governed by public international law. Tax treaties also affect the domestic rights of taxpayers and states. Conflicting, principles of interpretation may apply in public international, and in domestic contexts. The article seeks to reconcile these different principles. The tax treaties need to be interpreted uniformly to achieve reciprocity. The paper distinguishes interpretations with the help of domestic law and international models namely OECD Model and UN model. It shall illustrate the problem of interpreting and its consequences. The problems which arise when a treaty term is not defined or is inadequately defined in the treaty and the parties attach different interpretations to the term under their domestic laws shall be discussed in length. In addition, the paper shall discuss the problem of international tax avoidance and solutions which generally involve restricting the interpretation of a treaty term

INTRODUCTION TO TAX TREATIES AND NEGOTIATION PROCESS

A Tax treaty is a contract between two sovereign governments relating to

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international taxation conflicts. They are considered international agreements under public international law and therefore are subject to general international law. These treaties are entered into by governments to allocate fiscal jurisdiction and on the other hand they become part of tax law of the contracting states. Tax treaties are applied by national tax authorities and national courts either by direct incorporation into the domestic law or by enactment into that law. Most treaties are bilateral but there are multilateral treaties also. Absence of world tax court and lack of uniformity in interpretation and application leads to treaty conflicts. The goal of the treaties is to promote international trade and commerce and allocation of tax revenues between various countries. The use of a tax treaty qualifies or becomes an abuse when taxpayers get a benefit which is inconsistent with the intentions of the makers of treaty. There are various forms of treaty abuse such as treaty shopping, conduit transactions, arbitrage transaction, over-leverage' base erosion and profit shifting.

The main purpose of tax treaties is to avoid double taxation and fiscal evasion. It may take several years from the initiation of negotiations till the tax treaty actually comes into force. Treaties may progress to the final stages, but never comes into force due to delay and time taken in negotiations. The domestic tax laws of those countries may have changed in due course and the countries may be forced to re negotiate. Tax treaties are the authoritative source of international tax law but that authority is depends upon how a contracting individual nation views the terms of the treaty in vis-à-vis its domestic laws. In some countries the treaties are automatically binding whereas in other countries there is a requirement of special legislative procedures to be followed so that the provisions of the treaty effectively become law. Tax treaties are generally used to avoid double taxation and prevent tax fraud or fiscal evasion. Double taxation takes place when the taxpayer is taxed simultaneously by the foreign nation of residence and the home country. Double taxation has its own drawbacks as it can stifle commerce, and international trade. It can be particularly harmful to nations whose economies rely heavily on tourism. While double taxation is crippling to all economies, tax evasion also affects the economies of the world due to the loss in revenue. Many a times nations cannot agree upon a comprehensive tax treaty and their agreements tend to focus on one particular issue. Issues related to the application of tax treaties arise due to a lack of a clear understanding of the rules and principles governing the interpretation of tax laws in general and treaties in particular. Therefore the question of interpretation is much debated by scholars.

HISTORY OF TAX TREATIES AND MODEL CONVENTIONS

In the 19th century it was only individual states that entered into bilateral conventions

to avoid double taxation. At that time treaties were concluded amongst closely allied states but after the First World War extensive treaty network developed specially in Europe. First structured study was on double taxation was conducted by group of economist and a "Report on Double Taxation" was submitted to financial committee of the League of Nations in 1923[1]. A standing committee was appointed by the League of Nations in 1928.After the advent of Second World war two treaties were drafted namely Model Treaty of Mexico 1943 and London Model Treaty 1946. The work started by the League of Nations was continued by Organisation of European Economic Cooperation (OEEC) and Organisation for Economic Cooperation and Development (OECD).A committee of fiscal affairs was formed in 1956. It submitted series of Model treaty articles and four interim reports. A model convention called the OECD convention and a commentary called the OECD commentary was submitted. Any state that had any reservation in following the convention submitted the comments in the commentary. Apart from reservations it also included observations and they formed a very good indication as to how the treaty was implemented or interpreted in the domestic context. This model convention of 1963 was revised in 1977, 1992, 1994, 1995, 1997, 2000, 2003. It was only a recommended format and had no legal binding at national or international level. It was a discretionary document and not mandatory. Soon many countries developed their own models based upon the OECD model. Netherland based its model on OECD and published it in 1988. Similarly US published the US Model in 1977 and revised it in 1981. In 1996 a technical explanation was issued to the US Model . United Nations published a new model in 1980 with the help of United Nations Economic and Social Council (ECOSOC). This model is based on OECD Model with 27 adaptations. This model also has commentaries. This model was amended in 1990 and updated model was adopted in 1999.

PURPOSE / OBJECTIVES OF CONVENTIONS

The treaties are generally formulated to prevent double taxation and fiscal evasion. They also contain tie breaker rules for the taxpayers who are resident in more than one country. They have rules that provide relief to the taxpayer by way of foreign tax credit or the exemption from the foreign source income. Most of the countries have their own tax provisions to avoid double taxation and the tax treaties assist them in this process. This tax treaty instrument improves the provisions in the domestic law to integrate it better with the laws of the partner country. The rules of the tax treaties need to be read together with the domestic

1 Group of economist were Professor Bruins, Prof Einaudi, Prof Seligman and Sir Josiah Stamp who submitted the report to League of Nations Doc.E.F.S73. F.19(geneva1923), p 36

laws. A tax treaty cannot create or extend taxing rights of a country. Tax treaties also have an operational objective to prevent fiscal evasion. This objective counterbalances the elimination of double taxation. Globalisation has also contributed to the international tax avoidance and evasion.

NEED FOR INTERPRETATION

The importance of tax treaties has increased in recent times because of globalisation of economies and also liberalisation of cross border trade and business. Most domestic tax laws are detailed, whereas tax treaties are 'purposive' and their interpretation should be agreed between the contracting countries. Domestic Laws are not a yardstick to interpret them. No treaty can expressly resolve all issues that may arise in the course of its application. Treaties are more to be interpreted keeping in mind the intentions of the parties involved. It cannot be foreseen what facts may arise in the future and it is not possible to provide for all of them with absolute precision. International agreements, and also domestic laws, require interpretation. The need for interpretation can arise from a difference of opinion between the contracting states. Questions of interpretation with regard to the application of a treaty can also arise, before domestic administrative authorities or courts, and in most countries the courts are then authorized to interpret the treaties.[2] Governments need to check what types of treaty abuses are of concern to them and then decide upon anti-abuse rules to combat such cases. The anti-abuse rules should be selected based on what would work best with their existing legal and tax system.

"To interpret" is to unfold a text. It has therefore been claimed that interpretation is such a general cognitive process that it[3] cannot be regulated through law. There is existence of different rules of interpretation within the legal systems of various states.[4] It is difficult to formulate these interpretive principles in precise terms. The interpretation of international agreements, even by domestic courts cannot be based upon domestic rules of interpretation. Treaty interpretation by an international forum must look into the fact that treaty interpretation by domestic courts does not conflict with the international obligations of the state in question. Special problems arise when a treaty uses legal terms that simultaneously are

2. Eduardo Baistrocchi, *The Use and Interpretation of Tax Treaties in the Emerging World Theory and Implications* British Tax Review Issue 4, 2008 Sweet & Maxwell Limited 100 Avenue Road Swiss Cottage London NW3 3PF available at: *http://ssrn.com/abstract=1273089(visited on Aug 2 2014).*
3. Boidman, *Canada- New Legislation Respecting Treaty Interpretation,* 1983 INTERTAX 383
4. *Berkeley Journal of International Law Vol. 4 Iss. 1 [1986], Art. 1[http://scholarship.law.berkeley.edu/bjil/vol4/iss1/1(visited on Aug 6 , 2014).*

terms of the substantive law of the contracting states.

VIENNA CONVENTION ON THE LAW OF TREATIES

This convention was adopted May 22, 1969 and came into force on January 27, 1980. It provides the standards for all kinds of treaties including tax treaties. It has been ratified by 96 nations and there are 45 signatories. Article 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) contains binding interpretation rules of International Law for parties of the VCLT.

In practice, most countries construe a tax treaty liberally. This is in consistence with Article 31 and also Article 26 of the Vienna Convention. These articles provide that treaties must be interpreted by the parties 'in good faith'; Therefore a broad interpretation is to be favoured over a narrow interpretation. Article 32 provides that supplementary means of interpretation may also be used like preparatory work of the treaty and the circumstances of its conclusion. This would check that no meaning is ambiguous or obscure or leads to a absurd result. It would also keep at abeyance unreasonable conclusions. The use of supplementary means of interpretation is not limited to what is expressly mentioned in Article 32 of VCLT, It also includes commentaries, parallel treaties, decisions of foreign courts, etc. Article 33 provides for Interpretation of treaties authenticated in two or more languages. When a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 is unable to remove, the meaning which best reconciles the texts shall be adopted . It should also be reconciling as regard to the object and purpose of the treaty. VCLT states that all languages shall be equally authoritative, unless the treaty itself provides an authentication to one single language only. It might also be possible that the contracting parties agree that a particular language shall prevail. It can thus be reasonably concluded that rules of interpretation contained in the Vienna Convention do not establish a rigid hierarchy but call for careful consideration of all relevant aspects.

RELATIONSHIP BETWEEN ARTICLE 3 (2) AND VCLT ARTICLES 31 AND 32

Article 3(2) states that in case certain terms are not defined in the treaty, the domestic law meaning can be resorted only if the context permits. This relationship has been a subject of debate in the international taxation . Some jurists are of the view that Article 3(2) is a special rule in relation to VCLT Articles 31 and 32. It should therefore take precedence over the general rules. Alternatively, it has been argued that the domestic law reference in Article 3(2) is essentially a rule of last resort. However, the former view has got the majority of the support.Other

legal instruments like Protocol, Parallel treaties, Expert opinions and court decisions are also used as aid to interpretation. Court cases are a useful aid to treaty interpretation, particularly if a case is recognised as having international fiscal significance.

Parallel treaties are referred to, but their value as aids to interpretation is generally low. Every treaty must be construed individually But a state generally strives for a certain amount of consistency in the interpretation. Tax treaties provide a degree of certainty for international business in cross-border matters. Views of eminent jurists are also considered while interpreting the treaties for their persuasive value.

MODEL CONVENTIONS

Since different countries have varying interests, it is good to have more than one model tax convention. Both, rules as well as interpretation of rules, contribute to treaty conflicts. Considering the different interest of different countries, it is natural to have multiple options in the form of more than one model tax convention to address them.

The different Model conventions provide a starting point for tax treaty negotiations between nations. These models make tax treaty negotiations easier and help in avoidance of any complications for nations whose laws require ratification. There are three major model conventions namely Organisation for Economic Cooperation and Development (OECD) Model Tax Convention; United States Model Tax Convention; and United Nations Model Tax Convention. The OECD and UN model income tax treaties are generally designed to minimize income that would be allocated to *source* countries, with the residue allocated to *residence* countries.

This process began in the 1920s after the World War I. The origins of these treaty models can be traced to formation of International Chamber of Commerce ("ICC"). At that time all countries had crushing debt burdens. The League of Nations was formed at about the same time as the ICC as a global political organization. It worked for global laws and the tax laws became effective in 1923. Residence concept became the base for the OECD/UN model treaties. The League of Nations formulated following essential treaty principles:

1. Source country should tax local operations, including property or other pertinent matters that can generate review.

2. Residual income should be earned by the country of residence, which

5. B. Wells & C. Lowell, "*Tax Base Erosion and Homeless Income: Collection at Source is the Linchpin*," 65 Tax L. Rev. 535 (2012).

provided the knowledge and capital for the business. This shall harmonize the international transactions

3 Presence of an interim holding company should be treated as a residence country.

The model treaties that eventually became the OECD Model, and subsequently the UN Model, are based on these principles.

OECD MODEL

The OECD began in 1961 replacing the Organisation for European Economic Co-operation (OEEC) created in 1948. The organization currently includes 33 nations which are mostly developed European nations and most importantly the United States. This convention contains commentaries. They are formulated take into consideration b reservations from member nations and opposing positions taken from nonmember nations.

The OECD model provides the basis for tax treaty negotiations for most developed nations, who either use the model convention as their starting point or adapt most or all of the provisions for their own model tax convention. OECD Commentary has been changed several times so it would be beneficial if the Commentary states a rationale as to why a particular interpretation is preferred over the one already existing.

To promote cooperation and to overcome territorial issues exchange of information is required and Article 26 of the OECD model specifically provides for it. It also eliminates discrimination against foreign nationals as provided in Article 26 of the convention. It provides mechanism for the solving of the disputes between the tax system by mutual interaction procedure.

US MODEL

The U.S Income Tax Convention provided the starting point for the United States in negotiating tax treaties and was originally published in 1981. It was revised in 1996 and 2006. It contains technical explanations and is used to ensure that any issues that could potentially complicate the ratification process in the Senate are disposed of during bilateral negotiations.[6] The U.S. model is similar to the OECD model in most respects. It only differs regarding anti-discrimination provisions related to foreign taxpayers and it also targets the use of tax havens more aggressively

6. Tittle, Martin B. & Avi-Yonah, Reuven S., *The Integrated 2006 United States Model Income Tax Treaty*. Lake Mary, FL: Vanderplas Publishing, 2008.

UN MODEL

The United Nations model was published in 1980. It was designed to assist developing nations in tax treaty negotiations[7]. The U.N. model is similar to the OECD Model and contains many similar provisions. This model has focus on source based taxation as opposed to residence based taxation. The U.N. Model is substantially different from the U.S. Model because of less rigorous nondiscrimination policies as well as less emphasis on tax fraud and fiscal evasion. UN model allocates more taxing rights to source state as compared to residence state.

REFERENCE TO OECD COMMENTARIES

OECD model treaties and conventions are important for interpretation. Their legal status under the provisions of Vienna convention is unclear. There has been increased reference to OECD conventions. There are different views of scholars whether the OECD commentaries are in accordance with Vienna Convention. They are also taken as supplementary means of interpretation. Although OECD does not intend for commentaries to have a limited role. They are intended to be part of context and not preliminary material but this becomes difficult if the treaty is made before revision. These revisions make it difficult for the treaty to be taken as part of text.

ROLE OF DOMESTIC LAW IN IMPLEMENTATION OF TREATIES

Relationship of Tax Treaties and The Domestic Law

Whenever a treaty is signed the parties commit themselves to initiate procedures in domestic law so that the objectives of treaty are achieved. The conclusion of the process takes time. A treaty becomes applicable only when the contracting states ratify it. To include a treaty under domestic law states follow different rules .In some states domestic law is subordinated to international law. This is called the principle of incorporation. In such countries the treaties automatically become part of domestic law when they are ratified. Some countries treat domestic law and international law separately. This is called doctrine of transformation and treaties become part of domestic law only after legislation.

Tax treaties should have precedence over inconsistent provisions of the domestic tax law. There is a three step approach to look into the relationship between treaties and domestic law. Firstly it should be checked whether the domestic law imposes tax in the situation. If no tax is imposed then treaty is not applied as no

7. Lowell & Wells, "*Tax Base Defense: Time to Update the Model Treaties*," *CCH Int'l Tax Journal* (Jan. Feb. 2013).

treaty can create tax. If the tax arises under state law then the second step is taken In such case the tax treaty overrides the domestic law. Thirdly we need to determine the states right to tax within the limits of the treaty[8]

For understanding the role of domestic courts in the application of treaties nature and usage of modern treaties has to be analysed and clearly understood. The role of domestic courts in applying treaties varies greatly depending on whether the treaty provision at issue is horizontal (amongst states), vertical (states and pvt parties) or transnational.[9]The method of taxation can have a significant effect on application of the provisions of tax treaties. There are three predominant methods used by countries in their domestic laws to establish the amount of tax payable by a person namely Assessment by the tax authorities, Self-assessment, or Withholding. Countries generally use a combination of withholding taxes on certain payments to non residents in combination with either self-assessment or assessment by the tax authorities . The provisions of tax treaties do not deal with withholding per se.[10]

"Preservation Clause" and "Saving Clause"[11] are two other important rules regarding the tie up between treaties and domestic laws. The former nullifies any treaty provision that inadvertently takes away benefits otherwise granted by domestic laws, while the latter maintains the right of a Contracting State to tax its own resident or citizen as if the treaty did not exist.[12]

Treaties usually define important terms such as 'person', 'enterprise' and 'permanent establishment', etc. within their text. Article 3(2) of OECD/UN Model, provides a few general rules and common definitions. This is required because a treaty cannot define each and every term used. The Article provides that if a term is not defined in a tax treaty and the context does not require a different meaning then the meaning will be provided by the domestic law. The interpretation and allocation of meaning varies from case to case and forms a

8 Edwards-Ker, *Tax treaty interpretations* , London. Ch 33

9 David Sloss, "*Domestic application of Treaties*", April 29, 2011, page 10, available at: *http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs (visited on April 14, 2012).*

10 Brian J. Arnold, "*Overview of Major Issues in the Application of Tax Treaties*", May 2013, available at: *http://www.un.org/esa/ffd/tax/2013TMITTAN/Paper1A_Arnold.pdf (visited on Oct 5, 2013).*

11 With regard to this principle there has been a argument that Controlled Foreign Corporation (CFC) rule, which allows a country to tax its resident s on income attributable to their participation in certain foreign entity may conflict with the provisions of tax treaties.

12 Kiyoshi Nakayama, "*Tax Policy. Designing and drafting a domestic law to implement a tax treaty*", March 2011, available at: *https://www.imf.org/external/pubs/ft/tnm/2011/tnm1101.pdf(visited on April 14 2012).*

part of negotiation process. The mutual agreement procedure (MAP) is provided in Article 25 of model tax conventions (OECD/UN/US). This process is often used to agree upon a common definition of a term. The term is then given a meaning agreeable to both contracting parties and which is used in the domestic tax law of the countries. It is done to preserve the tax sovereignty of the contracting country and operates on the basis of tax laws of the contracting countries to which it applies. On the other hand it also creates a negative consequence. The two contracting countries may attach different meanings to terms in applying the treaty under their respective domestic law. This kind of a treatment and interpretation creates an "issue of qualification."[13] Sometimes there is another issue of interpretation. This is regarding interpretation of treaty by reference to the relevant commentary on the date the treaty was concluded (static approach) or on the date when the need for interpretation arises (ambulatory approach). This issue arises because once a treaty has been concluded, the respective committees of the OECD and UN may have updated their commentary relating to particular provisions. Ambulatory approach, allows a treaty to accommodate changes without warranting a need to re-negotiate the tax treaty. However ambulatory approach cannot be applied where there is a radical amendment in the domestic law thereby changing the meaning and substance of the term. The static approach, on the other hand is not feasible in today's fast paced world. The domestic laws change frequently and it may result in absurd results.

Disputes can arise between a taxpayer and tax authorities, and also between the tax authorities of two or more countries. The dispute resolution mechanism is different in both cases. Dispute between taxpayer and tax authorities follow normal litigation route, settlement process, special leave petition (SLP) etc or the mutual agreement procedure (MAP) under Article 25 of the model tax conventions (OECD/UN). Dispute between tax authorities of two or more countries follow Mutual agreement procedure (MAP) or Arbitration or look up to International Court of Justice (ICJ).

INDIAN SCENARIO

India is largely a source rule taxation country. It gives rise to cases of double non-taxation, some intended, some unintended. India has entered into many kinds of treaties with different countries like Mauritius and there is a very thin line of difference between treaty use and abuse. Receipt of any form of tax relief by the Source country is conducive for double non-taxation. Economists prefer

13. Klaus Vogel, *Double Tax Treaties and Their Interpretation 4 Int'l Tax & Bus. Law. 1 (1986). Available at: http://scholarship.law.berkeley.edu/bjil/vol4/iss1/1 (visited on April 16, 2014)*

residence based taxation to avoid the source argument but it has the drawback of mobility of residence and capital. Double non-taxation is also being criticized on the grounds of being unfair given that companies do not pay their fair share of taxes and that it ends up giving a foreign company a higher edge over domestic companies. The best way to avoid 'Double taxation' and 'Double Non-taxation' is by interpreting treaties in their right context rather than using domestic law.

'Double Non-taxation' can be divided into three kinds. Firstly where 'Double Non-taxation' is by purpose, the country having the taxing right doesn't tax. The second scenario as one where the transactions are structured in a manner not visualised by tax treaty. In such case, judges interpret the schamic of the treaties. Lastly, there can be a situation, where one of the countries changes its domestic rules, after the treaty is entered into. Mauritius entered into treaty with India in 1980s, but the FDI and FII increased only in the early 1990s. This was so because Mauritius changed its domestic law and incorporated Mauritius Offshore Business Corporations Act. Domestic law is not irrelevant at the international tax treaty level. 'Double Non-taxation' has been consciously permitted by some treaties and therefore, this situation has to be addressed by policy makers. There can be a different take on 'Treaty Shopping' and the India-Mauritius tax treaty. Some jurists opine that Mauritius tax residents too, pay corporate tax in Mauritius and therefore it should not be looked upon as a case of 'Treaty Shopping' or 'Double Non-taxation'.

There are several macroeconomic differences between developed and developing countries. Developing countries do not have national income to yield the necessary domestic savings to finance the investment required for further growth. This need of investment has triggered international tax competition among developing countries to attract foreign inward investment.

The object and impetus of the Tax treaties is "allocation of tax rights" and this can work only when both the parties understand the treaty terms in the same manner. Tax treaties do not aim to create tax liabilities; their goal is to reduce or eliminate disagreements and interpretations under the respective contracting party's internal law. Therefore they lie in with the national provisions that allocate taxable income to taxpayers, so that the context becomes relevant in domestic law.[14] International Court of Justice (ICJ), has pronounced that *the Vienna rules are in principal applicable to interpretation of all treaties whether the countries are parties to VCLT or not.*

14. Patricia Brandstatter, "*The Substantive Scope of Double Tax Treaties- A study of Article 2 of OECD Model Convention*", *Page 9, 2010.*

Despite this principle of International Law, domestic laws in some countries prevail over an erratic provision of a treaty. The peculiar alliance between treaties and domestic laws and the possibility of a treaty override[15] depends on each country's constitution, laws and judicial decisions. India follows the dualist theory for the implementation of International Law at the domestic level.[16] International treaties do not automatically become part of national law in India. Legislation has to be made by the Parliament for the implementation of international law in India.

The case of *Union of India* v. *Azadi Bachao Andolan*[17] was decided by the Supreme of Court of India on October 7, 2003. Foreign investors had been channelling their investments into India via Mauritius rather than channelling them into India directly. Those investors had decided to use the Indo-Mauritius tax treaty because of its advantageous tax features (tax treaty shopping). A scheme was structured in such a manner that a conduit company based in Mauritius was used to channel investment from, foreign country to India. It was done in such a way that capital gains were not taxed in either country (double non-taxation). The main issue before the Indian Supreme Court was whether this scheme was valid under the India-Mauritius tax treaty. The only justification for channelling the investment was tax avoidance.[18] The taxpayers had designed a triangular tax planning scheme for channelling FDI from the relevant countries into India via the India-Mauritius tax treaty.[19] According to the Supreme Court of India, the taxpayer's main goal was to achieve double non-taxation.[20] The Supreme Court of India decided the case in favour of the taxpayer. Supreme Court of India construed one tax treaty (the India-Mauritius tax treaty) in the light of another tax treaty (the India-US tax treaty). This inter-textual method of interpretation was strange but compelling. Arguments that may have lead to a result in favour of the tax authority could have been based on Article 31 of the Vienna Convention on the Law on Treaties (VCLT). Article 31 sets forth the general rule of treaty

15. The legitimacy of a statutory rule that "overrides" a treaty rule that may conflict with it must be determined on a case by case basis.
16. *Jolly George* v. *Bank of Cochin*, AIR 1980 SC 470.
17. SC 56 ITR 563 (India).
18. Channelling an investment by a Dutch corporation in India through a conduit company in Mauritius (M corp) by equity contributions to the M corp which acquires the company in India, is relatively simple where the Dutch participation exemption applies for the shareholding in M-corp. In that case ,dividends from and capital gains on the shares in the M corp might be exempted from tax in the Netherlands
19. L. Kaplow, "*Rules versus Standards. An Economic Analysis*" (1992) 22 *Duke Law Journal* 557.
20. L. Kaplow, "*The Value of Accuracy in Adjudication; An Economic Analysis*" (1994) 23 *Journal of Legal Studies* 307.

interpretation. It prohibits the use of unilateral documents for construing treaties which the Supreme Court relied upon. The commentary to Article 31 rejects the interpretative value of unilateral documents. There is no evidence in the *Andolan* decision that Mauritius had in any way accepted the India-US tax treaty.[21] Thus in favour of tax authorities it can be concluded that the India-US tax treaty should have been treated as a unilateral document in relation to the India-Mauritius tax treaty and should have been immaterial for construing the India-Mauritius tax treaty.

The Indian Supreme Court decided the case in favour of the taxpayer. It argued that the tax treaty shopping issue in this case was lawful. The Supreme Court presented two independent arguments. The first argument was based on law and economics, and the second on legal considerations.[22] The Indian Supreme Court said that the cost/benefit implications of tax treaty shopping were more and it attracted FDI to India.[23] Although the Indian economic reforms since 1991 permitted capital transfers, the amount would have been much lower without the India-Mauritius tax treaty. This implied that the developing countries allowed treaty shopping to encourage capital and technology inflows. The court felt that the loss of revenue was insignificant compared to the other non-tax benefits to their economy.

The Supreme Court of India also did not refer to the Commentary to Article 1 of the OECD model, which implicitly bars tax treaty shopping. The Supreme Court of India decided that the OECD model Commentary is not binding on India in the light of the Vienna Convention on the Law of Treaties. Supreme Court of India followed a static (rather than an ambulatory) interpretation of the India-Mauritius tax treaty.[24] It decided that the OECD Commentary on tax treaty shopping was irrelevant because the OECD Commentary was published after the conclusion of the India-Mauritius tax treaty in 1983. In short, the Supreme Court of India in *Andolan case laid* two important interpretations. Firstly tax treaty shopping is valid under the Indian tax treaty network, unless there is a specific tax treaty prohibition. It also said that general domestic anti-avoidance provisions cannot be

21. L. Arye Bebchuk, "*Federalism and the Corporation: the Desirable Limits on State Competition in Corporate Law*" (1991 1992) 105 *Harvard Law Review* 1435 at 1446 (arguing that the success of Delaware's Corporate law over competing regulations is its ability to offer a credible compatible commitment to predictability and stability).
22. W. Landes and R. Posner, "Legal Precedent: A Theoretical and Empirical Analysis" *Journal of Law and Economics* 249 (arguing that the body of legal precedents is a capital stock that yields a flow of information services).
23. Hardin, *Liberalism, Constitutionalism, and Democracy* (OUP, Oxford, 2003) at 102.
24. D.Tillinghast, "*Arbitration of Disputes under Income Tax Treaties*" 97 *American Society of International Law Proceedings* 107.

applied to address tax treaty shopping cases.[25] Secondly the decision created a controversial taxpayer right. It clearly accepted that developing countries offer mutually harmful tax incentives to attract potential foreign direct investors. It was also felt that developing countries have less options for attracting investors and thus they resort to such efforts.

He India is a factory of the world for tax decisions, but still the judgments delivered by Courts and Tribunals must be valued by both, the taxpayer and revenue. Not all doubly non-taxed income is "unintended" or inappropriate. Mauritius is an example of intended double non-taxation. Mauritius can be called an International Financial Centre ("IFC"). Mauritius has walked an extra mile in terms of the substance requirement. Mauritius has brought in various changes in its legal framework with regards to substance and economic nexus. Companies do not come to Mauritius because of tax benefits only. There are various other benefits for choosing Mauritius like solid regulatory framework, good corporate governance, business friendly environment etc. OECD has rated it as a 'Largely Compliant' jurisdiction that has substantially implemented tax standards. Mauritius shares a very special relationship with India, and India - Mauritius DTAA can be said to be a 'Win- Win' one. There are diverse opinions on the contentious issues of 'Treaty Shopping' and 'Double Non-taxation'. Any attempt to completely eliminate both 'Double taxation' and 'Double Non-taxation' will lead to an imperfect tax system. The best way to avoid "Double taxation"

CONCLUSION

India's tax policy is not in black and white and there is a gap between policy and implementation. Since India is a net exporter of services, its tax policy is inclined towards source based tax. India seems to be moving to an era where more and more income is deemed to accrue or arise in India. Lot of double taxation was caused due to conflicting source rules, extra territorial nexus and unilateral measures overriding treaties. If we see the Law in US there is a different interpretation altogether. In US, both the domestic laws and treaty provisions are treated equally. In US, as regards applicability, the later of the two prevails. Therefore treaties there encourage investment. And there are very few treaty override cases. Even Singapore has negotiated treaties to promote national interest and attract FDIs. Singapore authorities / policies are pro-business. Minimal efforts are taken by Singapore authorities to collect taxes, because they believe that once the economy is dynamic, taxes will flow naturally. India is very clear in its legislation as it provides for 'beneficial of the two provisions' to

25. T. Dagan, "*The Tax Treaty Myth*" (2000) (No.939) 32 *Journal of International Law and Politics* 943.

prevail, unlike US where both are treated at par. He also differentiated that in India, if domestic provision is against a treaty, it will override the treaty provision whereas in US, later of the two prevails. In the Indian context, the discernible principles of law should prevail and not morality in general sense. Court's over-arching principles comes in only when legislation is poorly drafted. Under Indian laws, subjects are not taxable according to spirit of the statute but only by its plain words. The strength of Indian judiciary is case by case adjudication. It is expected that the court should resist across the broad principle and every principle should be confined and understood in the facts of the case. For good drafting in tax laws, concepts in law must reduce discretion, not only for the Revenue Officers but also for the Courts. Law should not be drafted only to achieve revenue targets. In Indian context, this debate is "unguided". In India there are varying degrees of approach based on judges' perceptions while interpreting law. This can be illustrated with examples of Azadi Bachao case, wherein the courts showed greater latitude in interpreting law as against in McDowell's case.

The Models and the Commentaries are the outcome of decisions of work of the respective committees of the OECD and UN, having senior government officials participating from their respective member countries. The members have frequent consultation with tax organisations and therefore, keep pace with the current trends. The Commentary contains clear decisions arrived at while formulating the articles of their respective models.[26] Commentary/ Model reflect the current views on existing provisions and on their application to specific situations. It becomes a key source of interpretation.

Still the role of OECD/UN commentaries is a matter of dispute. Though they are updated regularly to keep up with the changing practices but this very characteristic has led to a debate on its sanctity. They are widely used to interpret treaties and are expressly referred to within tax treaties. They are used to interpret not only the OECD model based treaties, but also those treaties which follow the UN or US models. The US and UN Models are essentially adaptations of the OECD Model so interpretation goes well with them.

There is no direct reference to the Commentaries in the Vienna Convention which leaves open the debate whether they fall within Article 32 only, and thus have less influence than if they were included under Article 31. However, their acceptance by the Courts is widespread. This acceptance renders this debate to be a point of academic interest only. The Commentaries are now updated from time to time separately from the Model Convention itself. Despite the overwhelming

26. Baker, Philip. *Double Taxation Conventions: a Manual on the OECD Model Tax Convention on Income and on Capital.* London: Sweet & Maxwell, 3rd ed., 2001.

acceptance of the Commentaries as a valid means of interpretation by the cour in many countries, their legal status remains unclear.

In the last two decades the world has changed dramatically. The *source* countri have become developed or *residence* countries. It is very apparent that in th time period they have adopted their own versions of the imperialist mindset of t original colonial powers. On the other hand BRICS and other *source* countri have aggressively defended their source country tax base. In short, the positi of BRICS and other *source* countries is largely a rejection of the treaty polici developed in the immediate post-World War I era. The Treaty Policy therefo needs reformulation to reflect the world of the 2010s, not the 1920s. There are variety of grounds to support such a proposition:

1. The stress of interpretation and the doubts raised therein is not beneficial anybody.

2. Treaty protection is essential to all nations whether their economies a developed or developing.

3. The chances of double/multiple taxation in BRICS and other *source* countr is also of great importance material and needs to be taken care of .

4. All countries would benefit if the existing model treaties are updated.

5. The actual history of tax treaty policy in world is very different from wh it is commonly understood.

6. The world has changed dramatically.

Relatively negative effect of tax avoidance is that tax avoidance through artific structures erodes revenue collections. There is an increased perception t domestic and international tax rules are broken and those who pay taxes a 'naïve.' Double non-taxation and avoidance of double taxation should be balanc so that the cross border flow of investments and job creation is not disturb Treaty provisions are meant to give stability to investors. If domestic considerati are the basis for bringing changes in the treaties, then it will not serve its purpo

Transparency with the Revenue team will help developing relationship betwe the taxpayers and authorities two. Jury lawyer / consultant is a connecting thr between taxpayer and administrator. So it is their work to understand perspectives of both of them to help build an 'enhanced relationship'. Enhan relationship would encourage voluntary compliance by taxpayers. If taxpay are honest, then the revenue authorities will also look at situations pragmatica Enhancing relation would have the effect of reducing litigation to a certain ext

Co-operation by taxpayer is also required for enhancing relations. The taxpayer should explain the business well to the tax authorities, in light of various complexities in the structure. The revenue should also be able to discuss the judicial approach with the taxpayer. Only a common understanding will develop and lead to enhanced relations. Revenue officers in charge also need to be educated. It is desirable that the relationship between the tax treaties and the domestic laws be unambiguous. It shall benefit the tax payers when a tax treaty reduces or exempts source country taxation. It shall help treaty partners to lubricate the smooth application of treaty benefits. It is inevitable that this debate / discussion shall continue until a clear policy is formulated. It should reflect a reasonable balancing of interests of the pertinent parties. It can therefore be concluded that the treaties are international agreements which are entered in good faith, as endorsed by Article 26 (Pacta sunt servanda) of VCLT and, unlike the domestic law, do not warrant a literal interpretation. Therefore, while interpreting a treaty, a broader interpretation should be applied.[27]

27. *Introduction to International Double Taxation and Tax Evasion and Avoidance by Committee of Experts in International Taxation and Cooperation in Tax Matters*, Geneva 24th-28th October, 2011; *Available at : http://www.un.org/esa/ffd/tax/seventhsession/CRP11_Add1_Tax%20Evasion.pdf (visited on March 02, 2014)*

Nature of Requirement of Number of Arbitrators, Judicial Approach: A Study

Prof. (Dr.) Guru Gyan Singh

ABSTRACT

Matter of number of arbitrators is directly or indirectly related with many o the provisions of the Arbitration and Conciliation Act, 1996. Uncertaint veering around the requirement of odd or even number of arbitrators i bound to affect smooth and speedier functioning of the arbitration proces and the validity of the award made after huge consumption of time an money of the parties. Divergent judicial approaches to the issue would fue the fire of litigation and heavily impair efficacy and efficiency of the weapo forged to fight the evil implications of the adversary system of disput resolution through proper courts. Matter needs be resolved by a large bench or through legislative measures. To wait for evolution and developmen of law on the subject through case to case decision would be a time takin process and may frustrate the very aims and objectives sought to be achieve by the Act of 1996. Authority of Supreme Court's decision in Lohia appear to be staggering in wake of decision in Patel Engineering case.

INTRODUCTION

Arbitration is an age old system of resolution of disputes. It is an alternative t litigation i.e. dispute resolution through the proper courts set up by the State. I this process parties agree to appoint a person or persons of their choice to decid existing or future disputes between them in judicial manner and to be bound b the decision. Arbitration aims an efficient, effective, speedier and inexpensiv resolution of disputes by avoiding time consuming procedural requirements. It i broadly believed that maximum possible autonomy to the parties and minimum scope for judicial interference largely contributes to the success of this mechanism of dispute resolution. The Arbitration and Conciliation Act, 1996 (herein afte referred to as A&C Act, 1996) is widely based on the Model Laws framed b

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UNCITRAL (United Nations Commission on International Trade Law). Experiences gathered from the working of the Arbitration Act, 1940, have, also, been duly incorporated to make it more effective and efficient instrument of dispute resolution. However, instances are that because of conflicting judicial decisions efficiency appears to be impairing. One of such instances is judicial approach to the nature and extent of the provisions of section 10 of the A & C Act 1996. This provision extends freedom to the parties to determine the numbers of arbitrators subject to the express and solitary condition that that number shall not be an even number. There is default clause that in absence of such determination arbitral tribunal shall consist of the sole arbitrator.[1] Judicial approach to the meaning and scope of the condition on the parties' freedom to determine the number of arbitrators 'that such number shall not be an even number' is at variance. This article aims to enquire into the conflicting decisions.

JUDICIAL APPROACHES – A BRIEF ACCOUNT

In Stock-Exchange Mumbai v Vinay Bahuna[2] Bombay High Court has examined the nature and scope of the requirement of an uneven number of arbitrators expressly provided by S. 10 (1) of the Arbitration And Conciliation Act, 1996 in context of its another provision S.2 (4)[3].The relevant facts of the case were that bye-law 249 (a) of the Stock- Exchange, Mumbai, framed under S. 9 of the Securities Contracts (Regulations) Act, 1956, provided for appointment of two arbitrators. Award made by two arbitrators was challenged to be invalid for being not made by an uneven number of arbitrators as required by S.10 (1) of the A & C Act, 1996. It was a case of statutory arbitration under the provision of the Securities Contracts (Regulations) Act, 1996. Statutory arbitrations are different from the consensual arbitrations. In former case parties are directed by the force of statutory provision to resolve their disputes through arbitration. In terms of S. 2 (4), subject to some restrictions provisions of the A & C Act, 1996 are applicable to the statatutory arbitrations to the extent they are not inconsistent with the provisions of law dealing therewith (statutory arbitration). And, to the extent of inconsistency they are to be subordinate to the law providing for statutory arbitration and the rules made there under. Matter was examined under

1. S. 10 Number of Arbitrators.-(1). The parties are free to determine the number of arbitrators, provided that such number shall not be an even number. (2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.
2. AIR 1999 Bom 266
3. "This part except sub-section (1) of section40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this part are inconsistent with that other enactment or with any rules framed there under."

s.2 (4) of the said Act and it was found that in the scheme and intent of S 2 (4), provisions of S.10 (1) were to be subordinate to that of the Securities Contracts (Regulations) Act, 1956 and the rules framed there under. In this backdrop, it was observed that '.....there is no doubt in our mind that bye-law 249 (a) of the appellant Exchange is a statutory bye-law having force of enactment within the meaning of sub-section (4) of the section 2 of Arbitration Act, 1996 and since the said bye-law is inconsistent with provisions of sec. 10 of the said Act of 1996, so far as the number of arbitrators is concerned, the bye-law would prevail."[4]

MMTC Ltd. v. Sterlite Industries (India) Ltd.[5] is a Supreme Court decision having direct bearing on the subject of enquiry. In this case Apex Court examined the meaning and scope of S.10 in context of Ss. 7 and 11 of the A&C Act, 1996. In this case there was an agreement between the parties that each party would appoint one arbitrator and their appointees would appoint the umpire i.e. the third arbitrator. The respondent appointed an arbitrator as per agreement but appellant contended that arbitration agreement providing for appointment of even number of arbitrators was against the scheme of S. 10 (1) of the A & C Act, 1996 and remedy in the case was by way of suit and not by arbitration. It was, also, contended that provisions of S.10 (2) were, also, not attracted to the facts of the case as there was an agreement between the parties to appoint even number of arbitrators.

It was observed that number of arbitrators did not form integral part of the requirements of S. 7 of the A & C Act, 1996 that defines the term 'arbitration agreement'. S. 10 formed part of the machinery devised to ensure operations of S.7. Therefore, 'arbitration agreement' would not suffer from any illegality simply because of reference of appointment of even number of arbitrators. It was said that in view of the terms of agreement that each party would appoint one arbitrator and their appointees would appoint the umpire i.e. the third arbitrator, requirement of S.10(1) was satisfied. Arbitration agreement was deemed to have provided for appointment of three arbitrators. S 11(3) of the A&C Act, 1996 was held to have application in the facts and circumstances of the case. Accordingly, Chief Justice of the Bombay high Court was directed to appoint the third arbitrator under S.11 (4) of the Act.

In *Satya Kailash Chandra Sahu v. Vidarbh Distilleries, Nagpur*[6] two arbitrators were appointed to act as arbitrators but they refused to perform the functions of arbitrators. It was held that failure of arbitrators to act as arbitrators did not

4. *Supra note* 2 at p.279
5. AIR 1997 SC 605
6. AIR 1998 Bom 210

make the arbitration agreement invalid. This situation was held to be covered by S.10 (2) of the 1996 Act. *National Aluminium Co.Ltd. v. Metaliplex Ltd.*[7] is an important decision on the subject that provision of even number of arbitrators does not affect the validity of arbitration agreement as defined in S.7 of the A & c Act, 1996. In this case, also, each party was to appoint one arbitrator and the parties' appointees were to appoint the umpire i.e. third arbitrator under the Act.

Achalata S. Lohati v. Hiralal Lilladhar[8] has struck relationship between sections 10 (1) and 14 of the said Act. In case an arbitral tribunal is constituted against the provisions of S. 10 (1) of the Act, its members can not perform their duties as arbitrators for the reason that they become dejure unable to act. In such situation parties can move to the court to decide whether mandate stands terminated.

In *B.T. Patil and Sons v. Kokan Railway Corpn..Ltd.*[9] there was provision in the arbitration agreement that each of the parties would appoint one arbitrator and their appointees would appoint the 'umpire'. High Court ruled that provision to appoint two arbitrators was against the scheme of section 10 (1) of the A & C Act, 1996 and directed to appoint the third arbitrator. In *Sri Venkateshwara Construction Co. v. Union of India*[10], also, there was an identical provision in the arbitration agreement i e. that parties were to appoint one arbitrator each and the two arbitrators were to appoint the 'umpire'. Andhra Pradesh High Court held that it was against the imperative provisions of S.10 (1) of the Act of 1996. Court directed appointment of a sole arbitrator under s.10 (2) on the ground that there was no agreement to appoint arbitrators under S. 10 (1) of the Act.

Decision in *Narayan Prasad Lohia v. Nikunj Kumar Lohia*[11] constitutes a class in itself. Material facts of the case were that parties had agreed to resolve their disputes and differences with respect to the family business and properties through the two named persons. After the making of award by the two persons respondent applied in High Court for setting aside the award, interallia, on the ground that arbitration by the two arbitrators was invalid for being inconsistent with mandatory provisions of S.10.(1). High Court agreed with the argument. But that was overturned by the Supreme Court. Decision has examined the nature and extent of the provisions of s.10 in context of ss.4, 11, 16 and 34 of the Act. Apex Court has dealt at length with the issue of derogability from the requirements of S.10 (1). It is of immense relevance to extract some parts of the reported decision. "Undoubtedly, Sections 10 provides that the number of arbitrators shall

7. (2001) 6 SCC 372
8. 1993 (3) Arb.L.J.462 Bom.
9. 1998 (Suppl) Arb. L J 189 (Bom)
10. AIR 2001 A.P. 284
11. AIR 2002 SC 1193

be an even number. The question still remains whether Section 10 is a non-derogable. In our view the answer to this question would depend on the question as to whether, under the said Act, a party has right to object to the composition of the arbitral tribunal, if such composition is not in accordance with the said Act and if so at what stage. It must be remembered that arbitration is the creation of an agreement. There can be no arbitration unless there is an arbitration agreement in writing between the parties."[12]

Referring a Supreme Court decision[13] on the nature and scope of S.16 it has been observed that 'under section 16 the arbitral tribunal can rule on any objection with respect to existence or validity of the arbitration agreement'[14]. For, its authority there under 'is not confined to the width of it's jurisdiction but goes also to the roots of its jurisdiction.'[15] Court has concluded that 'it is no longer open to contend that under Section 16, a party can not challenge the composition of tha arbitral tribunal before the arbitral tribunal itself.'[16] Provisions of S.11 that provide procedure for appointment of the arbitrators have also been examined. By way of an example Court has explained that even if parties have fixed even number of arbitrators, there is enough scope under S.11 to appoint the third arbitrator.

There may be a situation that by 'agreement parties may provide for appointment of 5 or 7 arbitrators. If they do not provide for procedure for their appointment or there is failure of the agreed procedure, then Section 11 does not contain any provision for such a contingency. Can this be taken to mean thar an Agreement of parties is invalid? The answer obviously has to be in negative. Undoubtedly the procedure provided in Section 11 will mutatis mutandis apply for appointment of 5 or 7 or more arbitrators. Similarly if parties provide for appointment of only two arbitrators that does not mean that agreement becomes invalid. Under Section 11 (3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning.'[17] However, in view of the Court 'why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion arbitration proceedings are not frustrated. But if the two arbitrators agree and give common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed.'[18] Court has

12. *Ibid* at p. 1145
13. *Ibid. Kakon Railways Corporation Ltd V Rani Construction Pvt. Ltd.* 2002 AIR SCW 426
14. *Ibid*
15. *Ibid*
16. *Ibid*
17. *Ibid* at p.1146
18. *Ibid*

opined that this approach would protect the time, money and energies invested in the making of award and frustrate the design of the party trying to get the award declared invalid in case his interests are not served[19]. For, allowing 'such a party to resile would not be in the furtherance of any public policy and would be most inequitable.'

Regarding the scope of the provisions of s.34 (2) (a) (v) Apex Court has observed that: "in our view Section 34 (2) (a) (v) can not be read in the manner as suggested. Section 34 (2) (a) (v) only applies if "if composition of the arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties." These opening words make it very clear that if the composition of the arbitral tribunal or the arbitral procedure is in accordance with the agreement of the parties, as in this case, then there can be no challenge under this provision"[20]. It has further been explained that "When composition or procedure is not in accordance with the agreement of the parties then the parties get a right to challenge the award.

But even in such a case the right to challenge the award is restricted. The challenge can only be made provided the agreement of the parties is in conflict with a provision of Part 1 which the parties can not derogate." Regarding the meaning and scope of the second part of the section 34(2) (a) (v) Court has not fallen in agreement with the version of the respondent and held that that "would come into play only if there is no agreement providing for the composition of the arbitral tribunal or the arbitral procedure." The Court has arrived at the conclusion that "so long as the composition of the arbitral tribunal or arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the tribunal was in conflict with the provisions of Part 1 of the said Act. This also indicates that Section 10 is derogable."

ANALYSIS

Stock Exchange, Mumbai constitutes a class in itself. Provisions of law providing for statutory arbitration are to have overriding effect to the extent of inconsistency with the provisions of the A & C Act 1996. It is irrelevant that agreed number of arbitrators is even or uneven. It means and implies that s. 10 (1) is not absolute and unqualified. Rather, it admits at least one exception to the requirement of an uneven number of arbitrators. It is pertinent to note that the relevant bye-law has been amended and number of arbitrators has been raised to three. It appears to have been done to fall in line with the express requirement of s.10 (1).

19. *Ibid*
20. *Ibid* at p.1147

B.D. Patil & Sons v. Konkan Railway Corporation Ltd.[21], *Sree Venkateshwara Construction Co. v. Union of India*[22] and *Ashalata s. Lohati v. Hiralal Lilladher*[23] represent the judicial approach that s. 10 (1) is of mandatory nature. Its non-observance would imply invalidity of composition of the arbitral tribunal that forms basis for setting aside the arbitral award. In the above noted cases[24] as per arbitration agreement parties had agreed to appoint one arbitrator each and the 'umpire' i.e. the third arbitrator was to be appointed by the two appointed arbitrators. Does it not mean that parties were duly aware of the fact that total number of arbitrators was to be three? Was this situation not covered by the provisions of s.11 (3)? Parties are free to determine the number of arbitrators, however, that number must not be an even number. They are; also, free to agree on the procedure for appointing the arbitrator or arbitrators. In case of their failure to agree on a procedure for appointing the arbitrators provisions of s.11 (3) are to be employed. Parties' failure to ensure observance of the agreed procedure to appoint arbitrators could invite operation of s.11 (6).

Provisions of Sections 10 & 11 are part of the scheme of composition of the arbitral tribunal. Arbitration agreement providing that parties would appoint one arbitrator each and those appointees would appoint the third arbitrator is wholly in conformity with the letters of ss.10 & 11. Such a state of things does not warrant any venture to enquire into the nature of the requirement of s.10 (1).Use of the term 'shall' in s.10 (1) alone would not make the provision imperative. It is to be ascertained in the context of the scheme and intent of the Act as revealed by the express provisions and their implications. Party autonomy and minimum scope for judicial interference in the arbitration process and the arbitral award is the distinguishing feature of the Act and aim to promote successful arbitration.

MMTC Ltd. v. Sterlite Industries (India) Ltd.[25] propounds that agreed even number of arbitrators does not affect the validity of the arbitration agreement as envisaged in the scheme of section 7 of the Act. This observation is not free from doubts. Firstly, it reflects that s. 7 is on higher plane than the provisions of Chapter III of Part I of the Act that deals with 'composition of arbitral tribunal' comprising ss.10 to 15. It could be inferred and implied from the aforesaid observation that arbitration agreement actually concluded between the parties is to be tested firstly on touchstone of s.7 and thereafter under provisions dealing with number of arbitrators, procedure of appointment of arbitrators, their

21. *Supra note 9*
22. *Supra note10*
23. *Supra note 8*
24. *Supra notes 9,10,8*
25. *Supra note 5*

qualifications etc. Once such arbitration agreement survives the requirements of s.7, its validity continues even if it is against the letters and spirit of other provisions like that of ss.10 (1), 11 etc.

When agreed even number of arbitrators, despite being contrary to the requirements of Sec. 10 (1), was not to affect the validity of the arbitration agreement, then there was no need of seeking support from sec.11 (3) to direct the two arbitrators appointed by the parties to appoint the third arbitrator. It is submitted that case could have been solved without taking recourse to S. 7 defining the term "arbitration agreement". Relevant facts of the case fully conformed to the requirements of s.11 (3) i.e. arbitration by the odd number of arbitrators.

Composition of arbitral tribunal could be used to assail the validity of the arbitral award.[26] Even if composition of the tribunal is not in conformity with the requirements of arbitration agreement, it continues to be valid so long as arbitration agreement is not contrary to the non-derogable provisions of Part I of the Act. Arbitration agreement as defined in s.7 forms the very foundation stone of the system of arbitration. It is itself a non- derogable provision.[27]

Lohia has been criticized on many grounds[28]. General trend is to appoint odd number of arbitrators. After Stock Exchange Mumbai decision[29] bye-law was amended fixing number of arbitrators as an uneven number. Legislature did not adopt the relevant provision of model Rules in this regard, rather deliberately preferred an uneven number of arbitrators. There is nothing in the judgment to warrant the inference that s.10 (1) is not a mandatory provision. It belies the scope of invocation of the doctrine of waiver of right to object. Parties' agreement

26. S.34 (a) (v) of A & C Act, 1996

27. Chawla, S.K., *Law of Arbitration & Conciliation Practice And Procedure* Second Edition, Eastern Law House Kolkata, 2004 at p. 174 "An arbitration agreement is the very foundation upon which the jurisdiction of the arbitrators rests and when that is not in existence (for example because of its being illegal and void) at the time when the arbitrators enter their duties , the defect is not cured by appearance of the parties in those proceedings, even if that is without protest The words within bracket are author's"

28. Malhotra, O. P, & Indu, *The Law and Practice of Arbitration and Conciliation*. Second edition, 2006 Lexis-Butterworths, New Delhi, at pp.471-72 Also see, *Judicial Intervention In Arbitration . How Far Is It Justified?* Archi Agnihotri, *http /jurisonline in*/2010 01/judicial-intervention-arbitration-how-far- is'it justified/11/22/2011 at p.2 " The Supreme Court in ONGC' case also acknowledged that Section 34 (2) (a) (v) deals with setting aside of an award if arbitral procedure or composition of the tribunal was not in accordance with the parties' agreement or in absence of the agreement , Part I of the Act comprising of Sections 2 to 43. This was in stark contrast to Apex Court's decision in Narayan Prasad lohia v Nikunj Prasad Lohia ..... Wherein it was held that if an award was in accordance with the agreement of the parties, it may not be set aside by the Court."

29. *Supra note 11*

to appoint even number of arbitrators leaves no scope for Chief Justice to appoint the third arbitrator under s.11. Decision has been termed to be a kind of judicial legislation as the Supreme Court has ignored the expression "provided that such a number shall not be an even number."[30]

It has relied on Rani Construction[31] that now stands repealed in context of six judges' decision in *S.B.P. & Co. v. Patel Engineering Ltd.*[32]. Thus scope of sec. 16 has been drastically reduced thereby. When a matter goes to the tribunal through the process of Chief Justice under s.11, validity of the arbitration agreement will not be discussed or reopened. Even it would not be subject of inquiry under s. 34, it reveals that decision in Lohia[33] is of limited scope. Nature of s.10 (1) could be investigated under s.11 by the Chief Justice and result may be different from that of the decision in Lohia[34].

For, Lohia decision has heavily relied on provisions of ss. 4 and 16 of the Act in interpreting the scope of applicability of s.34 (2) (a) (v) to the facts and circumstances of the case. Object of requirement of uneven number arbitrators is to avoid the ill-effects of the situation when arbitrators are equally divided jeopardizing the entire resources used in resolution of the disputes. Decision in Lohia also, tries to save the award from the whims of the party that fails to win the case and uses the requirement of uneven number of arbitrators as weapon. Decision, also, supports party autonomy. Objectives are important but they should not be achieved by twisting the provisions.

CONCLUSION

It emerges from the above that judicial approaches towards the nature and scope of s. 10 (1) are at variance. Stock- Exchange Mumbai forms a class in itself. Provisions of s. 2 (4) are to have overriding effect over the scheme of s.10 (1) and to be treated as an exception thereto. Decisions in B.D. Patil & Sons and Sri Venkateshwara Construction Co. represent the view point that provisions of s.10 (1) are of imperative nature and are to be complied compulsorily. MMTC CO. and National Aluminium Co. have laid down that even number of arbitrators does not effect the validity of arbitration agreement as defined in s. 7 of the A & C Act, 1996 and, s.10 (1) forms the part of machinery devised to implement s. 7. It reflects that Apex Court has not treated ss. 7 and 10 (1) at par and of the same value and importance. This situation could be understood and explained to

30. *Supra note* 26
31. *Supra note* 11
32. 2000 (7) S CC 201
33. *Supra note* 11
34. AIR 2002 SC 1193

mean and imply that provisions of s.10 (1) are derogable.[35] Accordingly Supreme Court decision in Lohia[36] stands supported and sustained. In the scheme of decision in Lohia ss. 4 and 16 have been given crucial importance to substantiate the findings. However, in view of Patel Engineering Co. decision, unqualified application of the decision in Lohia appears to be doubtful. For, the appointments of arbitrators made by the Chief Justice under sub- sections (4), (5) and (6) of s. 11 are not be questioned at any level of arbitration proceeding as well as under s. 34 of the A & C Act, 1996. In this situation there would not be any scope for invoking the application of the relevant part of s.16 involving application of s.4. From the structure and organization of sub- sections (4), (5) & (6) of s. 11 it could be inferred that they provide either for appointment of sole arbitrator or the panel of three arbitrators i.e. odd number of arbitrators. There is nothing to warrant that Chief justice is vested with authority to interfere with the scheme of arbitrators to be appointed there under. Such a state of things could be said to be basis to dispel the doubts about the nature and extent of decision in Lohia. However, it would be in the interest of all of the stake holders in the success of arbitration system that things are made clear at the earliest available opportunity by the Apex Court or the legislature.

35 It is evident from the text and tenor of s.34 (2) (a) (v) that composition of arbitral tribunal does not attract the vice of invalidity despite being contrary to the requirements of the arbitration agreement, so long as arbitration agreement is not against any non-derogable provisions of the Part I of the Act. But, position is not the same in case of validity of arbitration agreement under s.34 (2) (a) (ii). It reflects that ss.7 and 10 (1) are at different footings.

36. *Supra note* 11

Implementation of Right to Information Act: Prospects & Challenges

Dr. Bhavish Gupta*

ABSTRACT

A standout amongst the most imperative law instituted by our particular Parliament is Right to Information. It distinguishes the individuals' entitlement to data, which have been announced by various legal judgments as the right which is crucial in nature is esteemed in the Constitution. The way of the Right to Information Act, be a noteworthy development. This takes the spot of the way of life of privacy and control with responsiveness and cooperation. By enveloping its extension the both the Governments i.e central as well as state, has additionally essential majority rule outlines and the foundations taking respective authorities designations, the legal system has got a more extensive range to approve nationals with certainties for guaranteeing clarity, accountability and great administration. The Act throwing an obligation on every open power and control to give learning suo motu to people in general and to reveal yearly different particulars in regards to the association containing the classes of chronicle accessible with it. Nationals are continually getting to be more aware of their entitlement to data. It has been utilized as a device to handle chose individuals responsible for the behavior in which they spend city stores. Along these lines, this Act is more than the legal entity, it is the strategy, an apparatus, a methodology and a social hypothesis to life.

INTRODUCTION

To advance and ensure the privilege to data in India, procurements were made in different Acts went by the lawmaking body for graning data to the subjects now and again. The Supreme Court of India, as well, has acknowledged the privilege to information as an innate piece of the right to speech and expression under Article 19(1)(a) and the right to life and personal liberty under Article 21 of the Constitution.

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In 1975, the Supreme Court if there ought to emerge an event of *State of Uttar Pradesh v Raj Narain*[1] viewed that the privilege to talk unreservedly and surge consolidates right of inhabitants to know every open exhibit, everything that is done in an open way done by their representatives. The Court aiso held that in an organization of commitment, where all the administrators of civil society must be accountable for their conduct, there can be however couple of secreat actualities. The people of this country have a benefit to know every open showing, everything that has been done in an open way, by their open administraters. They are fit to know about the particulars of every civil trade in all its manner.

Then in the year 1981, the Supreme Court in the case of *S.P. Gupta v. Union of India*[2], captivated that the right to know about a thing is included in the freedom of speech and expression.

Truly talking, a development for the privilege to Information first started in Rajasthan, in 1990, when an association called 'Mazdoor Kisan Shakti Sangathan' (MKSS) was enrolled on May Day in 1990. Its individuals were negligible laborers and landless specialists of town Dendungri in Rajasthan who chose to battle for their wages amid starvation and needed straightforwardness in the record in order to battle defilement.

Further, the Apex Court in case of *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal*,[3] narrowly broadcast its appearance on the accouterment of "Article 19(1) (a)" towards the right to get data. It captivated that the appropriate to abandon of accent and announcement contains the right to receive and communicate the facts. For establishing the charge less accent appropriate of civilian of the country, all-important that the civilian accept the account of advantage of angle and the ambit of belief on all accessible affairs. An acknowledged capitalism posits a blind citizen's assortment of assessment, opinion, account and creeds is important for enabling the civilian to reach at the decision on the facts which are related to the topics related to them.

"The Apex Court in the case of *Peoples Union for Civil Liberties v. Union of India*[4] held that for a true democratic administration it is very important to have a participation as the right in the hands of the civilian in making of the policies. The right which allows the people to participate is of no use if the civil are not informed about all sides of the facts on which they are required to make views.

1. AIR 1975 SC 865
2. (1981) Supp SCC 87
3. AIR 1995 SC 1236
4. AIR 2003 SC 2363.

If the information is of one side or the information is totally wrong or if there is no information these all together are the reason for a non-informed civilian which actualize apprenticed citizens which makes capitalism an absurdity if average of advice is absorbed either by an accessory axial ascendancy either by clandestine person or by autocracy organizations. This was decidedly as in the respective country similar to our area 69% areand of citizenry is not educated."

In *Dinesh Trivedi v. Union of India*[5] the Supreme Court said that the today democracy which is modern in constitutionality, it requires that the civilian of a country have the right to understand and know what their government is doing, about what are the matters in which the administration is concerned, because they are elected by these civilians only. To guarantee the proceeded with cooperation of the individuals in the law based procedure, they must be kept educated of the crucial choices taken by the legislature and the premise thereof. For this situation the court was managing the Vohra Committee Report and expressed that however it was not fitting to make open the premise on which certain conclusions were landed at in the report, the conclusion came to in that report ought to be analyzed by another body or organization or an uncommon council to be named by the President of India on the exhortation of the leader and after the thought of the Speaker of the Lok Sabha.

In the case of *Union of India v. Association of Democratic Reforms*[6], it was held and directed that it is the duty of the commissioner of the elections in India to make awareness about the former candidate who have stand for the election.

All the developments as mentioned above made the platform for the enforcement of the law on the access to the information, which in the May 2005 law was passed by the parliament of India.

CHALLENGES IN EFFECTIVE IMPLEMENTATION

The right to speak freely and declaration incorporates right to procure data and to disperse it. The right to speak freely and representation is vital for self - satisfaction. It empowers individuals to add to verbal confrontations on civil and good affairs. The most ideal approach is to discover the most genuine exemplary of all, since it's just that the amplest conceivable scope of thoughts can flow. It is the main vehicle of bureaucratic talk to the key of popular government. Similarly vital is the part it plays in encouraging aesthetic and insightful tries of numerous kinds.[7]"The reason for the people working in the media is to push the civic in

5. 1997 (4) SCC 306
6. AIR 2002 SC 2110
7. *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal*, AIR 1995 SC 1236: (1995) 2 SCC 161.

general passion by appropriated actualities and assessments without which a just constituency cannot make an accomplished decisions."The general population interest in flexibility of exchange stems from the prerequisite that individuals from the vote based society ought to be sufficiently educated that they may impact astutely the choices which may influence themselves.

Without a doubt, the RTI raises the familiarity with people in general about government working and advances human rights. In a quick creating nation like India, accessibility of data in regards to working of open associations needs to be advanced further. Since India has a law for RTI, it can be made more gainful by its powerful usage prompting enhanced open organization for the enhancement of the individuals. This is conceivable just through the administration's cutting down of its iron shades and also individuals' dynamic inclusion in this methodology. It has rightly been seen by Henry Clay that the administration is a trust and the officers of the legislature are trustees and both the trust and the trustees are made for the advantage of the individuals.

Hence, being the assignee of the respective government the citizens are allowed to ask for the clarity and clearness in the working of the civic authorities.

The powerful execution of the Right to Information Act, 2005 relies on upon three major shifts, to be specific, from the predominant society of mystery to another society of openness; from customized oppression to power coupled with responsibility; lastly from one-sided choice making to participative administration.[9]

Then again, it has been watched that to access the information freely has always restricted by various authorities and hierarchical elements, wasteful courses of action and instruments, mindfulness and use issues, lacking utilization of data innovation and so forth.

However, we should keep in mind that the Right to Information Act is a definite codification that has conveyed a clearness and clarity as a great conception in cyclic administration. We should forever keep in mind that we are the people who have invested our share in the Act and it is our duty to protect the Act from allowing it to evolve into instrument used for the buildup of an antagonistic relationship between other shareholders, because of which the Act will get and become weak.

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8 *Indian Express Newspapers (Bombay) (P) Ltd. v Union of India*, AIR 1986 SC 515: (1985) 1 SCC 641: 1985 SCC (Tax) 121: (1985) 2 SCR 287: (1985) 1 comp LJ 115: 1985 Tax LR 2451

9. Abhishek Jain, "*RTI implementation at the District level: Issues and Challenges.*", The Indian Journal of Public Administration, Vol. 55, No. 3, July-September 2009, pp. 346-363, at p. 347.

POSITIVE EFFECT OF THE ACT

"The usage of the RTI Act has occurred in the whole nation, nonetheless, the pace and advancement of execution contrasts from state to state. Despite the fact that it is just around ten years that the RTI Act has been actualized in the nation, yet the patterns are sufficient to show the positive result from it. The Act has acquired an "extreme" change in the way the legislature and organization capacity. Presently it is no more a time of shut, hidden out of reach, shrouded, internal situated organization. Gradually yet consistently, the different government functionaries are being prepared in the usage of the Act. The normal open has likewise begun utilizing their great part of dynamic numbers. Subjects have continuously gotten to be mindful of the colossal capability of this right in their general strengthening. The administration functionaries have gradually begun carrying on in a more mindful and also responsive way. The Act has come as an awesome salvage and excellence for all the upright and fair officers who need to carry out their employment according to the standards with no impedance from any quarter at all. The expert dynamic divulgence by different open powers. however not in the coveted quantum, has likewise decreased the data hole of the subjects.

Albeit a large portion of the Information Commissions require more assets, yet overall they are progressively assuming the part imagined for them under the Act. Common society associations as well as the persons working in the electronic field has begun utilizing this particular act of 2005 for encouraging it as a part of straightforwardness and objectivity. This act utilized as a part of the provincial connection by the poor and the defenseless portion of society.

The executive officers are provide with proper help al both the state as well as national level by many institutional instruments.

The most important thing is that because of the enactment of this Act there has been an increase in the functioning and the governing of the authorities. Which has resulted in the betterment of the capability and responsibility of the system of administration at liberty.

As far as the state-level experience is concerned, states like Bihar and Karnataka present an example of overcoming adversity. Bihar has one state run, multi lingual call focus to gather and process all requests for data looked for under the RTI Act and to forward them, for an ostensible expense, to the persons concerned. Data seekers can contact the call focus which would set up the formal application and fax or email it to the concerned office. in Karnataka, e-gatherings take up the reason for the RTI candidates. There the State Information Commission

enthusiastically takes care of the grumblings inside the ordered thirty days, and the Commissioner does not falter to force punishment on open officers for supplying incorrectly data or not agreeing to the applications for data.[10]

The experience and the practice of the most recent ten years has demonstrated that individuals over the social strata are conjuring the RTI Act for a mixture of reasons and much of the time this enactment has demonstrated very effective in checking the unreliable and now and again to a degree domineering conduct of managers, enjoying political and regulatory defilement. Open energetic nationals having a solid municipal enthusiasm to battle this debasement take resort to the RTI Act and the greater part of them have been fruitful in securing their common freedoms, gave the PIO's concerned have acted capably.

Numerous a times, the candidates have gone past securing solutions for their inquiries. They have got the contaminating commercial enterprises shut, battled defilement and shaped themselves into a bigger gathering to bolster each other. Web clients have framed their own particular online care groups and helped candidates' document applications. Individuals in provincial Karnataka consolidated battles for right to data and right to sustenance to battle hunger. An eighty six year old Dalit agriculturist in Maharashtra utilized RTI information to keep his strawberry fields from going away. in Uttar Pradesh, more than fourteen thousand inhabitants in a bunch of eight towns utilized RTI to battle for their entitlement to have streets, extensions and power.[11]

This is a critical increase. Subsequently, we have seen that in a lot of cases RTI offers a strong politico-legitimate instrument to the composed intrigues attempting to ensure and advance common freedoms of the individuals and in addition to the persecuted and distraught people and gatherings, yet there are sure detours which have hampered the smooth operation of the Act and these must be retouched to get an all pervasive straightforwardness in organization.

CHALLENGES IN THE ACTIVE APPLICATION OF THE ACT

As we all know that there are always two sides of the coin, we have studied the one side of the RTI Act which was the positive side, whereas many scholars who criticize this act says that there are some loopholes in this act and it is somewhere not framed correctly. Further they say that this act is over ambitious, it does not cover the difficulties which one faces in the practical life in the application of its

10. Ashok Kumar Mukhopadhyay, *"The RTI ACT: A Critical Assessment"*, The Indian Journal of Public Administration, Vol. 55, No. 3, 2009, pp. 434- 454, at p. 441.

11. Vidya Subramanian, *"Right to Information is Now a Common Man's Instrument"*, The Hindu, 15 October 2008, p. 03.

clauses. It was founded that there is a negative biasness against the functioning of the government authorities and the public functionaries in the framing of the act. Also the person seeking information have some bona fide queries and concern respecting the Act.

We can say that this Act is useful in many ways but some critics says that this act mostly solves the issues and fulfill the needs of the exclusive class and that too in a very narrow way because the infrastructure is very limited, alienation of capability partner. In the following paragraphs we will discuss the challenges and the issues which are found in the active application of the act.

HURDLES IN FINDING INFORMATION

Just giving the right and allowing to access the information is not sufficient, with the right there has to be cure or ways to deal with the hurdles or the obstacles that come in the way while accessing the information. There are many information seekers who are either not aware of their rights to seek information or they are depressed because of the careless, combative and usually arrogant approach of the public functionaries. Low quality of the facts and the information and the absence of a consistent structure across the administration in different regions adds burden on the shoulder of the applicants seeking for the factual information.

- **Low Public Awareness:**

Because of the less awareness about the provisions of the act of 2005 many people who wants to use their right of accessing information are somehow left behind. The main problem lies in the procedure formality, there are so many persons who want to seek the information without meeting the public information officer directly went to the commission and when their application get rejected that person without going for the appeal under the authority of appellate to make first appeal directly go to the commission. The main drawback lies that the people are not aware of the procedure that has to be followed while making an application for letting him access the information.

The worst part is that neither the information asker nor the authorities providing the information knows about the provisions of the act and they are still doubtful. We have observed that again and again in the newspapers that the first appellate authorities are not functioning properly. They either don't give the opportunity to the applicant to speak or they give the orders because of which the irritated applicant has to make a second appeal to the information commission. This result into a lot of inconvenience and wastage of limited resources.

The sad side if this act is that even the officers appointed under this act does not

know about all the provisions of this act. It is evident through the newspaper who daily publish about the malfunctioning of the commissions as well as of the authorities made for filing the appeal. The lack lies on the fact that the officers are not performing their duties completely sometimes the orders are not been passed or the officers did not give the opportunity to applicant to keep their wordings before them because of which the applicant is left with no other option to move an appeal before the second appellate authority. An inconvenience is caused because of this malfunctioning on the part of the officers as well as the it leads to the wastage of the time and of the resources which are already scared.

- **Restraint in Record Examination as well as in Application Filing:**

Many scholars have observed, framers of the Act of 2005 have not taken proper step while framing it, as the many provisions of the act are not user-friendly. It happen many times that the applicant did not know where the office of the rti is located or where the application has to be submitted or to whom the application has to be addressed, they are not aware of the fact that if they application is not entertained or rejected then to whom they should consult, who is the consulting authority.

- **Provided Information in Poor Quality:**

Sometimes the information provide for a particular query is very poor in nature. The applicant did not get satisfied with the reply which they get as an answer to their query. The information is either inadequate or false. The information is very absurd in nature. About seventy nine percent applicants are not satisfied with the information they are getting in reply. About ninety percent people living in the states of Uttar Pradesh and Andhra Pradesh said that the information which they got was vague ad incomplete.[12] It is commonly criticized that to deal with the deadline of furnishing the information the providers give incomplete information.

- **Complication in Finding the Correct Officer:**

It has becomes very difficult for the applicants to discover the correct officer because in many offices especially in the public authorities at their district and block level the names of the respective officers are not displayed properly with their designations. And the worst part is the consistent transfers of the officers. When the applicant meets one officer a week ago when he will return, he will find that the respective officer has been transferred. So the applicant has to find the newly posted officer each time he visit the office for their queries. Which result in the wastage of the time, money of the applicant which discourage the

12. Final Report, Understanding the Key Issues and Constraints in implementing the RTI Act, Pricewaterhouse Coopers, June 2009, p. 44.

applicant to move to the rti offices.

- **Approach of PIOs:**

Those seeking for the information frequently whine of the antagonistic and threatening disposition of the authorities. There is no courtesy even basic are found in the offices of the information as well as in POIs. The applicants are harassed by these officers. So to get the information now the applicants believe that they has to be rigid as well as harsh, that is the last option left with them while dealing with these POIs.

Against PIOs there are numerous number of reports, saying that these officers are not helpful. This situation is not only because of the POIs but their superiors are also responsible they hold the hand of the POIs.and ask them not to disclose all the facts to the applicant. To fulfill their malpractices what they do they try to deliver the information in the language which is vague on the face of it, which is very difficult for a normal person to understand. We can say that these POIs show on the face that they are working according the rules as well as the regulations framed by the acts but inside they are just making fun of it by applying there corrupt minds.[13]

- **Fee Payment:**

Mode for the payment and the amount charged for providing the information is not fixed. The main point is that the applicant did not know the correct account to which the fees for the application have to be credited.

- **No Whistleblower Protection:**

The main drawback of the act is that it does not provide any kind of safety to those who try to bring the faces of the industrialist as well the corrupt politicians who are increasing the evil of the corruption within the roots of the system of the administration. The example of this drawback is the case of Amit Jethwa, he was one of the activitst in support of the right for accessing the information, this activist was a resident of Gujarat state, his input was that he was standing against the practices of the corruption he was asking for the information as well filed numerous petition against the sanctuary of lion in Gir.

As a result of which he was killed. From this we can see that if a person wants to know about particular information he should be ready to face the consequence and that consequences can lead to the death of that person.[14] The one who are actually want to seek information are always under the evil eyes of the bad

13. Ranbir Singh, "*RTI Ineffective in Haryana*". *The Tribune*, Chandigarh, 0 July 2009, p. 09.
14. Shreyas Navare, "*Whistling in the Dark*". *The Hindustan Times*, July 24 2010, p. 10.

people. There are other examples of these brutality are Manjunathan as well as Satyendra Dubey, they all were the activist apparent several acreage scams and base politicians and bureaucrats and the have to pay the amount of death in exchange of using their right to access the information. As a result of this the government tried to make laws to protect these suffers a bill was drafted in the year 2006, it was drafted but could not become a law. As per the abstract law, any being can accomplish a complaint on bribery adjoin any axial government agent The guidelines according to this bill was that any person who are suffering by corruption done by the hands of the government agencies are free to file a complaint under the CVC. After te matter is filed under the CVC now the role of the CVC starts from here, it will do complete investigation and on the basis of such ill safeguard the whistleblower.

CONCLUSION

The Right to Information Act 2005 has been regarded as one the golden step taken by the legislatures in the history of the India, which allows the general people to know about what actually is going around the world, what the authorities appointed by them are doing for them. Bin there are some exemptions to their freedom and they are enumerated under the Section 8(1) which talks about the interest of the civic and this section has been overridden by the section 8(2) which says that it is the in the hands of the civil administration to disclose an information or not, they first analyses that whether the disclosure of such information ill affects the interest of the public at large or not and if they find that it will then they will allow the disclosure of such information, but they are not satisfied that the disclosure will be in favor of masses then they will not allow the disclosure of the information.

If the administration tries to hide the information from the civic they are not helping the people but they are actually creating many problems for the people, who are suffering from the hands of their representatives who are elected by these people only. This policy of hide seek has resulted that the people are not trusting their representatives, make fun of the works done by the government and it also leads to bedew the enthusiasm of the people. To make a person free he has to be well informed. In a country where people lack basic information and knowledge about their own rights are therefore rightly treated as slaves because under the sovereign will of the government and steps are taken to encourage the spread the knowledge about the basic rights of the human life. The spread of a law like RTI would not only help a nation of population having more than one billion to rise out of their miseries but would also help in eradicating the social evils like corruption, nepotism, red tapism and abysmal state of working the

administration and bureaucracy of this country. A feature of RTI act, are the provisions that makes inform the people about how to access the information. This act has been marred by controversies like whether it is self-efficient enough as a law to help the people in distress and need.

RTI act has not only gave the powers in the hands of the people but they have also help in minimizing the corruption. This has been made possible because now the authorities of the public are answerable to all the activities they are doing, now they cannot do corruption on the name of the functions.

Till now this act has been an effective step towards the growth of the nation but alone this act cannot perform all the functions which help in the growth of the nation the civilians too has to perform the duty of their bit. They have to take full but for proper reasons use of this act. They should file the application for seeking the information for a proper reason they should not file it just for the sake to file which can lead to over burden on the commission and as a result will minimize the efforts. So the civilians have to be conscious while exercising the power which is given to them.

Enforced Disappearance: An Undefined Crime in Bangladesh

Md. Raisul Islam Sourav*

ABSTRACT

Enforced disappearance is regarded as State sponsored heinous crime which emerged recently in Bangladesh. Political opposition is the main target of forced disappearance; however, civilians are also victim of this offence. Most of the incidents are unsolved and law enforcing agencies repeatedly denied their involvement with this. UN has adopted an International Convention for the Protection of All Persons from Enforced Disappearance in 2006 to abolish the offence from the planet. According to this convention state parties are obliged to take necessary actions to stop this offence. Some other international conventions also treated it as crime against humanity. However, no criminal laws of Bangladesh have yet recognized forced disappearance as offence albeit now it is a reality in Bangladesh. Nevertheless, right to life is one of the key fundamental rights guaranteed under Bangladesh constitution which is violated by continuous occurring of this crime. It has huge impact on victim's family as well as on the society of Bangladesh. Bangladesh needs to be a state party of the International Convention for the Protection of All Persons from Enforced Disappearance immediately and needs to legislate a new law to prevent any sort of state sponsored crime to stop further consequences. Otherwise, present illegal practice of forced disappearance will bring massive consequences for the whole nation.

INTRODUCTION

In last couple of years, the occurrences of abduction, kidnap, enforced disappearance, killing etc. have increased immensely in Bangladesh. Among them the seven murders case at Narayanganj in 2014 had created most reaction among the citizens which exposed the cruelty and inhumanity of the incident as

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well as aware the country massively about the gravity of these offences. Apart from this, in recent years there are huge numbers of allegations regarding kidnap, abduction, forced disappearance, extortion and finally killing by unidentified perpetrators.

Most of the incidents are still unsolved and a very few people are rescued successfully by the law enforcers. However, in most of the abduction cases family members, relatives and friends of the victim triggered their assertion towards law enforcement agencies and specifically they have suspected and alleged that people wearing civil dress introduce them as member of Rapid Action Battalion (RAB) or Detective Branch (DB) or from other law enforcing agencies are arresting and forcefully bringing the victim with them.

But when victim's family or media are asking the law enforcers, they repeatedly denied the matter and told that they even do not know anything about it or they did not conducted any such operation. Till now, none of the offenders have brought to trial. Moreover, the incidents are neither properly investigated nor any actions has been taken with proper liabilities to prevent such events. Hence it is not impractical at all that the criminals took the opportunity and gained their desire by the name of law enforcement agency.

DEFINITION OF ENFORCED DISAPPEARANCE IN INTERNATIONAL LAW

Enforced disappearance is a relatively new addition to state crime.[1] **Enforced disappearances persist in many countries all over the world, having been a continuing feature of the second half of the twentieth century since they were committed on a gross scale in Nazi-occupied Europe.**[2] After the expansion of this offence in December 2006, the UN has adopted the international Convention for the Protection of All Persons from Enforced Disappearance.[3] The Convention entered into force on 23 December, 2010. To date, 90 states have become signatories, and 30 have ratified the Convention.[4] Among those

1. "*Enforced Disappearance: A Violation of Humanitarian Law and Human Rights*," International Committee of the Red Cross, 27June 2006. <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/human-rights-council-statement-270606

2. Jean-Marie Henckaerts & Louise Doswald Beck, *Customary International Humanitarian Law*, P. 379 (2005)

3. The text was adopted on 20 December 2006 (A/RES/6)/177), and was opened for signature on 6 February, 2007.

4. The countries that have ratified the Convention to this date are: Albania, Argentina, Armenia, Belgium, Bolivia, Brazil, Burkina Faso, Chile, Cuba, Ecuador, France, Gabon, Germany, Honduras, Iraq, Japan, Kazakhstan, Mali, Mexico, Montenegro, Netherlands, Nigeria, Panama, Paraguay, Senegal, Serbia, Spain, Tunisia, Uruguay & Zambia.

states that are a party, 12 have recognized the competence of the Committee of Enforced Disappearances (CED) to receive and consider communications both by individuals alleging that their rights under the Convention have been violated as well as communications by states claiming that another state party is not fulfilling its obligations under the Convention. Very few states have implemented the Convention into national law. The convention aims to prevent enforced disappearances taking place, uncover the truth when they do occur, punish the perpetrators and provide reparations to the victims and their families.

The Convention delivers a definition of the crime of enforced disappearance and necessary state action in order to both prevent the occurrence of the crime and to allow for the investigation and prosecution of the culprits. As per the language of Article 2 of the mentioned Convention an enforced disappearance takes place when a person is arrested, detained or abducted by the state or agents acting for the state, who then deny that the person is being held or conceal their whereabouts, placing them outside the protection of the law. Hence the International Convention for the Protection of All Persons from Enforced Disappearance identifies the following elements in the definition of enforced disappearances:

- There is an arrest, detention, abduction or any other form of deprivation of liberty;
- That conduct is carried out by agents of the state or by persons or groups of persons with the authorization, support or acquiescence of the state;
- The conduct is followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
- The objective result of the conduct is that the disappeared person is placed outside of the protection of the law.

Article 1(2) also furnishes, in no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. In addition to this, under Article 4 each State party has an obligation to take necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Moreover, the aforementioned Convention added in Article 6(1) (a) & (b) that any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance; and a superior who: knew, or consciously disregarded information which clearly

indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance and he/she shall be liable for the commission of that offence.

Enforced disappearance is a cumulative violation of human rights.[5] This is because it may inflict a wide range of human rights violations, including violation of:

- The right to life: as the person may be killed or his or her fate may be unknown;[6]
- The right to security and dignity of a person;
- The right to be free from arbitrary detention;[7]
- The right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment;[8]
- The right to humane conditions of detention;[9]
- The right to legal personality;[10]
- The right to fair trial;[11]
- The right to free movement;[12]
- The right to family life;

All of the above rights are guaranteed as fundamental rights whether directly or indirectly and enforceable by the court under the scheme of the Constitution of the People's Republic of Bangladesh.[13]

5. Steven R. Ratner, Jason S. Abrams & James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Pp. 128-29 (3d ed. 2009).
6. Guaranteed as fundamental right underArticle 32 of the Constitution of the People's Republic of Bangladesh.
7. Guaranteed as fundamental right under Article 33 of the Constitution of the People's Republic of Bangladesh.
8. Guaranteed as fundamental right under Article 35 of the Constitution of the People's Republic of Bangladesh.
9. Guaranteed as fundamental right under Article 33 of the Constitution of the People's Republic of Bangladesh.
10. Guaranteed as fundamental right under Article 31 of the Constitution of the People's Republic of Bangladesh.
11. Guaranteed as fundamental right under Article 35 of the Constitution of the People's Republic of Bangladesh.
12. Guaranteed as fundamental right under Article 36 of the Constitution of the People's Republic of Bangladesh.
13. Mahmudul Islam, "*Constitutional Law of Bangladesh*," 2nd ed., Mullick Brothers, 2010, Dhaka

Apart from this, the Rome Statute of the International Criminal Court, the Committee of the Red Cross Rules of Customary International Humanitarian Law, the Inter-American Convention on the Forced Disappearance of Persons prohibits the act and obliges the State parties to define forced disappearance of persons as a crime in their national law and to impose a appropriate punishment commensurate with its gravity.

Rome Statute of the International Criminal Court particularly treats forced disappearance as crime against humanity in Article 7 as "*For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

(i) Enforced disappearance of persons."[14]

Additionally, Inter-American Convention on the Forced Disappearance of Persons affirmed the obligation of State parties in this regard in Article I as "*The States Parties to this Convention undertake: a) Not to practice, permit or tolerate the forced disappearance of persons, even in the states of emergency or suspension of individuals guarantees.*"

Hence to prevent this kind of offence Bangladesh should become a state party to the International Convention for the Protection of All Persons from Enforced Disappearance and must needs to legislate a new law urgently to stop the crime effectively.

IMPORTANCE OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

Unlike other human rights violations, enforced disappearances were not prohibited by a universal legally binding instrument before the Convention come into force in 2010.[15] Before that only the Rome Statute of the International Criminal Court[16] provided for prosecution and award of reparation to victims in cases where enforced disappearance amounted to crimes against humanity.[17]

The crime of enforced disappearances was also prohibited prior to 2010 by the 1992 UN Declaration on the Protection of all Persons from Enforced

14. Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court, in the International Criminal Court: The Making of the Rome Statute*, Pp. 79 & 102 (Roy S. Lee ed., 1999).
15. Antonio Cassese, *International Criminal Law*, P. 80 (2003).
16. Came into force in 2002
17. Theodor Meron, *The Humanization of Humanitarian Law*, Pp. 94 & 239 (2000).

Disappearance, the 1996 Inter-American Convention on Forced Disappearance of Persons Rights and customary international humanitarian law. However, this previously existing framework exhibited both serious gaps and ambiguities, and has proven to be insufficient as a protection mechanism. The Convention, despite its own flaws, corrects some of the existing gaps in the legal framework.

- Firstly, the Convention makes enforced disappearance crime under international law and recalls the right of every person not to be subject to it, even under exceptional circumstances, such as the state of war or a threat of war, internal political instability or any other public emergency.
- Secondly, it is an important treaty because it obliges states to implement it into national law. Therefore, ensuring that impunity shall not prevail for enforced disappearance.
- Thirdly, it guarantees the rights of victims or their relatives to have access to justice and full and effective reparation.
- Fourthly, the Convention sets up the Committee on Enforced Disappearances which begins its work in November 2011.

Prior to this, the only mechanism specialized to deal specifically with enforced disappearances was the UN Working Group on Enforced on Involuntary Disappearances.[18] This body has received and examined reports of disappearances submitted by relatives of disappeared persons or human rights organizations acting on their behalf since its establishment in 1980. This important global rapid response mechanism for requesting states to carry out investigations into cases in which the Working Group believes an enforced disappearance has taken place and monitoring state compliance with the Declaration on the Protection of all Persons from Enforced Disappearance continues to exist.

The Committee on Enforced Disappearance (CED) will similarly receive requests for urgent action from relatives of the disappeared, their legal representatives or others, which it can transmit to the state party concerned with a request to clarify the fate and whereabouts of the disappeared person. Also it will be able to consider individual complaints by persons who claim to be a victim of a violation of the provisions of the Convention, although only after states parties have recognized the Committee's competence to do so. The Committee is also empowered to perform other functions to monitor implementation and state parties' compliance with their obligations under the 2010 Convention.

18. Maureen R. Berman & Roger S. Clark, *State Terrorism: Disappearances*, Pp. 13 & 531 (1982).

FORCED DISAPPEARANCE UNDER THE CRIMINAL LAWS OF BANGLADESH

In any law of Bangladesh there is no recognition of enforced disappearance. It is not only undefined in any penal law but also not treated as an offence in any way. It is a new form of crime in this country and launched last couple of years past. But there are provisions regarding kidnap & abduction in the Penal Code, 1860.[19] According to section 362 of the Penal Code, 1860 a person is said to commit the offence of abduction when he by force compels or by any deceitful means induces any other person to go from one place to another.

On the opposite side, section 359 enumerates kidnapping is of two kinds i.e kidnapping from Bangladesh and kidnapping from lawful guardianship. Whoever conveys any person beyond the limits of Bangladesh without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from Bangladesh. On the contrary, whoever takes or entices any minor or any person of unsound mind, out of the keeping of the lawful guardian without such guardian's consent is said to kidnap such person.

As per the provision of the Penal Code a person whoever kidnaps any person from Bangladesh or from any legal guardian shall be punished with detention of either description for a term which may extend to seven years and shall also be liable to fine. Further, section 364[20] prescribed the punishment for kidnapping or abduction where the intention is to murder up to imprisonment for life or rigorous imprisonment for a term, which may extend to ten years and fine also. After analyzing these two we can say that **kidnapping and abduction have the following features:**

- Kidnapping is committed in respect of minors under sixteen years in case of a male and under eighteen years in case of a female, or a person of unsound mind. Abduction can be committed in respect of a person of any age.
- In the event of kidnapping, a minor is usually taken away, forcefully or not, without the consent of legal guardian but force, compulsion or deceit are basic elements of abduction.
- Consent of the victim in case of kidnapping is immaterial where in case of abduction absence of voluntary consent is of vital importance.
- Kidnapping moves the victim away from the custody of legal guardian and

19. Alhaj Zahirul Haq, "*Penal Code,*" 5th ed., 2010, Anupam Gyan Bhandar, 2010, Dhaka.
20. The Penal Code, 1860 (Bangladesh).

being so it is a substantive offence but abduction is an auxiliary offence.

Apart from this, if a person kidnaps or abducts any child under the age of ten, in order that such child may be murdered or subjected to grievous hurt, or slavery, or to the lust of any person, shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years, and shall not be less than seven years.[21] Additionally, if a person kidnaps or abducts any woman with intent that she may be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse shall be punished with death or transportation for life or with rigorous imprisonment of either description for a term which may extend to twenty years but not less than ten years, and shall also be liable to fine.[22]

The punishment for murder after abduction is death penalty or imprisonment for life as stipulated in section 302 of the Penal Code, 1860. In addition to this, if kidnapping or abduction is committed with an intention to wrongful confinement, the offender shall be punished with custody of either description for a term, which may extend to seven years and shall also be liable to fine.

Enforced disappearance is a crime under international law for which states are obliged to hold perpetrators responsible through criminal investigation and prosecution. Moreover, it amounts to a crime against humanity when it is committed as part of a widespread or systematic attack on a civilian population. Forced disappearance is a particularly cruel human rights violation; a violation of the person who has disappeared and a violation of these who love him/her.[23] The disappeared person is often tortured and in constant fear for their life, removed from the protection of the law, deprived of all their rights and at the mercy of their captors while every person has the right to life, liberty and security of person.

ROLE OF COMMITTEE ON ENFORCED DISAPPEARANCE (CED) TO PREVENT FORCED DISAPPEARANCE

The Committee on Enforced Disappearance (CED) is similar in its form and function to other UN human rights treaty bodies, such as the Committee against Torture (CAT). CED is composed of ten experts in the field of human rights, who serve on the Committee in their individual capacity and are expected to exercise their functions independently and impartially. Within two years of accepting the

21. Ss. 6, 7 & 12 of the Prevention of Oppression against Women and Children Act, 2000 (Bangladesh).
22. S. 5 of the Prevention of Oppression against Women and Children Act, 2000 (Bangladesh).
23. William Winthrop, *Military Law and Precedents*, P. 812 (2d ed. 1920).

Convention, state parties are required to submit a report to the Committee about the measures they have been undertaking to implement the Convention. Upon examining the report, the Committee will make general suggestions and recommendations as it considers appropriate to the state party.

Furthermore, the Committee can transmit requests for urgent action sent by or on behalf of the relatives of a disappeared person to state parties requesting that they clarify the fate and whereabouts of the disappeared person. It can also undertake visits if it receives reliable information indicating that a state party is seriously violating the provisions of the Convention, or may bring situations of widespread or systematic practices of enforced disappearances to the attention of the UN General Assembly.

Moreover, the Committee also has an optional individual complaints system. This means that it can consider communications submitted by or on behalf of individuals alleging to be victims of a violation of the provisions of the Convention by a state party, which has declared that it accepts the competence of the Committee to receive such individual communications.

The Committee may also receive and consider communications in which a state party claims that another state party is not fulfilling its obligations under the Convention if the state party concerned has agreed to the optional inter-state communications procedure.

EFFECT OF FORCED DISAPPEARANCE ON THE SOCIETIES AND INDIVIDUALS

An enforced disappearance of an individual has a tremendous effect on the lives of his or her loved ones and their communities.[24] Families are often emotionally unable to find closure and come in terms with the disappearance of their loved ones. Many suffer from severe psychological distress, sometimes resulting in physical illness as well. Children are not immune from such anguish; disappearance of a parent, sibling, or other members of the family often adversely affects their educational performance and social behaviour.

Furthermore, families frequently face enormous economic consequences, especially when the victim was the principal bread-winner of the family. Even if this was not the case, many families find themselves in dire economic straits during the course of their search for the victim. The societal and cultural isolation faced by the families frequently go undocumented. For example, while widows in certain

24. Egon Schwelb, *Crimes Against Humanity*, pp. 178, 179-80 (1946).
25. UN War Crimes Comm'n, Law Reports of Trials of War Criminals, P. 115 (1949).

cultures have a well-established support system within communities, wives of disappeared victims are at times left in limbo.[25]

Often, people who have disappeared are never released and their fate remains unknown. Their families and friends may never find out what has happened to them. But the person has not just vanished. Someone, somewhere, knows what has happened to them. Someone is responsible but all too often the offenders are never brought to justice. However, the sufferer and his/her family have right to get fair justice and to reparation.[26] They also have the right to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end.

VIOLATION OF NATIONAL AND INTERNATIONAL LAWS

This incident indicates the serious scenario of falling rule of law in Bangladesh. The Republic is bound to ensure security and safety of life and property of every citizen. Furthermore, it has responsibility to ensure citizens fundamental rights guaranteed by the Constitution.[27] But, by detaining any person without any due process of law, Govt. has grossly violated his fundamental rights. The Constitution of People's Republic of Bangladesh says that: *to enjoy the protection of the law; and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.*[28]

On the other hand, another Article of the Constitution incorporates: *no person shall be deprived of life or personal liberty saves in accordance with law.*[29] In reality, this has not been implemented and this most fundamental right is being repetitively violated with complete impunity. The Govt. violated these two Articles of the Constitution of Bangladesh by depriving it's citizen from enjoying the protection of law and to be treated in accordance with law that are announced in our sacred Constitution as inalienable right of every detenu.[30] The law enforcing agencies detained at the time of illegal arrest without any warrant of arrest from any court of law. Even they didn't inform the ground(s) for arrest, didn't produce

26. Beth van Schaack, Crimen sine Lege, *Judicial Lawmaking at the Intersection of Law and Morals*, Pp. 97 & 119 (2008).
27. Enumerated in Part III of the Constitution of the People's Republic of Bangladesh.
28. Art. 31 of the Constitution of the People's Republic of Bangladesh.
29. Art. 32 of the Constitution of the People's Republic of Bangladesh.
30. Art. 31 of the Constitution of the People's Republic of Bangladesh.

him before the nearest Magistrate Court till now and didn't get chance to consult with any lawyer which is the clear violation of the Constitution.[31]

The Universal Declaration of Human Rights, 1948 prohibits Govt. from arbitrary arresting with its clear cut text as it includes: *"no one shall be subjected to arbitrary arrest, detention or exile."*[32] Each and every forced disappearance violated universal human right to be safe from illegal arrest.[33] Bangladesh acceded to the International Covenant on Civil and Political Rights (ICCPR),[34] that prohibits the grave violations of rights highlighted above. According to Article 6 and 2 of the ICCPR, Bangladesh respectively has the obligations to ensure the right to life of its people and to ensure prompt and effective reparation where violations occur.

It is also obliged to bring legislation into conformity with the ICCPR. Under the obligation of ICCPR,[35] the Bangladesh government must ensure a fair and public trial for anyone charged with a criminal offense, and such a trial must take place "without undue delay." ICCPR also requires Bangladesh to protect freedom of expression.[36] Bangladesh is a state party to the Convention Against Torture (CAT) and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Under CAT, the Bangladesh government must ensure that any person who alleges he has been subject to torture has the right "to complain to and to have his case promptly and impartially examined by competent authorities."

RECOMMENDATIONS TO STOP FORCED DISAPPEARANCE

The government of Bangladesh should ensure a fair and independent investigation into all the cases of disappeared citizens. The government also needs to make clear to its security forces that the era of torture with impunity is over. Any criminal offence should be tried through the criminal justice system; it must not be punished by security forces outside of the due process of law. In the serious human rights violation case, Govt. should take positive step very soon. Every

31 Art. 33 of the Constitution of the People's Republic of Bangladesh. The said Article says: (1) No person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

32 Art. 9 of the Universal Declaration of Human Rights, 1948.

33 H. Lauterpacht, *The Law of Nations and the Punishment of War (Oxford*, P. 58 (1944).

34 On 6 September 2000.

35. Art. 14 of the International Covenant on Civil and Political Rights (ICCPR), 1966.

36. Art. 19 of the International Covenant on Civil and Political Rights (ICCPR), 1966.

victim should be produce before the Court immediately by the concerned law enforcing agency within whose custody he is detained.

International community must consider the issues of human rights violation and the disappearances in political arena while making any decision about their relation with Bangladesh. Donor agencies should ensure that no person is kidnapped or tortured due only to his political identity, and that all people get equal protection of law from the state. Bangladesh must be urged to halt the growing phenomenon of enforced disappearances and show its commitment to do so by ratifying the International Convention for the Protection of All Persons from Enforced Disappearance without delay and producing and implementing in full domestic legislation in line with the provisions of this instrument.

States must commit themselves to ending the practice of enforced disappearance by taking steps to respect, protect and fulfill the rights of individuals not to be subjected to enforced disappearance. Furthermore, states must tackle the issue of impunity and ensure that the perpetrators are brought to justice.

Bangladesh should ratify the International Convention for the Protection of All Persons from Enforced Disappearance. Moreover, Bangladesh should accept the competence of the Committee on Enforced Disappearances to receive complaints from individuals and state parties under Articles 31 and 32 of the Convention. In addition, it should implement the Convention into national law into line with international law and standards.

Adoption of a long-term and comprehensive plan can prevent and eliminate enforced disappearance, which involves establishment of effective training programs of law enforcement and other personnel. Civil society actors can take specific actions to support their calls urging governments to ratify the Convention. Civil society may participate in the drafting and commenting of national implementing legislation. Civil society members can provide information in relation to the Committee's (CED) review of state reports and its other functions under the Convention, submit urgent requests for action to clarify the fate and whereabouts of a disappeared person, or submit individual communications on behalf of an individual who claims to be a victim of a violation of the Convention's provisions by a state party.

Women and women's organizations should be particularly encouraged to do so to ensure that gender issues are taken into account and that the process of preparing implementing law is inclusive. Also, in many countries, it is men who are most often subject to disappearance, and it is their women family members who spearhead efforts to obtain justice for their loved ones.

CONCLUSION

State must commit to conclude the practice of forced disappearance by taking steps to respect, protect and fulfill the rights of individuals not to be subjected to enforced disappearance. Bangladesh should ratify the convention and incorporate the offence in domestic law immediately. Also the State should take effective legislation, administrative, judicial or other measures for the taxpayers to prevent and provide protection against unacknowledged or involuntary and forced disappearances. Further, states must undertake the issue of impunity and ensure that the criminals are brought to justice

Evaluation of the Rights of Issuing Bank under Documentary Credit Law in India: A Critique

Dr. Susmitha P. Mallaya*

ABSTRACT

Today the phenomenon of globalization is affecting commercial transactions all over the world. One of the thrust areas is documentary credits. They are the most common and safest payment instruments used in international trade transactions. India also promotes use of these instruments both in national and international trade. Merchants world over treat them as equivalent to cash. Banks acts as intermediaries between the parties and earns commissions which are relatively high. Issuing banks play a pivotal role in these transactions and they are entitled to get re-imbursement once they comply with the terms of the credit. This is based on the general principle of law of agency. Hence, if the buyer commits any breach in terms, the issuing bank has right to sue him. The judicial decisions show that the rights of the issuing bank depend on the fulfillment of the agreed terms and these terms vary from case to case. This generates problems to determine the scope of the rights of issuing bank. This paper will examine the role played by issuing bank in documentary credit transactions and also critically evaluate the scope of this right in the Indian banking scenario.

INTRODUCTION

The bank issues a letter of credit on the basis of an application made by its customer. There is an undertaking of the bank to arrange payment to the beneficiary on compliance of the terms and conditions set out in the documentary credit generally known as letters of credit. A contractual obligation is formed in this transaction.[1] The bank's undertaking is under an assurance of indemnity by the customer. The rights arising from this undertaking in favour of the issuing bank depends on the contractual relationship between parties involved in this credit.

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1. H.C. Gutteridge and Maurice Megrah, *The Law of Banker's Commercial Credits*, Europa Publications Ltd, London (1979), p.5.

The documentary credit can be compared with the ordinary credit provided by banks. In such transactions bank adopts several methods to realize the loan advanced to the customer. This can be followed in the documentary credit transactions also.

Another concern with regard to the rights of the issuing bank is against correspondent bank. The relationship between the issuing bank and the correspondent bank is that of principal and agent.[2] When the issuing bank instructs the correspondent bank to pay the beneficiary the amount mentioned in the credit on behalf of it, the correspondent bank acts as an agent of the issuing bank. As an agent of the issuing bank it has to observe the directions given to it by the issuing bank. The correspondent baker will get protection only if it comply strictly with the mandate given to it so that the issuing banker can invoke right of recourse against the customer. It is necessary to analyse the scope and ambit of the functions of issuing bank and correspondent bank resulting in the invocation of these rights.

The undertaking of the issuing bank is absolute so long as the documents of the title to goods which the sellers tender to the banker to receive payment are in order.[3] Sometimes problem may arise when beneficiary tenders non-confirming documents which go unnoticed by the issuing banker. In such situations the interest of issuing bank will get jeopardized. In case of any doubt regarding non-conformity of documents presented by the beneficiary, the banker will be ready to make payment on the basis of an indemnity given by the beneficiary. In that situations bank may have recourse against him and may hold him liable on indemnity.[4]

Apart from this issuing banks' consent is required in order to affect the transfer of letters of credit. The transferee may be put to difficulties if the issuing bank refuses to affect a transfer of the credit at the request of the transferor beneficiary. The discretion given to the bank is accepted by the practice of trade.[5] Even if it consents to transfer, the extent and manner should also be accepted by the bank.[6] Therefore it is essential to analyse how far these rights are regulated by national and international systems.

RIGHTS OF ISSUING BANK

The written agreement between the issuing bank and the applicant for the letter

2. *Ibid*
3. *Belgian Grain Co v. Cox* (1919), 1 Ll.L.Rep.256.
4. *Moralice (London) Ltd., v. E.D & F. Man*, [1954] 2 Lloyd's Rep. 526.
5. Article 38 (a), the U.C.P.600.
6. *Ibid.*

of credit is the basis of the rights of the issuing bank.[7] If the bank acts in accordance with terms agreed, it has a right to be indemnified by the customer. The contractual right can be exercised by the issuing banker only if it strictly follows the terms and conditions agreed in the credit. If there is any deviation from any terms agreed it will lose its claim. To note the observation by Lord Summer:

> "It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorized to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which do just as well..."[8]

If the corresponding bank which negotiates and pays the beneficiary believing that the documents are irregular, it should pass the documents to the issuing bank. Issuing bank should determine whether it will honour or refuse them. It must be done only on the basis of documents alone. The issuing bank is concerned itself to see that the documents appear regular on their face. But the legality of the documents presented is not to be examined by the issuing banker. If the applicant fails to give clear and complete instructions regarding issue of the documentary credit, the issuing bank has different options.[9] Therefore it can be seen that the rights of the issuing bank is governed by the contract.

EFFECT OF AMBIGUOUS INSTRUCTIONS GIVEN BY CUSTOMER

In documentary credit transactions the issuing bank is not concerned with the efficacy of any documents stipulated by parties. In *Midland Bank* v. *Seymour*,[10] the instructions given by the buyer were ambiguous. Even then bank paid the beneficiary. Later when buyer refused to reimburse the bank, it took the plea that it acted upon the terms and conditions agreed between them. The court held that the bank was not I default as the instructions given were not clear. The facts of the case relate to shipping of rubbish materials by the seller. The buyer sued the bank on several issues. One of the issues related to the unauthorized acceptance of draft presented by the seller. It can be seen that this decision was designed to protect the interest of the bank. The law always tries to protect the decision of the bank when the buyer gives unclear and imprecise instructions.[11] There is a

7. A.G.Davis, *The Law Relating to Commercial Letters of Credit*, Sir Issac Pitman & Sons Ltd., London (1963).
8. *Equitable Trust Co. of New York* v. *Dawson Partners Ltd.*, (1927) 27 Lloyd's Rep.49 at p.52.
9. Article 34, the U.C.P.600
10. [1955] 2 Lloyd's Rep. 147.
11. Article 12 and 16 of the U.C.P.600

special provision in the U.C.P. 600 which disclaims for acts of an instructed party.[12] It is well established principle that if the instructions given by the customer to the issuing banker regarding the document tendered by the beneficiary are ambiguous, the banker is not in default of he acts upon a reasonable meaning of the ambiguous instructions. But what is reasonable is a flexible concept and there is no specific law to determine its meaning.

In the United States, the law seems to deny a right to the issuing bank to test the quality of goods. It tries to protect the interest of bank in case of unclear instructions. Thus in *Maurice O'Meara Co.* v. *National Park Bank of New York*,[13], the seller presented the documents describing the newsprint paper as required in the letters of credit. In fact the letter of credit did not require that a certificate from an independent laboratory should accompany the documents. The bank refused to pay on the ground that it had not got any opportunity to test the tensile strength of the paper. The seller argued that the issuing bank had no right to test the same. Though the decision was in favour of the seller denying such right to the issuing banker on the ground of independence principle raised several issues regarding the rights of the issuing bank.

However such a right is is given to the banker to see the merchandise also then banker will be in trouble because it is a time consuming and there will be a need for expert opinion. Also it will hamper the smooth flow of trade and prompt payment principle which is the crux of documentary credit will get jeopardized. The decision of the Court of Appels for the ninth circuit which held that the issuing bank is under a duty to verify the buyer's complaint that the goods did not confirm to contract specifications was criticized by jurists.[14] If this is followed it will result in the destruction of the certainty of the promise embodied in the letter of credit. Therefore the United States statute[15] contains a provision which protect the interest of bank issuing credit for the applicant if it honours a presentation as per the agreed terms of letters of credit. Therefore if the instructions that the applicant gives are clear and precise, the issuing bank has to act strictly with it. In cases of ambiguous instruction it is a matter to be decided through interpretation of courts.

ISSUING BANKS RIGHT AGAINST CORRESPONDENT BANK

In normal situations correspondent bank pays the beneficiary and receives the

12 Article 37, *Ibid.*

13. 239 N.Y. 386, available at *https://h2o.law.harvard.edu/cases/2404*, (last visited on 1.05.2015)

14. Clark L. Denik, "*An Issuing Bank's Duty of Payment under an Irrevocable Letter of Credit: Associacio De Azucareros De Guatemala v. United States National Bank of Oregon*", 12 Ariz.L.Rev. 835 (1970).

15. Uniform Commercial Code- Article 5-108.

document mentioned in letter of credit. There is no liability to pay if it only advises the beneficiary and its obligations are to ensure that the beneficiary is advised and the credit is delivered.[16] Therefore the advising bank will take reasonable care to check the apparent authenticity of the credit which it advices. This is usually done by comparing the signature on the credit with the authorized signatures it maintains on file. Once the advising bank confirms the letter of credit the rights and liabilities will be changed. Apart from this the issuing bank has the right against correspondent banker to supervise. The correspondent banker must obey strictly the instructions he receives as an agent. When the bank acts accordingly the contractual principles govern their relationship.[17]

The correspondent bank must take reasonable care to ensure that the document received appear on its face consistent with the terms of credit. Then only they can claim reimbursement from the issuing bank. Issuing bank has got the right to reject the documents if they are inconsistent with the terms agreed by the correspondent bank. It is immaterial whether the correspondent bank paid to the beneficiary or not.

The difficulties that arise in this arrangement are due to receiving the instructions which are not clear. The term understood will be something which is not intended by the issuing bank. The U.C.P. tried to overcome this difficulty by providing that in case of receipt of incomplete and unclear instructions they may give notification to the beneficiary for information only without any responsibility.[18] But this provision is not clear regarding the element of time. It only says "without delay". However to decide the "delay" was once subject to litigation *in Bank Melli Iran* v. *Barclays Bank (Dominion, Colonial and Overseas)*,[19] the correspondent bank paid against documents which did not comply with the terms of credit. When they forwarded these documents to the issuing bank to receive the reimbursement they remained silent. There was a delay on the part of the issuing bank to reject the document. This inadvertent delay was taken as ratification by the correspondent bank. It was held that the inaction on the part of issuing bank amounted to ratification.

Gutteridge criticizes this judgment and says that it deprives the issuing bank the right to complain of the payment against unsatisfactory documents.[20] It was evidenced by the issuing bank that such delay was because of the pressure of work in the documentary credit department. These observations cannot be accepted

16. Article 9 (f), the U.C.P.600.
17. Mark Hapgood (Ed.), *Paget's Law of Banking*, Butterworths, London (1983),p.624.
18. Article 12 of the U.C.P.500.
19. [1951]2 Lloyd's Rep.367.
20. *Supra* note 1.

in the light of modern letter of credit transaction. The provision should be clear as to the time limit for informing the correspondent bank regarding irregular document. Then only they can get reimbursement from customer. Therefore the U.C.P. 600 does not contain this clause and tried to clarify these difficulties by limiting the reasonable time to a maximum of five banking days.[21]

The legal principle which determines the right of reimbursement is contained in the rules adopted by non-governmental agencies. They are given binding effect by incorporating them into the contract. The International Chamber of Commerce has published a number of rules dealing with the bank to bank reimbursement.[22]It is for the issuing bank to initiate the reimbursement procedure.[23] However these are inter-bank arrangements and these rules are not intended to override or change the provisions of the U.C.P. Moreover, the U.C.P. 600 specifically incorporated bank to bank reimbursement arrangements. It provides certain guidelines to be followed by the banks in case if a credit fails to state that reimbursement is subject to the I.C.C. rules for bank to bank reimbursements.[24] Accordingly it states,

i. An issuing bank must provide a reimbursing bank with a reimbursement authorization that conforms to the availability stated in the credit. The reimbursement authorization should not be subject to an expiry date.

ii. A claiming bank shall not be required to supply a reimbursing bank with a certificate of compliance with the terms and conditions of the credit.

iii. An issuing bank will be responsible for any loss of interest, together with any expenses incurred, if reimbursement is not provided on first demand by a reimbursing bank in accordance with the terms and conditions of the credit.

iv. A reimbursing bank's charges are for the account of the issuing bank. However, if the charges are for the account of the beneficiary, it is the responsibility of an issuing bank to indicate in the credit and in the reimbursement authorization. If a reimbursing ban's charges are for the account of the beneficiary, they shall be deducted from the

21. Article 14 (b) of the U.C.P.600.
22. Uniform Rules for Bank to Bank Reimbursements under Documentary Credits, ICC Publication No.525.
23. *Id.*, Article 2 (a).
24. Article 13, the U.C.P. 600.

> amount due to a claiming bank when reimbursement is made. If no reimbursement is made, the reimbursing bank's charges remain the obligation of the issuing bank..."[25]

Thus the right of the issuing bank against the correspondent bank is settled to an extent.

ISSUING BANK'S OBLIGATION UNDER A NEGOTIATION CREDIT

The negotiation credit, where the purchase by the nominated bank of drafts or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the baking day on which reimbursement is due to the nominated bank can be issued in one of two forms.[26] In the first one it may be freely negotiable and in the other negotiation may be restricted to one or more banks named in the credit. In either case the issuing bank's primary obligation is to reimburse the negotiating bank if the negotiating bank has complied with the terms of the credit.

It is the issuing bank that authorizes the negotiating bank[27] to negotiate against documents. The bank's undertakings are clearly predicated on the assumption that the draft and documents will have been presented to the negotiating bank and negotiated by that bank before presentation to the issuer for payment. This raises the alarming possibility that the credit may fail to provide payment despite the beneficiary's compliance with its documentary stipulations. This possibility arises because the act of negotiation is voluntary on the part of the nominated bank to decide whether the credit is restricted or freely negotiable.[28] If the beneficiary is unable to persuade a bank to negotiate, despite the documents are being in conformity with the credit, it appears that he is unable to operate the credit. This disturbing conclusion derives judicial support from the decision of the Singapore Court of Appeal in the *Indian Bank Case*.[29] In this case the court ruled that since the presentation to the nominated bank was for collection, there had been no negotiation under the credit and the issuer thus incurred no liability there under. Unless, the nominated bank is the confirming bank, nomination by the issuing bank does not constitute any undertaking by the nominated bank to negotiate. The nominated bank's receipt for examination and forwarding of the documents does not make the nominated bank liable to negotiate. However the issuing bank

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25. *Id.*, Article 13 (b).
26. Article 2 of the U.C.P. 600.
27. R K.Gupta, *Banking Law and Practice*, Modern Law Publishers, Allahabad (2004), p.783.
28. *Maran Road Saw Mill* v. *Austin Taylor & Co Ltd*, [1975] 1 Lloyd's Rep.156.
29. *Chinavin Trading (Pte) Ltd* v. *Indian Bank*, 1993 S.L.R 144 as cited in Alan Ward, "The Nature of Negotiation Under Documentary Credits", 14 J.B.L.292 (1999)

is under an obligation to make necessary arrangements to pay the beneficiary if he tenders required valid documents under credit.

Another question that may arise is whether the nominated bank can claim a right of reimbursement from issuing bank if it does not actually pay beneficiary. However if value is given by the nominated banks on assumption of a risk, the issuer might not pay on documentary grounds. It might not be able to pay on insolvency or political grounds also. Then reimbursement should logically be available in respect of the negotiating bank despite the fact that the negotiating bank has not been paid.

ISSUING BANK AND THE SELLER

So long as the issuing bank is solvent and does not dispute the intermediary's acceptance of the tender of documents the right of recourse can be exercised by the issuing bank against beneficiary. The undertaking to pay by the issuing bank is independent. The correspondent bank only acts on the instruction of the issuing bank. When the documents are presented by the seller, the correspondent bank pays him after the verification of the documents. These documents are then forwarded to the issuing bank to get reimbursement of the amount paid.[30] There again the issuing bank has got the right to examine the document. Problem will arise if the issuing bank finds out any inconsistency with the documents which were not found by the correspondent bank. It can be argued that unless there is a deliberate breach on the part of the seller for inconsistency of documents, it is impracticable for the correspondent bank to deny payment even if any discrepancy exists. It will be time consuming to detect minor errors and to get confirmation. In this situation the banker can invoke a right of recovery from the seller against the payment made under mistake. Here again issuing bank can also invoke right, in the absence of the confirming banker after making the reimbursement to them. Similarly if there is a mutual mistake on the part of the seller and the bank which leads to make payment under the documentary credit the issuing banker has got the right to refuse payment. But if there is a mistake of banker and the seller is aware of the mistake he cannot recover.[31]

ISSUING BANKS' RIGHT OF WAIVER

The issuing bank is under a duty to examine the documents. Waiver is based on a decision by the bank to pay regardless of the state of the documents.[32] The

30. See Notes, "The Letter of Credit as Protection for a Performer", 66 Yale Law Journal 903 (1956-57).
31. *Riverlate Properties Ltd v. Paul* [1974] 3 W.L.R. 564 (C.A.).
32. S.Arrowsmith, "*Mistake and the Role of the Submission to an Honest Claim*", in A.S. Burrows (Ed.), *Essays on the Law of Restitution*, Oxford Press, London (1991), p. 17.

issuing bank has the right to waive discrepancies and pay regardless if they have the approval of the applicant.[33] In order to waive a right, the waiver must be aware of the existence of the right to be waived. The issuing bank pays on the basis that the documents are goods. It does not realize that it has a right to recover the money paid. In common law it cannot accept both the documents and retain the right to reject them later. However this depends on the banks knowledge of its initial entitlement to reject the documents.

ISSUING BANKS' RIGHT OF RECOURSE

When a bank makes a payment in error the effect of its recourse from the payee needs to be examined in straight credit transactions and payment on a bill of exchange. It is also necessary to examine whether its rights are barred under international rules governing credit transactions.

STRAIGHT CREDIT TRANSACTIONS

A straight documentary credit is essentially a bank's guarantee of payment against specified document.[34] Its duty is to pay when the beneficiary presents the documents to it. Once the bank undertakes payment in non-confirming documents a question will arise against whom the right of recourse can be exercised, is it against the beneficiary who present the non-confirming document or is it against the applicant of credit? In practice usually the payment in discharge of debt of applicant is made by the bank. But the documents must be non-confirming on their face.[35] Nonetheless there are cases where for commercial reasons applicant cannot be sued. This is where the applicant is bankrupt. Here the bank is forced to pursue its remedies against the payee or beneficiary.

PAYMENT UNDER BILL OF EXCHANGE

When the issuing bank accepts and pays a bill of exchange under letter of credit, three situations need to be considered. In situation where the draft is drawn on the issuing bank, the issuing bank has no right of recourse against the seller.[36] The issuing bank acts as a holder when seller is the drawer and the buyer is the drawee. In these circumstances the right of recourse is automatically excluded.[37] The third situation is drawing the bill on the issuing bank by the applicant and the payee is the beneficiary. In *Barclays Bank v. W.J. Simmsson & Cooke (Southern)*

33. Article 16 (b), the U.C.P.600.
34. ICC Guide to Documentary Credit Operations (ICC) No.515 (1994)
35. Article 14 (a), the U.C.P.600.
36. S.60, The Bills of Exchange Act, 1882.
37. Duncan Sheehan, "*Rights of Recourse in Documentary (and other) Credit Transactions*", [2005] J.B.L.326.

Ltd.,[38] it was held that right of recourse is available to the issuing bank. This is because of the common law position that payment made under a mistake can be recovered under right of recourse by the bank. The payment by mistake is a case of unjust enrichment. In cases of unjust enrichment the bank can avail the subrogation remedy.[39] It is an established principle of subrogation law that the purpose of subrogation is to provide restitution when the absence of restitutionary relief would yield unjust enrichment.[40] However Benjamin says that if the issuing bank commits mistake, right of recourse should not be made available to it.[41] There is no reason why a right of recourse should not be made available against the issuing bank if it has made genuine liability mistake subject to the standard of restitutionary defences. In most of the cases of the letters of credit, the U.C.P. will prevent recovery.[42] Thus issuing bank can exercise right of recourse in letters of credit transaction subject to the rules of practice followed by them.

Apart from this the issuing bank can exercise its right to refuse payment to the seller in case of fraud committed by seller.[43] However he can exercise this right only on a clear proof of fraud by the seller.[44] Similarly, issuing bank can exercise the right of constructive possession. When the bank acts as a pledge, the document of title gives the bank the right to constructive possession. Once the bank gets possession and when reimbursement is refused, issuing bank can take delivery of the goods from the carrier. It has also got the right to sell. It may be argued that the bank's interest in the goods as pledge is a proprietary which can be enforced against third parties.[45] As a pledgee, the bank can re-pledge the goods without the pledgor's consent because the bank has a right to immediate possession of the goods as pledge of the bill of lading. This can be invoked only in cases of documents of title to the goods. If the documentary credit does not include a bill of lading, the bank will not get proprietary rights.

RIGHTS OF THE ISSUING BANK: INDIAN PERSPECTIVE

The rights of the issuing bank in India depend upon the compliance with the terms of letters of credit they issue on an application from the buyer-applicant. While

38 [1980] Q.B. 677.

39 s 117 of the Uniform Commercial Code.

40 Job F.Dolan, "*A Study of Subrogation Mostly in Letters of Credit and other Abstract Obligation Transaction*", 64 Missouri Law Review 789 (1999)

41 A.G.Guest (Ed), *Benjamin's Sale of Goods*, Sweet and Maxwell, London (2002), p.160.

42 Article 16 (b), the U.C.P.600.

43 *Bank Russo-Iran* v. *Gordon Woodroffe & Co. Ltd.*, (1972) 116 S.J.921.

44 *Discount Records Ltd.* v. *Barclays Bank Ltd.*, [1975] 1 W.L.R. 315.

45 Inns of Court School of Law, *Law of International Trade in Practice*, Blackstone Press Ltd., London (1998) at p.90.

issuing an import letter of credit, banks in India should ensure not merely that the terms of the credit are in conformity with what the customer has asked for but also that they do not go against the current import and exchange control regulations.[46] The issuing banks have right of recourse against the customer if they comply with the terms of credit they issue.

Similarly, the issuing bank has right to pay under reserve. If the documents presented under a credit are not entirely in conformity with its terms, instead of rejecting them the issuing baok can accept them on the strength ao indemnity from the intermediary bank and make payment. The issuing banks claim for refund of such a conditional payment on the documents when it is rejected by the buyer was considered by the Supreme Court in *United Commercial Bank v. Bank of India*.[47] In this case the sale agreement was for the supply of 'sizola brand pure mustard oil'. Accordingly beneficiary presented the agreed documents before appellant bank to receive payment.

On examination of the documents it was found that the railway receipt covering the dispatch of goods described the goods as 'Sizola Brand Pure Mustard Oil unrefined". Then the appellant bank refused to accepl the document and agreed to make the payment to the respondent bank under reserve. The court held that unless documents tendered under a credit were in accordance with those for which the credit calls for, the beneficiary cannot claim against him and it is the banker's duty to refuse payment. The court further emphasized that "the documents must be those called for and not documents which are almost the same or which seemed to do just as well". Therefore the issuing bank has the right to refuse payment if the documents tendered are not in conformity with those agreed.

Similarly, the issuing bank has right to claim reimbursement of the amount it paid to the beneficiary irrespective of any insurance coverage. In *Hiralall & Sons v. Lakshmi Commercial Bank*,[48] the court held that the buyer should pay the amount to the issuing baoker. It emphasized that whether the ship sunk or sailed was not the concern of the issuing banker. If the ship sank, it was the buyer's business to pursoe the claim against the insurance company even though the policy of insurance was in the name of the buyers as well as the issuing bank. The insuranco policy was only a means of security in the hand of the banker. Though the bank had lodged a claim against the insurance company, that did not mean that the primary obligation of the buyer to pay the amount to the bank ceased. The courts in India expect banks to ensure the documents apparently

46. *Roshan Lal Anand v. Mercantile Bank Ltd*, (1975) 45 Com.Cas.519 (Del.).
47. A.I.R. 1981 S.C. 1426.
48. (2002) 6 S.C.C.389.

meet the description with what they are in the letter of credit.[49] Similarly the rights of the issuing bank to claim reimbursement from the buyer depends upon compliance with the terms.[50] If the issuing bank has any objection to the acceptance of the documents it must inform the negotiating or confirming bank immediately before the negotiating bank made payment to the seller.[51] Otherwise the issuing bank cannot refuse to accept the documents.

The importance given to the terms of the letter of credit by courts sometimes go against the basic nature of the letters of credit. Thus in *State Bank of India v. Manganese Ore (India) Ltd.*,[52] went to the extent of holding that the obligation of a bank to honour letter of credit is conditional upon the supply of quality goods in conformity with condition of the letters of credit. The issuing bank is also liable to accept the bills of exchange if it adds confirmation on it.

Once it agrees with the negotiating bank to honour the bills of exchange and accept that payment will be made on due date it cannot refuse payment even on the ground of fraud played by officers of the bank. Hence, in *Virgo Steels v. Bank of Rajasthan*[53] the court held that the issuing bank was bound by its own confirmation and if the documents were in order payment had to be made. The Supreme Court[54] also made it clear that the issuing bank is not concerned with the disputes between the opener of the letter of credit and the beneficiary thereof. Its liability is solely based on the letter of credit terms.

A CRITICAL EVALUATION OF RIGHTS OF THE ISSUING BANK

The issuing bank's right to reimbursement is dependent on complying strictly with the instructions given by the buyer. To enforce this right it may rely on any security interest it has in the shipping or other documents received from the beneficiary. Even though the bank may deliver these shipping documents to the applicant, it is only for the purpose of processing the goods. Once the bank is put with funds by the applicant, it becomes his exclusive property.[55] The right of reimbursement becomes effective only if the beneficiary is paid by the bank. Even a slight variation from the mandate given by the customer will defeat this right of the issuing bank. This influence can be drawn from *South African*

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49 *Interdas Advertising (P) Ltd.* v. *Bentrex & Co.* (1983) 53 Com.Cas.646 (Del.).

50 *Indian Overseas Bank Ltd.* v. *S.K. Ramalingam Chettiar*, (1970) 2 M.L.J. 288.

51 *National Oils and Chemicals Industries Ltd* v. *Punjab & Sind Bank Ltd.*, (1980) 50 Com.Cas.390 (Del.)

52 (1997) 4 Comp L. J.57 (S.C.).

53 A I.R. 1998 Bom.82.

54 *Forge Freight Ltd* v. *Commodities Exchange Corporation*, (2004) 7 S.C.C. 203.

55 *Sale Continuation Ltd* v. *Austin Taylor & Co. Ltd.*, [1968] 2 Q.B. 849.

Reserve Bank v. Samuel & Co. Ltd.,[56] where the bank took up warehouse receipts which simply stated that they were for certain quantities of maize without identifying the source from which they had been acquired. The Court of Appeal held that it was necessary for the bank to ensure that the maize for which warehouse receipts were delivered was represented by shipping documents. The bank lost its right to get reimbursement. Apart from this the U.C.P. does not incorporate adequate duties to be exercised on the part of the issuing bank towards the buyer applicant and restricts the buyer applicant's right to sue if the issuing bank acts contrary to its undertaking under documentary credits.

However there is no decided case on the question with regard to the right of reimbursement by the bank from the buyer if the bank pays against the shipping documents which are not mentioned in the credit. If the bank is negligent in not making adequate inquiries before concluding that the conditions have been fulfilled, it will lose its right to reimbursement only when it is negligeut[57]. But if the rules are not mentioned, it is an open question for litigation.

Therefore it can be ascertained from the case laws dealing with this aspect that the right of the issuing bank depends on its fulfillment of the agreed terms. These terms may vary from case to case. Determining the clear boundary describing the rights of the issuing bank is a difficult task. On the other hand if they are not specifically enumerated, a lot of uncertain situation will be crept in. Therefore it is necessary to harmonize the interest of parties for the smooth operation of documentary credit.

56. (1931) 40 *LI.L.R.* 291.
57. Article 13 of the U.C.P. 600

Special Federal Provisions of the Indian Constitution: An Overview

Dr. Vijay Saigal*

ABSTRACT

Anybody who impartially studies the Indian Constitution from close quarters acknowledges that Political Science today admits of different variations of the federal system cannot but observe that Indian system is extremely federal or that it is a federation with strong centralizing tendency. The Indian Constitution possesses all the essential characteristics of a federal Constitution. Constitution establishes dual polity i.e. central government at one level and state governments at the other. There is a division of powers between the central and state governments. Legalism is inherent in a federal polity It means necessary pre-dominance given to the Judiciary in making it the arbiter of the validity of the laws enacted by the federal or state legislatures. An assessment of the features of Indian federalism lead to the conclusion that under the normal circumstances it has to work as federal system but under exceptional circumstances it can work as a unitary or quasi-federal system. But these exceptions though very important component of the Constitution cannot overrule or overshadow the basic or normal features of the federal structure. Thus, one can conclude that the Indian Constitution is neither purely federal nor purely unitary, but is a combination of both according to requirements of time and circumstances. Its ethos is that inspite of federalism, the national interest ought to be paramount.

According to traditional classification Constitutions are either unitary or federal. The political scientists tend to regard the U.S. Constitution as an example or model of a federation. Thoughts keep on changing and the scholars are adopting the view that whether a State is federal or unitary is one of degrees and the answer will depend upon the number of federal features possessed by it[1]. A federation is more a functional than an institutional concept. Any theory that

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1 W.F. Wagner, "*Federal States and their Judiciary*," 25 (1969).

asserts that there are certain inflexible features without which a political system cannot be federal ignores the fact that the institutions are not the same in different, social, political, economic and cultural environment.[2] With this cue in mind an attempt is made in this paper to analyze the federal features possessed by the Indian federation. The features which are inconsistent with Federal principle, but constitute a specialty of the Indian federation have been analyzed critically to prove both their validity and utility in the context of Indian scenario.

DEFINITION AND NATURE OF FEDERAL PRINCIPLE

According to Professor *Wheare* the federal principle means, "the method of dividing powers, so that general and regional governments are each within a sphere coordinate and independent and not subordinate to one another".[3] The existence of the coordinate authority independent of each other is gist of federal principle. Professor Wheare further observes, "Are we to confine the forms to cases where the federal principle has been applied completely and without exception? It would not be sensible to do this. After all, the Constitution of the United States itself, as originally drawn up contained at least one exception to the federal principle in that the Senate was composed of representatives selected by the legislatures of the states.

Thus a part of the general government of the United States was dependent to some extent upon a part of the regional government. This exception to the federal principle was maintained in law until 1913. Yet the American Constitution was and must be called a "federal constitution" for the federal principle was predominant in it. That is the criterion.

Is the federal principle predominant in the Constitution? If so, that Constitution may be called a "Federal Constitution". If, on the other hand, there are so many modifications in the application of the federal principle that it ceases to be of any significance, then the Constitution cannot be termed as federal.[4] This appears to be the most instructive and reasonable way in which to use the term 'Federal Constitution'. It seems essential to define the federal principle rigidly, but to apply the term "federal constitution" more widely.[5] Thus Professor Wheare is of the opinion that exceptions are permissible provided the federal principle is predominantly retained in the Constitution.[6]

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2. Livingstone, "*Federation and Constitutional Change*", 6-7 (1956): quoted by *Brij Kishore Sharma, Introduction to the Constitution of India* 33 (2002 reprint).
3. K.C. Wheare, "*Federal Government*", 10 (1963).
4. See also V.N. Shukla, *Constitution of India*, A. 29 Mahendra P. singh (Ed). (Reprint 2004).
5. *Supra note* at 15.
6. J.N. Pandey, *Constitutional Law of India*, 17 (1969)

ESSENTIAL CHARACTERISTICS OF A FEDERAL CONSTITUTION:

A federal Constitution has generally the following five characteristics[7]:

1. Distribution of Powers

The distribution of powers between the Federal and Regional governments is an essential feature of federalism. These powers which constitute the forces of the State are generally the legislative, administrative and financial in nature. According to A.V. Dicey, "Federation means the distribution of the force of the State among number of coordinate bodies each originating in and controlled by the Constitution".[8]

2. Supremacy of the Constitution

The Constitution being the supreme law of the land, the federal state derives its existence and authority from the Constitution. The distribution of powers between the federal and state governments is subordinate to and controlled by the Constitution. Neither of the two governments should be in a position to override the provisions of the Constitution relating to their power and status which each enjoys under the provisions of the Constitution.

According to Professor Wheare, "these two institutions-the supreme Constitution and the written Constitution are, then, essential institutions to a federal government. The supreme Constitution is essential if government is to be federal; the written Constitution is essential if federal government is to work well".[9]

3. Written Constitution

The foundations of a federal state are complicated contracts. It will be practically impossible to maintain the supremacy of the Constitution, unless the terms of the Constitution have been reduced into writing. "To base an arrangement of this kind upon understandings and conventions would be certain to generate misunderstandings and disagreements".[10]

4. Rigidity

Though a Constitution of a country is considered to be a permanent document but it should not be legally immutable. It is called the supreme law of the land. Supremacy of the supreme law of the land can be maintained only if the method of its amendment is rigid but not altogether impossible. The power of amending

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7 *Supra note 4.*

8 A. V. dicey, *The Law of the Constitution*, 157 (IX ed.).

9 *Supra note* 3 at 56.

10 *Supra note* 8 at 146.

the Constitution should not remain exclusively with either the central or state governments; rather it should be shared by both.

5. Authority of Courts

In a federal state there is a division of powers between the central and state governments and it is envisaged in the Constitution itself. It is, therefore, essential to maintain the supremacy of the Constitution and division of powers between two levels of governments so that they do not encroach upon each other powers. This must be maintained by some independent and impartial authority i.e., Judiciary, which must have the final power to interpret the Constitution and declare laws *ultra-vires* on the ground of excessive exercise of power.

The Indian Constitution possesses all the essential characteristics of a federal Constitution. Constitution establishes dual polity i.e. central government at one level and state governments at the other. There is a division of powers between the central and state governments. The Constitution of India is written and supreme also. The provisions of the Constitution which are concerned with federal principles cannot be changed without the consent of majority of states. The Constitution also establishes a Supreme Court to decide disputes between the Union and the States or the States inter-se and to finally interpret the provisions of the Constitution. Legalism is inherent in a federal polity. It means necessary pre-dominance given to the Judiciary in making it the arbiter of the validity of the laws enacted by the federal or state legislatures.[11] The Supreme Court may be moved by any person aggrieved by violation of distribution of powers or by any State or the Union.[12] It is the existence of these features that led the Supreme Court to describe it as federal.[13]

There are scholars who characterize the Indian Constitution as 'quasi federal', 'unitary with federal features' or 'federal with unitary features'. Professor Wheare was emphatic in saying "the constitution establishes a system of government which is almost quasi-federal....a unitary state with subsidiary federal features rather than a federal state with subsidiary unitary features". Professor C. H. Alexandrowicz does not agree with the view of Professor K.C. Wheare that

11. Keith, *Constitutional law* 22 (7th edition).
12. Following are the example where states went to the court (a) *State of West Bengal v. Union of India* AIR 1963 SC 1241; (b) *State of Rajasthan v. Union of India*, AIR 1977 SC 1361. Following are the examples of an individual moving the court (a) *Automobile Transport Ltd v. State of Rajasthan* AIR 1962 SC 1406, (b) *S.R. Bommai v. Union of India* (1994) 3 SCC 1.
13. In the *State of West Bengal v. Union of India* AIR 1963 SC 1241 Chief Justice Sinha did not agree with this view. However, Justice Subba Rao in his dissenting opinion has strongly pleaded that the Indian Constitution is basically federal.

Indian federation is quasi-federation".[14] He upholds the view of an Indian Constitutional Jurist Dr. D.D Basu when he Says "India is case sui generis".[15]

To reproduce what Dr. D. D. Basu says:

"The Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of novel type. It enshrines the principle that inspite of federalism, the national interest ought to be paramount".[16]

Jennings has rightly said that India is a "Federation with strong centralizing tendencies".[17] While submitting the Draft Constitution, Dr. B.R. Ambedkar, Chairman of the Drafting Committee observed:

"I think it is agreed that our Constitution notwithstanding the many provisions which are contained in it whereby the centre has been given powers to override the Provinces (States), nevertheless, is a federal Constitution".[18]

The farmers of the Indian Constitution thus described it as a federal, Dr. D.D. Basu writes that anybody who impartially studies the Indian Constitution from close quarters acknowledges that political science today admits of different variations of the federal system cannot but observe that the Indian system is extremely federal or that it is a federation with strong centralizing tendency".[19]

But there are provisions in the Constitution which modify the strict application of the federal principle and these are enumerated below:

(i) One Constitution for the states:

Constitution is framed by the people of India and not by the States. It is not a result of a compact or an agreement between the union and the states. Constituent Assembly of India enacted it for the union as well as states.[20] However, the state of Jammu and Kashmir is an exception and was allowed to frame its own Constitution.[21] Most parts of the constitution are applicable to the State of Jammu and Kashmir either with or without modifications.[22] "The Constitution of Union

14 *Supra Note* 3 at 28.

15 See C.H. Alexandrowicz, *Constitutional Developments in India* 157-70 (1957).

16 D.D. Basu, *Commentary on the Constitution of India* volume A, 55 (7th ed.); *Introduction to the Constitution of India* (2003 reprint).

17 Jennings, *some Characteristics of the Indian Constitution*, 1

18 VII CAD

19 D.D. Basu, *Introduction to the Constitution of India* 60-61 (2003 reprint).

20 See, the Preamble of the Indian Constitution.

21 See, the Constitution of Jammu and Kashmir, 1956.

22 See, the Constitution Application of J&K State Order, 1950 and the Constitution Application to J&K State Order, 1954; See also Article 370 of the Indian Constitution which confers special status on the State of J&K.

and of the States is a single frame from which neither can get out and within which they must work.[23]

(ii) States not Indestructible:

In India the Union is indissoluble but not so the States. No State have the right to secede from the Indian Union.[24] The Union has the power to alter the boundaries of any State, create a new State by separation or merger of two or more states. It may change the name of any State, form a new State or abolish an old State. The Hyderabad and Madhya Bharat were abolished. Assam was divided and Mizoram, Arunachal Pradesh and Meghalaya etc. were carved out. Bhopal and Ajmer were merged in their respective contiguous states. Three new states viz. Uttaranchal, Jharkhand and Chhattisgarh were created in the year 2000. Parliament can bring this Legislation just by simple majority in the ordinary process of legislation[25] and no consent of States is required. Such laws will not amount to amendment of the Constitution. The states have no right to territorial integrity[26] and are not "indestructible" units as in USA. The Indian Parliament enacted the States Reorganization Act, 1956 which reduced the number of states from 27 to 14 within a period of six years from the commencement of the Constitution. And the process of disintegration of the existing states which has been affected by unilateral legislation by the Parliament has led to the formation of several new states, thus raising their number to 28. Thus, the Indian Constitution offers no guarantee to the states against affecting their territorial integrity without their consent.[27]

(iii) More Legislative Powers with the Union:

The scheme of distribution of distribution of legislative powers between the centre and the states is laid in Arts. 245 & 246 read with Sevendi Schedule of the Constitution. The Seventh schedule has three lists; Union List- 97 entries, State list- 66 entries, State list- 47 entries. All residuary powers of legislation are vested in the Union. If the central legislature enacts a law on any subject mentioned in the concurrent list; the states are debarred from entering that field occupied by the Centre. In case a subject is not enumerated in any of the list, the power to legislate on that subject belongs to the Centre i.e. residuary power of

23. See the speech of Dr. B.R. Ambedkar, *Constituent Assembly Debates*, Vol. VII, p 34.
24. Constitution 16th Amendment Act., 1963 inter alia provides that even the advocacy of secession will not have the freedom of expression. See D.D. Basu, *Constitutional Law of India*, 46 (1991).
25. Article 4 (2).
26. Brij Kishore Sharma, *Introduction to the Constitution of India*, 33-39 (2002).
27. D.D. Basu, *Introduction to the Constitution of India*, 57 (2003 reprint).

legislation. Thus, the centre has predominant power of legislation and more powers as compared to the states.

(iv) Parliament's Power to Legislate with respect to matters in the State List.

The Constitution contains provisions whereby without amending the Constitution the Parliament can enact laws with respect to subjects in the State List. The power of the States to enact laws with respect to the entries in the State list is not inviolable. In this respect the Indian Constitution breaks new ground. These provisions are discussed as under:

(a) Power of the Parliament to enact in the national Interest (Art. 249).

Article 249 provides that if the Rajya Sabha passes a resolution by the majority of not less than 2/3 of the members present and voting declaring that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for the Parliament to make laws for the whole or any part of territory of India.

Article 249 is a unique contribution of the Indian Constitution and finds no parallel in any other Constitution.[28] This power may be used for a temporary period. The Rajya Sabha is authorized to pass the resolution under Article 249 (i), because of its character of being a representative house having representatives of States who are duly elected by the State Legislative Assemblies that is why it is also called Council of States.

A resolution passed under clause (i) of Article 249 lasts for one year, but it can be renewed by the Rajya Sabha as many times as it deems necessary. Every time a resolution is passed it shall remain in force for one year only.

Laws passed by Parliament would cease to have effect on expiration of a period of six months after the resolution has ceased to operate. There are a few instances when recourse to Article 249 was taken. For example, The Supply and Prices of Goods Act, 1952 and the Evacuee Interest (Separation) Act, 1951 are the laws passed under this Article.

(b) Proclamation of Emergency under Article 352:

Article 250 (i) provides "Parliament shall while a proclamation of emergency is in operation have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

28. M.P Jain, *Indian Constitutional Law*, 281(1987).

The proclamation of emergency referred in Article 250 (i) is a proclamation issued by the President under Article 352. During National Emergency, Parliament can enact laws with respect to all the three legislative lists contained in the VII Schedule of the Constitution. Parliament can make laws conferring powers and imposing duties on the Union and its officers in respect of all lists (Art 353(b)). Laws enacted under Article 250(i) shall cease to have effect on expiration of period of six months after the proclamation has ceased to operate Art 250(2).

State legislatures are not prohibited to enact laws with respect to matters in the state List on which the Parliament has enacted laws during emergency. However, in case of conflict between the laws enacted by the Parliament and the State Legislature, it is the former which shall prevail over the latter and the State law shall be void to the extent of repugnancy.

(c) Proclamation under Article 356:

If the President is satisfied that the government of a State cannot be carried on in accordance with the provisions of the Constitution, he can issue a proclamation,to that effect and assume all the functions of the State government including the powers of the Governor. However, he cannot assume any of the powers vested in or exercisable by the High Court. By the same proclamation, he can authorize Parliament to exercise the powers of State Legislature (Art 357).

During the proclamation of emergency issued under Article 356, the Parliament may make laws with respect to any or all matters contained in the State list. Laws so made by the Parliament would be operative in the State concerned only and shall continue in force until amended or repealed by appropriate Legislature i.e. either by the Parliament during the operation of proclamation of state emergency or by the State Legislature after such proclamation ceases to operate.

(d) By the Consent of States:

Article 252 (i) provides that when all the houses of Legislatures of two or more states have passed resolution to the effect that it shall be desirable that on any of the matters in the State list Parliament should be requested to enact a law, it shall be lawful for Parliament to pass an Act for regulating that matter.

The resolution must be passed at least by the Houses of two legislatures and it may be passed by the simple majority of members present and voting in a House before the Parliament gets empowered to legislate under Article 252 (i).

An Act so enacted by Parliament shall be operative within the territories of only such States who have requested the Parliament by passing the resolution as per Article 252 (i). However, the Act can be adopted by the other States also by

passing resolution in the Houses of their legislatures for that very purpose.

Few examples of Acts passed under Article 252 (i) are: the Estate Duty Act, 1952; The Prize Competitions Act, 1955; The Wild Life (Protection) Act, 1972; The Urban Land (Ceiling and Regulation) Act, 1976; The Transplantation of Human Organs Act, 1994.

(c) Implementations of International agreements and Treaties:

Article 253 provides: "Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any International Conference, associations or other body".[29]

The limitations impose by Article 245 and 246 are lifted and the entire field of legislation relating to implementation of International treaties and agreements to which India is party is open to Indian Parliament.

6. Union's Power to issue Administrative directions to the States

Article 256 provides that the executive power of every State shall be so exercised as to ensure compliance with the laws made by the Parliament. It further empowers the central Government to give such directions to a State as may appear to be necessary for that purpose.

The basic objective is that the Union laws are properly executed in the States. It is mandatory upon the State Government to act in accordance with the directions issued by the Union Government.

Article 257(i) provides that the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the Executive power of the Union. The Central Government is thus empowered to give directions to the states for such a purpose. Thus the states are under a constitutional duty to give effect to the policies of the centre.

On failure to comply with such directions, the President may assume to himself all the functions of the Government of the State (Article 365) as is done under Article 356.

7. During Financial Emergency

When a proclamation of financial emergency is issued under Article 360 the powers of the Centre get enlarged. The Centre may issue directions to the states

29. Entry 14 of Union list reads "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries".

requiring that all Money Bills and some other Financial Bills passed by the State Legislature be reserved for the consideration of President. Necessary directions can also be issued for the reduction of salaries and allowances of public servants belonging to the union and the states. Even the salaries and allowances of Judges of the Supreme Court and the High Courts may be reduced.

8. Control of Bureaucracy

Article 312 empowers Parliament to create by law All-India Services common to the Union and the States. Centre alone has the power to regulate the recruitment and conditions of service of persons appointed to the All India Services. But such persons are paid and serve the state to whose cadre they belong. Centre exercises an amount of control over the State bureaucracy. The object is to ensure greater inter-state coordination and implementation of the policies of the union government through the member of these services. It also facilities the execution of Union laws in the States. Though a State government is competent to initiate disciplinary proceedings against a member of All-India service, but he can be dismissed or removed only by the Union government.

9. No Equality of State Representation:

One of the essential characteristic of American Federalism is that there is an equality of representation of the states in the Senate irrespective of their population or size. Whereas in India the membership of the states in Rajya Sabha varies from 1 to 31 depending on the population of a State. Besides this the President has the power to nominate 12 members to the Rajya Sabha.[30] In such a situation can it be correctly described as federal chamber. According to D.D. Basu, "In view of such composition of the upper Chambers the federal safeguard against the interest of the lesser states being overridden by the interests of the larger or more populated states is absent under our Constitution."[31] Thus there is no theory of equality of state rights", underlying the federal scheme of the Indian Constitution since it is not the result of any agreement between the states.

10. Single Citizenship

There is only single citizenship for whole of the country and there is no separate citizenship of the states. A person who is citizen of India enjoys the same civil and political rights irrespective of the state to which he belongs.[32]

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30. See Fourth Schedule of the Constitution of India, Council of States has 238 representatives of the States and the Union Territories and 12 nominated members.
31. *Supra note* 27 at 97
32. See Arts 5-11 of Constitution of India.

In USA there is a dual citizenship i.e. citizenship of the State to which person belongs and the citizenship of the USA. In such a system a State may "discriminate in favour of its own Citizens in certain matters such as the right to hold a public office or to secure licensees for practising professions such as law or medicine in the State". Indian Constitution takes care of such problems and follows the Canadian model of Single Citizenship. The birth or residence in a particular State does not confer any special status as a citizen of that State in the Indian polity.[33]

11. Appointment of Governor

The governor is appointed by the President[34] and holds office for a term of 5 years from the date on which he enters upon his office. But his appointment may be terminated earlier because he holds the office during the pleasure of the President. He is the nominee of the Central Government. He is not responsible to the State.

The practice of appointing a Governor from outside the State has proved beneficial to the Unity and integrity of the country as it helps in suppressing the separatist tendencies. A local Governor may not be conducive to national unity. Through the office of Governor the Central Government maintains its control over the states.

12. Appointment of Judges of High Court

Judges of the State High Court are appointed by the President in consultation with the Chief Justice of India, the Governor of the State and in case of appointment of a judge other than the chief Justice of the High Court, the Chief Justice of the High Court concerned.[35] Thus the states have a very limited role in the appointment of judges of the High Court.

An assessment of the features of Indian federalism as discussed above lead to the conclusion that under the normal circumstances it has to work as federal system but under exceptional circumstances it can work as a unitary or quasi-federal system. But these exceptions though very important component of the

33. M.P Jain, *Indian Constitutional Law*, 8, 13 (1987). See also Article 246, Entry 17th in the Union list, Seventh Schedule of Constitution.

34 Article 155.

35 Article 217: Special Reference No. 1 of 1988; (1998) 7 SCC 739. After this special reference known as Third Judges Case, the consultation will be with a collegium consisting of Chief Justice of India and two senior most Judges of the Supreme Court. The collegium should also take into consideration the opinion of the Chief Justice of the High Court and other Judges of the High Court concerned who may have been consulted. The view of the Judges of the Supreme Court who are conversant with the affairs of the High Court concerned by virtue of either being a Judge or Chief Justice of that High Court should also be taken into consideration.

Constitution cannot overrule or overshadow the basic or normal features of the federal structure. The cases where the exceptions are not attracted, federal provisions are to be applied without being influenced by the existence of the exceptions. According to D.D.Basu, "Thus it will not be possible for the Union or the State to assume powers which are assigned by the Constitution to the other Government, unless such assumption is sanctioned by some provisions of the Constitution itself. Nor would such usurpation or encroachment be valid by consent of the other party, for the Constitution itself provides the cases in which this is permissible by consent (e.g., Arts 252, 258 (i), 258-A); hence, apart from these exceptional cases, the Constitution would not permit any of the units of the federation to subvert the federal structure set up by the Constitution even by consent. Nor would this be possible by delegation of powers by one Legislature in favour of another.[36]

Thus, one can conclude that the Indian Constitution is neither purely federal nor purely unitary, but is a combination of both according to requirements of time and circumstances.[37] Its ethos is that "inspite of federalism, the national interest ought to be paramount".[38] Indian federation envisages "a new kind of federation to meet India's peculiar needs".[39]

Federalism at Work in India

In India the states are not the agents or instrumentalities of the Centre and have been able to assert their rights. There have been territorial disputes between Karnataka and Maharashtra; and Punjab and Haryana. Disputes over sharing of water took place between Karnataka and Tamilnadu. Nagaland, Tripura and Manipur have laid claims to each other territory.

The existence of different political parties in different states is an evidence of federalism. In Kerala and West Bengal, the Left Front has formed the Government a number of times. in Gujarat, Madhya Pradesh, Maharashtra, Uttar Pradesh and Rajasthan, political parties other than Congress have been in power for a longtime and all this happened when a different political party or coalition was ruling at the centre.

In 1950 there were 9 part A and 5 Part-B states. Now Part B states have been abolished and the total number of states is 28. It speaks of success of Indian Federation, when there is a never ending demand for creation of more states.

36. D.D. Basu, *Introduction to the Constitution of India*, 64 (2003 reprint).
37. VII, *Constituent Assembly Debates* 33-34, See the speech of Dr. B.R. Ambedkar, Chairman of the Drafting Committee.
38. Jennings, *Some Characteristics of the Indian Constitution* 55.
39. Granville Austin, *The Indian Constitution* 186 (1966).

States are also raising loud voices for obtaining more grants from the Centre and they are also asserting their autonomy in matters pertaining to law and order. The centre has been paying more to the smaller states than recommended by the Finance Commissions appointed from time to time under Article 280. The bigger states are not allowed to appropriate all their resources and system of assignment and distribution of tax resources by the Union means the dependence of the states upon the Union to a large extent.[40] There is no such intervention by the Centre, the bigger states might have left the smaller ones lagging behind to the detriment of national strength. Thus within the existing federal regime the states with sufficient financial grants from the Centre can efficiently discharge their development programmes as envisaged in List-II of the VII schedule.

40. Art 269, 270, 272

Environmental Pollution and Development of International Environmental Law

Dr. Anshuman Mishra*

ABSTRACT

States in order to meet the requirement of rapid growth and to keep pace with the competitions, advertently or inadvertently, encroach upon the space or field of other States which international law does not allow. Development of science and technology has further made the situation complicated as the developed nations have the means to exploit natural resources by using new technologies and in absence of such means the developing ones have no way but either to compromise or to depend on the existing international legal framework and to work in the direction of further strengthening it with the help of other similarly affected interest groups. In this respect, various international legal documents in the form of legally binding or non-legally binding instruments have been signed. However, in this unending process the temperature is continuously rising posing a threat to the entire mankind. Climate is changing fast. The development of international environmental law can be traced back to the nineteenth century when some bilateral treaties concerning fishing stock and conservation of other species were adopted. However, the approach of international law to environmental problems can be understood by some international arbitration cases. One of the arbitrations named Behring Fur Seals Arbitration (1898) resulted into regulation of seal fishing while the other one named Trail Smelter Arbitration (1941), which became the starting point in the development of international environmental law as far as trans-boundary environmental pollution is concerned. The arbitration was between the US and Canada. The principle evolved in the arbitration finds its place in the Stockholm declaration, 1972 as the only normative principle and also in Rio declaration, 1992. However, now in reference to environmental problems like climate change, the question before the world community is not about evolving of principles alone but to

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take solid steps as the experience shows that the international law has developed at a very low pace as far as environmental problems are concerned. The present work is an humble effort to look into the environmental problem of climate change and solutions thereof provided by the world community.

Only after the last tree has been cut down,
Only after the last river has been poisoned,
Only after the last fish has been caught,
Only then will you find that money cannot be eaten.

- Native American saying.

Like many other important international days Earth Overshoot Day also known as Ecological Debt Day does not follow the standard practice of having a fixed commemorative day. It is more of a countdown in nature. August 19 of the year 2014 was Earth Overshoot Day, commemorated as an estimation of the moment in a twelve month period of the year when humans consumed more natural resources than the biosphere can replace and created more waste than it can absorb. In other words, in less than eight months of 2014, the annual supply of land, water and trees and the planet's ability to deal with waste products, including carbon dioxide had been used up.[1] December 19, 1987 was the first commemorated Earth Overshoot Day. On that day mankind was 11 days in debt. Since then, the ecological debt has been accelerating. In 2000, Earth Overshoot Day occurred in October. In 2014, it has advanced by two months. The obvious conclusion is that the planet certainly does not have the capacity to keep on satisfying the current rate of human demand.[2]

A big problem[3] attached with the above said phenomenon is that if natural resources are consumed at the current rate it will result into substantial global

1 See an Article "Earth Overshoot Day" by Lyla Bavadam in the Magazine *Frontline*, India's National Magazine dated October 3, 2014. Global Footprint Network (GFN), a 10-year-old international think tank that works to "advance sustainability", carries out the calculations for humans overshooting budgeted supplies. Using a novel source accounting tool called the Ecological Footprint, it "measures how much nature we have, and how much we use". Conceived in 1990 by Mathis Wackernagel and William Rees at the University of British Columbia, the Ecological Footprint is now in wide use by groups as diverse as scientists, businesses, governments, agencies and institutions.

2 *Ibid.*

3 Apart from global warming, as far as the issues of the environment degradation are concerned, it is big in terms of the size of the problem faced and the solutions required e.g., the destruction of the ozone layer, acid rain, deforestation, overpopulation, toxic waste and polluting rivers by dumping waste into it are all global issues which require an appropriately global response. It is big in terms of the range of problems and issues like air pollution, water pollution, noise pollution, waste disposal radioactivity, pesticides, countryside protection, conservation of wildlife etc. etc. The list is virtually endless.

warming. The continued growth in greenhouse gas concentrations caused by human-induced emissions would generate high risks of dangerous climate change. Scientific studies declare that the temperature increase beyond 2 °C could be disastrous for the world.

The possible consequences include the threat to the very survival of vulnerable populations in developing and least developed countries, and island nations. The Intergovernmental Panel on Climate Change (IPCC)[4] in its latest fifth assessment report has mentioned that the increase in temperature between 1880 and 2012 is already 0.85 °C[5]. The IPCC has also predicted an average global rise in temperature of 1.4°C to 5.8°C between 1990 and 2100.[6] The challenge posed before each and every country of the world now is- How to save mother earth? The answer is that there is no other way but to cut carbon emissions imperatively. However, there are a few countries which voluntarily present themselves to cut carbon emissions. What about the others who for one reason or the other do not want to take responsibility to protect environment?

ENVIRONMENT DEFINED.

The word environment comes from the French word '*environner*' which means to encircle or surround. The Oxford Advanced Learner's Dictionary defines 'environment' as the natural world in which people, animals and plants live. The term natural environment refers to the air, water, soil, mountains, oceans etc. It also includes all organisms.

'Environment' is a difficult word to define. Its normal meaning relates to the surroundings, but obviously that is a concept, which is relatable, to whatever objects it is which is surrounded. **Einstein** had once observed, "The environment is everything that isn't me." The Supreme Court[7] has referred to a famous story about the reply given by the wise Indian Chief of Seattle to the great White Chief in Washington who wanted to purchase their land. The reply is beautiful as it contains the wisdom of the ages. The whole of it is worth quoting as it explains the real meaning of the words used in section 2(a) of the EPA i.e. "*the inter relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.*"

4 The Panel was established by the World Meteorological Organisation and the United Nation Environment Programme in 1988. It involves 1000 scientific, legal and policy experts from over 60 countries.

5 See an Article "The fight for equity" by R. Ramachandran in the Magazine *Frontline*, India's National Magazine dated October 3, 2014.

6 Source- *Wikipedia*.

7 *K.M Chinnappa v. Union of India*, AIR 2001 SC 724, 729

"How can you buy or sell the sky, the warmth of the land? The idea is strange to us. If we do not own the freshness of the air and the sparkle of the water, how can you buy them? Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experience of my people. The sap which courses through the trees carries the memories of the red man..... The air is precious to the red man, for all things share the same breath the beast, the tree, the man; they all share the same breath...."

Environment (Protection) Act, 1986 provides for an inclusive definition of the word environment". According to section 2(a) of the Act "environmem" 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.

ENVIRONMENTAL POLLUTION - MEANING

Environmental pollution simply means presence of pollutants in the human environment. Pollutants include solid, liquid or gaseous substances present in greater than natural abundance produced due to human activity, which have a detrimental effect on our environment. "Pollution" is noun derived from the verb "pollute" which means to make foul or unclean, dirty, to make impure or morally unclean. In Halsbury's Laws of England[8] "pollution" means the direct or indirect discharge by man of substances or energy into the aquatic environment resulting in hazard to human health, harm to living resources and aquatic ecosystems, damage to amenities on interference with other legitimate use of water. In the natural environment, organisms are surrounded by non-living components like air and water. The living and non-living components affect each other. Section 2(c) of EPA defines "environmental pollution" as the presence in the environment of any environmental pollutant and "environmental pollutant[9]" means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment.

NEED OF INTERNATIONAL LAW FOR ENVIRONMENTAL PROTECTION

Global problems require globally accepted laws. Like domestic environmental law, international environmental law is also concerned with regulating environmental problems but there are certain limitations. Firstly, it is difficult to reach a consensus as the nation parties are guided by their economic interests, and secondly there is

8. Forth Edition, Volume 38, para 66.
9. See section 2(b) of EPA.

problem of implementation even in case of reaching a consensus. However, the reasons[10] for having a strong regime of international law to protect environment are as follows:

1. Transboundary and global problems require international (or at the very least, bilateral) solutions, and international legal regulation of some kind will be either necessary or desirable.

2. International agreements may generate standards which are adopted in national law, or by regional groupings like the European Community.

3. The international arena is of some importance for the development of principles of environmental law, such as sustainable development or the precautionary principle; such principles often develop precisely because of their often non-binding origins.

4. Because of its nature, recent developments in international law have focused on how an attention to procedures, and on positive inducements to comply rather than negative "command and control" style enforcement mechanisms, can be used to secure compliance.

5. Perhaps negatively, the development of environmental law at all levels may be subject to restrictions originating in international law, for example import restrictions which are deemed to be incompatible with the rules regulating international trade.

Therefore, the world community has been continuously struggling to evolve consensus as far as law making is concerned, specifically under the auspices of United Nations.

INTERNATIONAL ENVIRONMENTAL LAW

The first thing is to know whether there is anything like International Environmental Law. Some scholars[11] have avoided use of the term, saying that there is no distinct body of 'international environmental law' with its own sources and methods of law-making deriving from principles peculiar or exclusive to environmental concerns.[12] No doubt international environmental law is part of international law as a whole but over emphasizing the role of general international law itself will

10. Stuart Bell & Donald McGillivray, *Environmental Law* (5th edn., Oxford, 2000, 1st Indian edn., 2004) Part 1, Ch.4, page 85.

11. Ian Brownlie, *Principles of Public International Law* (5th ed., Oxford, 1999), Ch.XII. See Patricia Birnie and Alan Boyle, *International Law & The Environment* (2nd ed., Oxford, 2002) Ch.1, page 1.

12. Patricia Birnie and Alan Boyle, *International Law & The Environment* (2nd ed., Oxford, 2002) Ch.1, page 1.

create problems. Traditional approach of general international law towards principles like doctrine of sovereignty which advocates unfettered freedom to the states, work in some other perspective and have failed to deliver in environmental perspective. To try to overcome such inadequacies, as environmental problems have worsened, it became necessary to develop a body of law more specifically aimed at protection of environment.[13] A study of contemporary international environmental law thus required to consider both i.e. the new body of specifically environmental law as well as the application of general international law to environmental problems. The expression 'international environmental law' is used simply as a convenient way to encompass the entire corpus of international law, public and private[14] relevant to environmental issues or problems, in the same way the use of terms 'Law of the Sea', 'Human Rights Law', and 'International Economic Law' is widely accepted.[15]

DISTINCTION BETWEEN INTERNATIONAL LAW RELATING TO THE ENVIRONMENT AND INTERNATIONAL LAW RELATING TO SUSTAINABLE DEVELOPMENT

A more difficult issue is the distinction, if there is one, between international law relating to the environment, and international law relating to sustainable development. The 1992 Rio Declaration of the UN Conference on Environment and Development refers to the 'further development of international law in the field of sustainable development'[16], and it is sometimes suggested that this has subsumed international environmental law. A more nuanced approach was endorsed by the UN Environment Programme, whose 1997 Nairobi Declaration refers to 'international environmental law aiming at sustainable development'.[17]

13 *Ibid.*

14 The present paper is restricted to discussing public rather than private international law, i.e., the law between states rather than the conflict of legal systems. The latter is, of course, relevant in environmental law, eg. questions concerning the appropriate forum in which to hear pollution related claims against transnational corporations.

15 *Ibid*, at page 2.

16 Principle 27, The Supreme Court in *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715 has held that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists. Some of the salient principles of "Sustainable Development", as culled out from international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Cooperate, Eradication of Poverty and Financial Assistance to the developing countries. The Court has also opined that "The Precautionary Principle" and "The Polluter Pays Principle" are essential features of "Sustainable Development".

17 Adopted by UNEP Governing Council decision 19/1 (1997). Patricia Birnie and Alan Boyle, *International Law & The Environment* (2nd edn., Oxford, 2002) Ch.1, page 2.

Although much of international environmental law could be regarded as law 'in the field of' or 'aiming at' sustainable development, there remain important differences. International environmental law encompasses both more and less than the law of sustainable development. There is a major overlap in rules, principles, techniques, and institutions, but the goals are by no means identical.[18] Most obviously, sustainable development is as much about economic development as about environmental protection; while these two aspects have to be integrated in order to achieve sustainable development, they remain distinct.[19] Moreover, not all environmental questions necessarily involve sustainable development, or vice versa. One may wish to preserve Antarctica, or endangered species such as the great whales or the giant panda, for the reasons that have little or nothing to do with sustainable development, or put another way, one may wish to preserve them from sustainable development.[20] In this sense international law may in some cases reflect environmental concerns or trump development, however sustainable. At the same time development priorities may in other cases override international concerns without thereby ceasing to be 'sustainable development'.[21]

DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

The focus has always been on international treaties relating to environmental protection. However, 'customary' international law, that part of international law which applies even without a treaty, on the assumption that states have implicitly agreed to it, is also of some importance. If generally agreed principles of international law are to emerge, this is likely to be through customary law. The sources of international law are generally divided into 'hard' and 'soft' law. Hard law[22]is found in the form of agreements[23], customary and general principles of international law, and judicial decisions. Hard law is considered as binding in the sense that any legal rule or principle binds a state only in relations with other states. Soft law, in the form of declarations or recommendations etc., does not have a binding effect but it certainly has a great persuasive value.

18. Patricia Birnie and Alan Boyle, *International Law & The Environment* (2nd edn., Oxford, 2002) Ch.1, page 2.
19. Patricia Birnie and Alan Boyle, *International Law & The Environment* (2nd edn., Oxford, 2002) Ch.1, page 3.
20. *Ibid.*
21. *Ibid*
22. Recognized by Art. 38 of the ICJ Statute.
23. The various terms, 'treaties', 'conventions', and 'agreements' all mean the same thing. A 'Protocol' also has the same legal force, although it is a sub-agreement to a treaty, generally used to flesh out or amend the treaty (e.g. the 1997 Kyoto Protocol contains the carbon emissions reductions that the state committed themselves to agreeing to in the 1992 Framework Convention on Climate Change). Treaties generally come into force a specified number of days after a certain number of states have ratified them.

As far as the development of international environmental law is concerned two arbitration cases are worth mentioning. In the *Behring Fur Seals Arbitration*[24] there was a dispute between the US and Great Britain over alleged over-exploitation of fur seals in areas beyond the (then) three nautical mile limit of US territorial waters. The US objected to such over-exploitation of fur seals on the ground that their conservation was important for the US citizens and their migration between the high seas and US territory. However, the objection was overruled on the ground that the US had no right of 'protection or property' in the seals. The US further argued that it was acting 'for the benefit of mankind', i.e. an '*erga omnes*' or 'common heritage' was also rejected. However, the dispute resulted into a series of provisions, binding on the two parties to regulate fishing in the area. Many modern conservation treaties include such provisions e.g. closed seasons, limited means of killing or taking etc. the decision did not bind the other countries sealing in the area, who continued unrestricted until a treaty was adopted in 1911 binding on all the relevant states.

Trail Smelter Arbitration[25] is another trend-setting decision and first international ruling on trans-border air pollution which became the starting point in the development of international environmental law as far as trans-boundary environmental pollution is concerned. The arbitration was between the US and Canada. A Canadian company was emitting sulphur fumes, thereby causing damage to crops, trees, pastures and Columbian River Valley in the US State of Washington, within the territory of Canada, therefore, the issue was not the right to exploit natural resources on Canadian territory but the manner of doing so. Earlier the dispute had a private law beginning for compensation and smoke reduction between American Farmers and Canadian company but quickly it took shape of an international conflict i.e. *US* v. *Canada*.

The issue was- How international law should respond to trans-boundary air pollution? Interest of others, specifically neighboring States, is also of paramount importance. The tribunal held that no State has the right to use of its territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. The principle is based on the maxim- '*sic utere tuo ut alienum non laedas*' (so use your own property as not to injure another's property), having its basis in the law of nuisance. The arbitration became the genesis of a well known principle named 'Polluter Pays Principle' as the basis for resolving trans-boundary environmental disputes. The principle evolved in the arbitration finds its place in the Stockholm declaration,

24. (1898) 1 Moore's Int. Arbitration Awards 755.
25. 3 RIAA 1907 (1941); 33 *AJIL* 1939, 182

1972[26] as the only normative principle and also in Rio declaration, 1992[27].

UNITED NATIONS AND DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY

UN convened certain conferences to address environmental issues even before 1972[28] but their scope was limited.[29]

United Nations Conference on the Human Environment (UNCHE)-1972

The conference was convened under pressure from NGO's especially in the USA popularly known as Stockholm Conference on the Human Environment. The General Assembly passed a resolution convening the conference that there was "an urgent need for intensified action, at national and international level, and where possible, to eliminate the impairment of the human environment". Apart from accepting the need to regulate the use of the planet's resources in conformity with the goal of maintaining developmental opportunities as a fundamental principle the conference resulted in four major initiatives at the normative, institutional, programmatic, and financial levels.

Normative- Adoption of certain principles by way of a declaration named Stockholm Declaration of Principles[30] which intended to "inspire and guide peoples of the world in the preservation and enhancement of the human environment".

Institutional- A new institution within the UN- UN Environment Programme (UNEP) was established.

Programmatic i.e. adoption of an action plan for the development of environmental policy, to be administered by UNEP.

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26. Principle 21.
27. Principle 3.
28. In 1972 for the first time the world community stood up for the cause of environment at Stockholm.
29. E.g. UN Scientific Conference on the Conservation and Utilisation of Resources, 1949 and UNESCO Conference of experts on the Scientific Basis for Rational use and Conservation of the Resources of Biosphere, 1968. The conference addressed the problems of life support systems of plants and animals; for the first time the range of ecological issues were discussed and man's relationship to nature at international level was recognized. Further, lack of comprehensive environmental management policies was also stressed upon. By the early 1970s, environmental issues were appearing on the agenda of various UN and non-UN agencies viz. Atmospheric pollution at WHO, IAEA, FAO, UNESCO, OECD, WMO, and ICAO; Urban problems at WHO, FAO, UNESCO; Pollution of marine environment at IMO; Pollution and Freshwater resource development at WHO, FAO, UNESCO; Over-exploitation of living resources of sea at FAO; and Wildlife and nature protection in IUCN.
30. There are 26 principles in all but almost all the principles are policy oriented.

Financial by which an institution of an environment fund by voluntary contributions was established.

Since Stockholm Declaration opened with the human rights perspective though an innovative step at that time, its legal status remains controversial as the principles are largely aspirational rather than mandatory.

BRUNDTLAND REPORT

In the international sphere, "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called "***Our Common Future***". The Commission was chaired by the then Prime Minister of Norway, Ms. G.H. Brundtland and as such the report is popularly known as "***Brundtland Report***". "Sustainable Development" as defined by the report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs".

United Nations Conference on Environment and Development (UNCED)-1992

Then came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history who deliberated and chalked out a blueprint for the survival of the planet. Among the remarkable achievements of the Rio Conference was the signing of two conventions, one on **biological diversity** and another on **climate change.** The conventions were signed by 153 nations. Three non-binding documents namely, a Statement on Forestry Principles, a Declaration of principles on environmental policy and development initiatives containing 27 principles and Agenda 21 (a programme of action into the 21st century in areas like poverty, population and pollution) were also approved by the delegates. From Stockholm to Rio "Sustainable Development" has come to be accepted as a viable concept.

The Climate Change Convention i.e. the United Nations Framework[31] Convention on Climate Change (UNFCCC), 1992, the first comprehensive international environmental treaty, which was an outcome of the United Nations Conference on Environment and Development (UNCED), also known as Earth Summit, aimed at combating global warming was held in Rio de Janerio. The purpose of the treaty was to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate

31. It does not contain explicit targets and timetables for stabilizing GHGs.

system. The treaty provided for the establishment of a supreme body called Conference of Parties to ensure implementation of the same. Since then the Conference of Parties meet every year, however, till date the annual climate summits held at various places could not succeed in laying down a binding international agreement[32] on limiting carbon emissions so that the average global surface temperature does not overshoot the limit of 2°C.

Article 3.1 of the UNFCCC provides that 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 (CBDR) and respective capabilities. At COP-15 in Copenhagen in 2009, the participating countries, after failing to conclude a legally binding treaty in accordance with the UNFCCC principles, pledged to work towards an agreement that would prevent global warming from exceeding 2°C. The world, at COP-21 to be held at Paris in December 2015, expects to have a fruitful solution.

CONCLUSION

Control of GHGs is the main issue as it goes to the heart of energy, transport and industry. UNFCCC is merely a framework convention establishing a process for reaching further agreements on policies and specific measures to deal with climate change. Neither a comprehensive law on the atmosphere nor a fully formed and detailed regulatory regime could be emerged like the Ozone Convention. The economic implications of climate change are much greater in comparison to other problems like ozone depleting substances (CFC's). However, it differs from the Ozone Convention in two important respects: 1. it specifies objectives and principles to guide implementation and further development of related legal instruments by the parties; 2. for the first time it makes the concept of common but differentiated responsibilities the explicit basis for every different commitments of developed and developing states parties.

Kyoto Protocol, the only binding agreement under UNFCCC adopted in 1997 is now being opposed[33] by big powers, expired in 2012 but somehow the 18th Conference of Parties at Doha[34] could extend it by 8 years i.e. up to 2020. This has to expire in Dec.2020, when the new globally binding agreement (expected to be adopted at CoP-21 in Dec.2015) will take effect. Now a new approach i.e.

32. Kyoto Protocol, a binding agreement reached in COP-3 in Kyoto, Japan in Dec. 1997 can be referred to as an exception. However, as far as bearing of responsibilities was concerned it required only the developed or Annex I countries to take on assigned targets for emission reductions over their 1990 levels based on the simple "polluter pays" principle.

33. Because of its top-down model.

34. Dr. Sukanta Kumar Nanda, *Environmental Law* , (3rd edn.,2013, CLA) Ch. XIII, p. 446.

bottom up approach (pledge-and-review) premised on unilateral emission reduction commitments by all countries is demanded."[35] Perhaps it is the effect of this approach that the Presidents of the United States and China in a joint statement announced their respective post-2020 actions on climate change, recognizing that these actions are part of the longer range effort to transition to low-carbon economies, mindful of the global temperature goal of 2!. The United States intends to achieve an economy-wide target of reducing its emissions by 26%-28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%. China intends to achieve the peaking of CO2 emissions around 2030 and to make best efforts to peak early and intends to increase the share of non-fossil fuels in primary energy consumption to around 20% by 2030. Both sides intend to continue to work to increase ambition over time.[36]

With the passing of every year, the mankind is witnessing and experiencing fast developing changes in the climate system. Atmosphere is a global common and something is required to be done immediately as according to a recent study, given the current rate of emissions, the available "carbon budget" would already be exhausted by 2040.[37] Guiding principles are already available in UNFCCC and hopefully the solution would be based on equity.

From the above discussion, one may conclude that the international environmental law has miserably failed to provide adequate solutions to the climate change issue, but one should not forget that the municipal legal systems have also not developed holistically and so is the case with international environmental law. International law provides many apparatuses to develop law viz. treaty, custom or soft law to be used in variety of ways to give solutions to the emerging problems and progress depends only on the willingness of the states. In the field of climate change, it is observed that soft law solutions have been preferred but in various other areas after four decades since Stockholm Conference there has been remarkable growth in legally binding measures of environmental protection in the form of treaties and customary international law.

35. See an Article "*The fight for equity*" by R. Ramachandran in the Magazine *Frontline*, India's National Magazine dated October 3, 2014.
36. See *www.whitehouse.gov/...us-china-joint-announcement-climate-change*.
37. See an Article "*The fight for equity*" by R. Ramachandran in the Magazine *Frontline*, India's National Magazine dated October 3, 2014

Legal Challenges of Commercial Surrogacy for Fertility Tourism in India

Mr. Zubair Ahmed Khan*

INTRODUCTION

Nature has strengthened a woman with physical fortitude to procreate a life. But due to physiological reasons, some women cannot able to conceive in a natural manner despite of having strong desire inclination to have a child of their own. That is why infertility rate is rising worldwide. However, they don't go for adoption procedure but it leads to advancement of assisted reproductive techniques (ART). Surrogacy is considered to be viable alternative solution where it is treated as an arrangement for a surrogate mother to deliver a child for another couple or a person under the agreement. It is generally possible in two ways, either through gestational surrogacy i.e., embryo transfer via In-vitro fertilization or through traditional surrogacy i.e., donor insemination where the surrogate mother's egg is artificially inseminated with the sperms of the intended father. The baby will have a biological connection to the surrogate/ host mother, but the intended parents will get legal custody over the baby. So the policy of surrogacy provides a ray of hope to every infertile couple around the world.

Every person can avail the right of marriage and right of procreation for family without discriminating on the basis of caste, nationality, religion. This right is accepted universally by many international conventions and national laws of different countries. Unfortunately, medical complications has created an unanticipated and unforeseeable stark reality for couples where conceiving a child becomes impossible leading to hopeless situation. There are many cases where couples have to face many restrictions due to biological reasons. It will lead to the birth of a process called as outsourcing pregnancy or outsourcing surrogate motherhood. Whether is it an appropriate terminology to call for or not is debatable issue. Its answer is very much related to ethical, moral psychological and social connotations. Practice of surrogacy is prevalent since time immemorial. Unregulation of this practice has raised many conflicting problems which encourage all possible kind of exploitation.

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Since many judicial decisions has recognized reproductive right as one of the basic human rights. In the case of *B. K. Parthasarathi v. Government of Andhra Pradesh*[1], it was observed that the right of reproductive autonomy of a person is an epitome of right of piracy It reflects the spirit of personal decision. If reproduction right is a facet of fundamental right under Constitution of India so it is important to note that surrogacy should also cover under constitutional protection.[2]

It is equally important to note that the matter of public policy where uniform system of rules for public good and maintainability of gender justice where lawful consideration exist. Prohibition of forced labour and child trafficking in case of post surrogacy arrangements is an important preventive measure to avoid any kind of social stigma where every state holds a sincere responsibility to take drastic actions for ensuring social security w.r.t Article 23 of the constitution.

Many medico-legal experts classified surrogacy into two types namely altruistic surrogacy and commercial surrogacy. Altruistic surrogacy is type of surrogacy when a surrogate mother conceives a baby by completing her service for intended parents without any remuneration or financial gain for herself. Medical expenses and other charges for the clinic should be taken care by intended parents. Whereas commercial surrogacy is the process in which intended couple pay remuneration to the surrogate mother in exchange for her carrying and delivering the baby. The baby will be looked after by intended couples or intended individual generally through legal process.[3]

It is important to know the role of The Indian Council for Medical Research under National Academy of Medical science gave National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India in the 2005.[4] The report made by Indian Council for Medical Research gave a bold direction to the Law commission of India in its 228th report in the year 2009 discussing about need of regulation of surrogacy.[5] It clearly emphasizes the importance of surrogacy arrangement which will be governed by a contract between the parties. The terms & conditions of the same contract will have the consent of surrogate

1 AIR 2000 *AP* 156.

2. Smith Chandra, *Surrogacy ... Is it your right ?, Reative Laws* (Sept.26,2014, 11.30 AM), *https://creativelaws.wordpress.com/tag/surrogacy/*

3 Dr Anoop Gupta, *Types of Surrogacy*, Delhi IVF Fertility Research Centre (Oct. 06, 2014, 1.30 PM), *http://delhi-ivf.com/typ_surrogacy.html*

4 National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, The ICMR National Academy of Medical science, Ministry of Health and Family Welfare, *http://icmr.nic.in/art/PrintIm_Pages.pdf*

5. Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy, 228th Report of Law Commission of India, August 2009, Government of India.

mother, agreement of her husband, medical procedure of assisted reproductive technology and indemnification of all kind of expenses for conceiving the child and commissioning parents will become legal parents of the child. But, no financial support or remuneration should be paid to the surrogate mother. So, it should not be meant for commercial surrogacy. One of the commissioning parents should be donor in the arrangement so that child must have biological relationship with him. It may give a reason to prevent any kind of child abuse. Proper legislation should be introduced where surrogate child must be treated as legitimate child for commissioning parents and birth certificate should carry the name of commissioning parents. Some precautions like right of privacy should be maintained and detection of sex of the surrogate child should be prohibited. Abortion should be allowed only in complicated situation which poses a threat to the life of surrogate mother. But one common query was raised in front of legal institution and different nongovernmental organization regarding non commercial form of surrogacy.

A commercial surrogacy is a type of surrogacy arrangement where commissioning parents and the surrogate mother's contract is reduced into writing and commissioning parents would pay remuneration after the service of surrogacy has been completed by surrogate mother. Other cost and expenses are paid by commissioning parents covered under the purview of the surrogacy arrangement. The baby would be given finally to commissioning parents where they are considered as legal parents, i.e. a child born through surrogacy would be considered as a legitimate child of the commissioning parents.

The central government has drafted the Assisted Reproductive Technology (Regulation) bill in the year 2008. It was revised and reframed in the year 2010 and 2013 on the recommendation of Minister of law and Justice. The draft bills of 2008 and 2010 was widely analyzed by different statutory bodies, NGOs, medical professionals so as to get constructive suggestion for introducing in the bill before passing an act.[6]

The Law Commission of India in their 228th report raised a concern of worry regarding commercial surrogacy where law commission of India discouraged the practice of commercial surrogacy and emphasize on altruistic surrogacy as practical approach in the present era.[7]

Commercial surrogacy is more prevalent because it gives a reason for surrogate mothers to get financial benefit in the form of remuneration. It is especially benefitted to poor women. Infertility clinics and surrogate agencies also get proper

6. The ART (Regulation) Bill,2010,ICMR, *Ministry of Health & Family Welfare, Government of India*, New Delhi
7. *Supra note 5.*

commission so as to provide better facility in the whole process of surrogacy arrangement. Commissioning parents especially belongs to foreign countries can also get avail the facility of surrogacy without any complication. So, the Assisted Reproductive Technology Bill, 2010 did not adhere to the recommendation of Law Commission of India regarding altruistic surrogacy where they realized the importance of rise of commercial surrogacy.

Before the introduction of the bill and law commission report, many diverse opinions were raised during discussion. It was believed that surrogacy can commodify womb of surrogate mother where surrogacy will be treated as womb on hire. It can give an opportunity for surrogate agencies and middlemen to exploit poor women and go for forceful surrogacy even without remuneration. That is why it was felt that commercial surrogacy where agreement can be enforced by keeping the same principle of Indian Contract Act, 1872. Commercial surrogacy can provide financial opportunities to many poor women who are vulnerable to exploitation by middlemen without any remuneration. These incentives will help them to sustain their family. Unfortunately, all kinds of exploitation still have perpetual growth even in case of commercial surrogacy.

The business of outsourcing surrogate motherhood has been expanded worldwide and resulted into a profitable business for surrogacy clinics and agencies. Commercial Surrogacy got legal recognition in India with the help of Supreme Court's decision in *Baby Manji Yamada v. Union of India and another*[8]. Being economic nature of commercial surrogacy, it is necessary that the ambit of commercial surrogacy should reflect the impression of independence, public-spiritedness, benevolence, non-deception and fairness. In this case, a Japanese couple like every other infertile couple wants to have a baby of their own .So they came to India to find a surrogate with the help of a surrogacy clinic. The clinic arranged a surrogacy contract for them. Before the birth of the Manji (surrogate baby) a matrimonial discord arose as a result of which they divorced. The situation became more complex legally. Surprisingly, couple while entering into surrogacy contract put a clause that the husband would take care of the baby Manji in case of separation of couple. But the intended mother refused to take responsibility of the baby post divorce. The intended father i.e., Mr. Yamada tried to complete every formality and documentation process so as to take Manji to his country Japan. But, the Japanese embassy refused to give Japanese passport or visa to Manji as Japanese Civil Code doesn't recognize surrogate children. Adoption process was also not possible at this stage as, the Guardian and Wards Act 1890 stated a single father can't adopt a baby girl. Secondly, adoption process could have another conflicting point as biological parents and adoptive parents should be

8 (2008) 13 *SCC* 518

different. Position of statelessness of Manji was apprehended. There is no specific law to regulate surrogacy in India open more legal complications. Supreme Court was worried about the care of the baby where it emphasized the role of State Commission of Child Rights under Commissions For Protection of Child Rights Act, 2005, but no official complaint was made in this regard. Finally, it was declared by the Supreme Court that Mr. Yamada i.e, intended father was genetic father and he should be given custodial rights of the child. Subsequently passport gave to Manji Yamada and she returned to Japan by carrying an identity certificate. The Supreme Court gave this decision on a positive note by maintaining the sanctity of surrogacy contract. This landmark judgment raised many legal questions like How Indian legal system deal with a position of statelessness of the surrogate child in case of cross border surrogacy? What will happen commissioning parents refused to take responsibility of the surrogate child post pregnancy? These types of questions realized the importance of a comprehensive legislation.

Due to drastic increase in demand for commercial surrogacy, people from foreign countries are coming in large number for surrogacy. Many Foreigners from different countries are interested to come there due to cheap cost where surrogacy arrangement is economical in India. Apart from good in-vitro fertilization facility in India, it is comparatively easy to find women for surrogate motherhood in India with the help of middlemen or surrogate agencies.

But, it is necessary that eligibility of surrogate mother should be fulfilled where she should be between twenty one years of age and thirty five years of age. It is important that surrogate mother should not previously go for surrogacy arrangement more than once. She has to accept terms and conditions of surrogacy agreement voluntarily. So she has to fill informed consent to the medical procedure via assisted reproductive technology. Every basic detail of surrogate mother should be mentioned in the agreement form including age, education, obstetric history, any other medical history. She should agree to go for medical examination to confirm surrogacy clinic and commissioning parents that she is capable of conceiving and carrying a child without any complication. But medical complications can't be anticipated. After thorough analysis, many challenging questions were raised in 228th law commission report and the ART bill,2010 either due to absence of explicit provision in the bill or absence of any specific guideline.

These questions carry the weightage of ethical, moral, psychological and legal issues related to the commercial surrogacy. First of all, it has to be analyzed whether parties to surrogacy need a proper medical informed consent model or not? A uniform medical informed consent model will remove all kind of ambiguity and chances of involuntary approval on paper with the help of inducement will be

reduced because surrogacy arrangement as a contract must be completed voluntarily .Otherwise exploitation of surrogate women will definitely increase. Secondly, one of the most important questions is whether surrogacy arrangement can be used for facilitating and benefitting infertile couples only? Whether single men or women, gay couple can also take benefit from surrogacy arrangement? This question has been raised from 2002 to 2013 by many jurists, National Commission of Women and various Non-government organizations. With rise of reproductive tourism, many couples from different foreign countries are interested to take part in surrogacy arrangement in India. Initially The Ministry of Home affairs put a condition for commissioning couple especially from foreigner that they should married for at least two years for entitlement of medical visa for surrogacy in India. Single person and gay couple could not go for surrogacy. Question was raised why discrimination should be created on this basis for surrogacy. Being single or turning into gay is a personal choice. Restriction on surrogacy on this ground is quite illogical. Perhaps with the effect of recent judgment of Supreme Court regarding nullifying gay couple has created an ambiguous situation.[9]

Subsequently, in the case of Shihabeldin v Union of India and others[10], a Sudanese national filed a petition in the Punjab and Haryana Court challenging restriction on medical visa for surrogacy given by Ministry of Home Affairs on the basis of Indian Council of Medical Research (ICMR) guidelines. He claimed that being a single parent, he should not be discriminated on the basis nationality where ICMR guidelines clarified that a single parent can go for surrogacy, but in case of a foreign national, there would be restriction on medical visa. The High Court while rejecting petition, stated that ICMR Guideline doesn't explicitly mention about it. A vacuum has been created due the absence of comprehensive legislation.

After thorough discussion and consultation, The Ministry of Home Affairs has decided to revisit and give serious consideration on prohibition of surrogacy for single person or gay couple (especially foreigners). Social security and precautionary measures regarding health play a crucial role throughout surrogacy process. This is one the genuine concern and a matter of worry which needs to be given serious consideration by surrogate clinics, surrogacy agencies and government. It is the responsibility of commissioning parents to take care of surrogate mother till pregnancy and even post pregnancy for at least two months. Medical expenses should also be taken care of by them.

It is a responsible task of the State Board and State Registration Authority to

9. Priyattama Bhanj, *The Assisted Reproductive Technologies (Regulation) Bill, 2010: A Case of Misplaced Priorities?*, *IILS, July17, 2014, at 2.*

10 CWP-15490-2013 (O&M)

check proper documentation for registering Assisted Reproductive Technology clinic in the initial stage. It is important for the registration authority to have proper inspection for well functioning of the clinics without flouting any norms. In spite of explicit provisions regarding conditions of grant, cancellation of registration of these clinics as well as various duties of these clinics which are emphasized in the Assisted Reproductive Technology Bill, 2013, malpractice are still followed due to unaccountability and lack of transparency. ICMR Guidelines and Assisted Reproductive Technologies(Regulation) bill, 2010 include every precautionary dimensions on paper and when the matter of implementation comes, it gives a harsh reality of exploitation and non- uniformity in this regard. Unaccountability exists as there are no proper data records of surrogate mother and child at state level and national level.[11] Absence of comprehensive binding law is the main reason for non-uniformity in the system where government doesn't adhere to the guidelines.

Irrespective of economical surrogacy treatment, another genuine problem is in the form of complex nature of whole surrogacy process which has many dimensions. It has been said by many doctors that surrogacy process is as secure as normal pregnancy, but it is a tedious and time taken process. It is not a easy task to find appropriate surrogate mother as there many criteria to fulfill it. But there are many complex situations and a kind of desperation for many infertile couples in which they do not want to introspect about surrogate mother, ART clinic and surrogate agency. One of the reasons may be the distance problem especially in case of cross border surrogacy, i.e. foreigner intended parents and situation become more vulnerable when they prefer to search through internet. Factors like abject poverty and urgent need of money raise compelling circumstances for poor women to go for surrogacy so that they can remove their financial insecurity. Unfortunately, these factors result into social insecurity directly or indirectly where either unregistered clinics or surrogate agencies can take undue advantage of this position. There is a reasonable apprehension that they may exploit and force any woman to become surrogate mother without fulfilling her eligibility as mentioned in the bill. Under the guise of commercial surrogacy, unregistered clinics can befool their customers in many ways.

In *Jan Balaz v. Anand Municipality*[12], this case gave a different direction in the jurisprudence of surrogacy process and opened a platform to demarcate rights & duties of parties. A German couple entered into a surrogacy contract with Indian surrogate mother. Twin children were born. Birth certificate of twins has the

11. Sonali Kusum, *No Record of Surrogate Mother and Child at Regional and National Levels*, *MAINSTREAM WEEKLY*, 5th April, 2014 at 15.

12. AIR 2010 Guj.21.

name of intended father of German national and surrogate mother. The German couple was working in England and the children required Indian passport to go there along with them. German authorities don't recognize surrogacy. German couple had no options but to go for adoption process. But it has conflicting nature as in case of positive approval by the Supreme Court, it may mean in every case of surrogacy intended would be treated as adopted parents and surrogate mother would be considered as legal mother of the surrogate child. It took two years for the Supreme Court to decide the matter and for two years no citizenship were granted to them i.e., position of statelessness of both children remained for two years due to lack of regulated binding law. A state of confusion and legal entanglement created a hurdle for intended parents to take the custodial rights of the child. With the help of guidelines of Central Adoption Resources Agency (CARA) which gave no-objection certificate, the Supreme Court rejected the demand of passports but granted an exit permit to twins and in the meantime German authorities decided to give a reasonable chance to the couple for adoption. The Supreme Court emphasized that there should not be any violation of surrogacy contract and intended parents would be treated as legal parents after documentation. Surrogate mother is only entitled for remuneration for her service and she has no right over the surrogate child.

Importance of International Surrogacy Arrangement in Cross-border Surrogacy

Reproductive tourism is a practice which emerged as which has palpable growth for everyone. It is a form of medical tourism where a couple from a different country move to another country with a purpose to have their own baby for which they enter into a contract with a woman of that country who agree to go through fertility treatment so that the couple can take the custody of the baby. Cross-border surrogacy gets recognition and a marketable image in the surrogacy industry because permission and prohibition of surrogacy in many countries varies according to their respective legislation. There are some countries around the world which allow altruistic surrogacy only. There are some countries which prohibit altruistic as well as commercial surrogacy whereas some countries which permit both of kinds of surrogacy. So, Assisted Reproductive Technology clinics encouraged the concept of cross-border surrogacy as business especially for foreign nationals. There many legal lacunas and contradictions which may create a mess because there is apprehension that basic right of surrogate woman and child might be violated in case of surrogacy arrangement. So, it is important that every international surrogacy arrangement needs a platform of proper uniformity and strict regulation. The word 'arrangement' may not bind the parties to fulfill their obligation and it

doesn't give assurance that clinic and surrogate agency will fulfill their responsibility with sincerity. So it is necessary that this arrangement must be enforceable in both countries, i.e. country of commissioning couple and country of surrogate mother or country where surrogacy process is completed. But, certain arrangement become legally complex when agreement between parties results into void or voidable condition, it will question the authenticity and hamper the purpose of surrogacy arrangement.[13] So, Baby Manji Yamada case and Jan Balaz case give a good lesson and allow us to introspect many grey areas especially concerned with rights of surrogate mother and child. In case of cross-border surrogacy, it is important for surrogate clinics and surrogate agencies to play a vigilant role to find the status of surrogacy law in the country of commissioning couple during documentation for entering into surrogacy contract.

Secondly, it is important to identify the basic rights of surrogate mother throughout the surrogacy process which are generally exploited from practical aspect of life in case of cross-border surrogacy.

1. Right to take independent crucial decision – Apart from fulfilling eligibility of surrogate mother according to the bill, free consent to enter into contract is very important step. Consultation within her family and consent of her husband is important criteria in this regard. Purpose of need of independent decision is to remove all kind of exploitation including forceful surrogacy.

2. Right of privacy and confidentiality- It is a very sensitive right of every surrogate mother. Surrogacy process is associated with ethical, psychological issues. So privacy and confidentiality of surrogacy arrangement will maintain dignity of the woman. Surrogacy is not accepted as one of the societal practice till now. So, disclosure of identity of the woman may raise many defaming questions against her self-respect.

3. Right to remuneration for her service – Surrogacy agreement needs to be enforced. it is the responsibility of commissioning parents to arrange legal fees, fees of surrogate agencies, fees of facilitating surrogate clinic, and remuneration of surrogate mother. It is important that whole remuneration should be paid to surrogate mother. The scope of remuneration is again debatable issue. Common observation was made where it is necessary that remuneration should be justified on the basis of factors like age, occupation, family status.

13. Ramasubramanian, *Surrogacy Agreement*, INDIAN SURROGACY LAW CENTRE (Oct.21,2014 at 2.30 PM), *http://Indiansurrogacylaw.com/Pre-Surrogacy/surrogacy-agreement.html*

4. Right to health – Right to have good health is not expressly mentioned in the Fundamental Rights of the Constitution of India, but it is an important piece of universal right where its violation leads to gross injustice. Generally, Medical professionals and Medico-legal experts made a common observation that everything in the process of traditional or gestational surrogacy can't ensure total freedom from health risks and other medical complications. Protection and success in surrogacy process is limited. There are many dimensions related to health concerns like side-effects of pharmaceutical drugs, hypertension, excessive pain & vomiting, birth complications, etc. In exceptional cases, decision of termination of pregnancy can be taken by surrogate mother in consultation with doctors of the clinic where there is apprehension of serious threat to the life of her. Such a right can be availed by her when the doctors recommend for the same and such a right won't effect on remuneration part.[14]

Thirdly, it is important to identify basic concerns related to surrogate child in case of cross-border surrogacy.

I. Refusal for acceptance by commissioning parents in case of cross border surrogacy. -

A common question is generally raised what will happen if surrogate mother refuse to give the custody of the surrogate child to the commissioning parents? Its answer is explicit on the basis of the principle that commissioning parents would be treated as legal parents of the child according to surrogacy contract and birth certificate will have name of commissioning parents only. So, Surrogate mother has no right over the surrogate child. It is mandatory on the part of commissioning parents to take the responsibility of the child irrespective of the fact whether the surrogate child is totally fit or suffered from any kind of abnormality and take the child with them to their respective country. It is a matter of perplexity and distress if commissioning parents refused to take responsibility of the surrogate child. Though ART Bill stated about mandatory responsibility and in case of refusal, it will constitute offence.[15] But, the bill silent about remedial as well as preventive measure in such case. Such nature of case has not yet come into picture. But there is reasonable apprehension that people may take undue advantage of this legal lacuna in this regard. Breach of terms & conditions of surrogacy contract may invoke penalty, but real problem will definitely rise in the form of dark future of the child where the state will go for orphanage because

14. Form J, ART BILL § 15.1 (2010).
15. 11 ART BILL § 34 (2010).

surrogate mother's obligation is over post pregnancy once she take her remuneration. National Commission for protection of Child Rights under Commission for Protection of Child Right Act, 2006 can take appropriate action for special care and protection of these children, though the act doesn't specifically mention about surrogate children[16]

2. Position of statelessness of the surrogate child due to legal lacunae.-

This problem is prevalent in case reproductive tourism especially when it has been handled by unregistered Assisted Reproductive Technology clinics and a consequence of where proper introspection was not made regarding whether the country of commissioning parents allow commercial surrogacy or not. As a result of which the country of commissioning parents refused to give entry to the child. But it is important to note that UN Convention on Rights of a Child have a clear mandate in the form of a policy to be adopted by countries which clearly mentioned that a child just after his birth, have a right to procure nationality.[17] In such a hapless situation, commissioning parents have one option to go through the procedure of Inter-country Adoption as prescribed by Central Adoption Resource Authority.[18]

3. Matter of worry and debatable issue in the case of single intended parent and gay couple.-

Legislature has an apprehension regarding safety of surrogate child when one of the parties to surrogacy contract is either single parent or gay couple. That is why the ART Bill, 2008 restricted single parent and gay couple, it allowed only these intended couple who are married for at least two years.[19] But with the passage of time, thought-provoking issues were raised if a guardian irrespective of sex can be appointed by court of law for the welfare of minor under the Guardian and Wards Act, 1890,[20] then a single parent should be given an opportunity to go for surrogacy contract. Likewise, it is important not to put any restriction on gay couple for facilitating surrogacy process without any discrimination. There is need of effective binding legislation to regulate surrogacy with effective punitive provisions in

16. 4 C.P.C.R.A. § 12(2005).
17. 45 U.N.C.R.C § 7(1989).
18. *Chapter IV, Procedure for inter Country Adoption, Guidelines for adoption from India, 2006* CARA, MWCD, Government of India (Oct.06,2014, 12.30 PM) http://www.adoptionindia.nic.in/guide_inter country chap4.htm
19. Foreign nationals intending to visit India for commissioning surrogacy, MHA, GOVERNMENT OF INDIA (Oct. 2, 2014, 6.30 PM) *http://icmr.nic.in/icmrnews/art/MHA_circular July%209.pdf*
20. Chap.II, The G.W.A. § 7 (1890).

case of breach.

4. Concerns regarding child abuse and child trafficking.-

A proper undertaking has to be taken from intended parents for giving special care and procreation of surrogate child. There is no denial of the fact that there won't be any child abuse or child trafficking at international level in cross-border surrogacy. Government should also introduce some changes for the protection of surrogate child in various legislation like The Immoral Traffic (Prevention) Act, 1986 (protection against child trafficking), The Child Labour (Prohibition and Regulation) Act, 1986 (protection against child abuse and child labour). In the present scenario, with the rise of expansion of cross border surrogacy, there is a reasonable apprehension regarding child trafficking in the world arena. Many countries raised this genuine concern as a consequence of which the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children Trafficking Protocol might allow for protection to a surrogacy trafficking victim. It is binding upon Indian government, being signatory of the protocol in 2011 to formulate a law that conforms to the International Convention and its provisions.

5. Whether any International Convention ideal or fit for regulating International Surrogacy Arrangement at international arena?

Many countries have different legislation regarding surrogacy with adoption and implementation of liberal approach, legal conflicts are bound to happen due to non-uniformity and disharmonisation. The challenging task is to know whether there will be any worldwide legal compatibility and accordance among all the countries in relation to international Surrogacy Arrangement. There many diversifications of countries as far as surrogacy legislation is concerned. 1. There are some countries which allow altruistic as well as commercial surrogacy. 2. There are some countries which allow only altruistic surrogacy.3.There are some countries where unregulation is palpable despite being presence of appropriate legislation 4. There are some countries which totally prohibit all kind of surrogacy.[21]

A state of quandary has enraged the thought among many international jurists to make any International convention related to inter-country adoption as ideal for international surrogacy arrangement among countries. it was

21. Vialcheslav Motayev, *Surrogacy laws by country*, SURROGACY BABY CONSULTANCY (Sept.27, 2014, 1.30 PM) *http://www.surrogatebaby.com/blog/2012/11/27/surrogacy-laws-by-country/*

not easy to acknowledge any International convention because of the commercial nature of surrogacy. Adoption can't be termed as a means of sole criteria or a way out for surrogacy in future. Finally the Permanent Bureau of the Hague Conference on Private International Law made an exhaustive representation entitled "Private International Law Issues Surrounding The Status of Children, Including Issues Arising from International Surrogacy Arrangements".[22] It has been realized that a multi-lateral convention is important to maintain homogeneity in surrogacy arrangements by creating international norms and some uniform rules of definitive platform. Non-conformity result into problems of many dimension like concerns regarding protection of surrogate child especially dealing with child trafficking and child abuse, exploitation of women, non recognition & non regulation of surrogate agencies ,tourist operators and the most decisive issue i.e., legal parentage which is important for authorizing child's identity, attainment of nationality. Uniform rules on jurisdictional issues of different courts, a cohesive element is important to show its presence in process of surrogacy, establishment of efficacious responsibilities of surrogate clinics, role of government to make regular inspection records.[23]

CONCLUSION

With the rise of surrogacy as societal practice, proper regulation of surrogacy is the need of hour. Though many medical bodies discouraged the practice of commercial surrogacy but, need for a concrete legal framework was felt which can monitor the existing state of surrogacy. All kind of precaution and check & balances should be made transparent and unambiguous regarding security of surrogate mother and child. Various mechanisms should be deployed to prevent financial exploitation of surrogate mother whenever there is apprehension of undue advantage of surrogate agencies and middlemen. Remuneration for surrogacy service should be decided on the basis of many considerations like health of surrogate mother (before and after birth of the child), occupation of surrogate mother (especially related to financial security). A formal consent model should be should be made by all ART clinics for the purpose of eliminating all kind of forceful surrogacy and coercive elements related. Justice won't be meted out if

22. Conference Report, The Private International Law Issues Surrounding The Status of Children, Including Issues Arising from International Surrogacy Arrangements, HCCH Hague Conference on Private International Law Conférence de la haye de droit international privé July 21 2014), *http://www.hcch.net/upload/wop/gensec2014pd11e.pdf*

23. Anne-Marie Hutchinson OBE , Dawson Cornwell , *The Hague Convention on Surrogacy. Should we agree to disagree?*, ABA SECTION OF FAMILY LAW 2012 CLE CONFERENCE PHILADELPHIA (Oct.2 2014 ,11.30 PM) *http://www.dawsoncornwell.com/en/documents/ABA_AMH.pd*

health insurance for surrogate mother is not covered under surrogacy contract for unanticipated medical risks and complications. So it is necessary to introduce certain provisions in Insurance Regulatory & Development Authority of India (Health Insurance) Regulations, 2013 to have standardized form of insurance policy for surrogate mother. Insurance Regulatory & Development Authority of India should ensure every appropriate step to check and balance in this regard. Though the Indian Council of Medical Research, being an apex institution of medical research, has done a commendable job in formulating many guidelines. But, it is important for Medical Council of India to take proper initiative to improve the medical standard of surrogacy. A parallel body like Indian Medical Register should be created for doctors of registered Assisted Reproductive Technology Clinics where their roles and duties are fixed.

The government should create a monitoring body which can check surrogacy clinics, to eliminate the practice of fixing of arbitrary prices for surrogacy arrangements. Comprehensive amendment should be introduced to have unequivocal responsibilities of shelter homes, agencies and clinics for ensuring the rights of surrogate mothers, commissioning parents and the child born through surrogacy arrangements. Substantive changes should be brought in the legislation to permit single person and gay couple to have the facility of surrogacy. Discrimination should not created on any ground so that it can avoid legal contradiction with respect to adoption laws where single parents are allowed to adopt through a strict and rigorous mechanism.

Delayed Justice: Can We Choose to Ignore the Denial of Justice?

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ABSTRACT

The Constitution of India reflects the quest and aspiration of the people of India for justice, when it's Preamble speaks of justice in all its forms- social, economic and political. Those who have suffered physically, mentally or economically, approach the court, with great hope, for redressal of their grievances. They refrain from taking law into their hands, as they believe that one day or the other, they would get justice from the courts. Justice delivery system is, therefore, under an obligation to deliver prompt and inexpensive justice to its consumers, without in any manner compromising on the quality of justice or the elements of fairness, equality and impartiality.

The success of Indian judiciary is unparallel. Its contribution in enlarging and enforcing human rights is widely appreciated. Its handling of Public Interest Litigation has brought its institution closer to the oppressed and weaker sections of the society. Indian courts are held in high esteem not only by the developing but the developed countries as well. There is a widespread praise for the quality of the judgments delivered. It is not long back when the Lord Justice of England & Wales in his farewell speech delivered at the conclusion of the Indo British Legal Forum Meet in Edinburgh, publicly appreciated the enormous work done by Supreme Court of India in developing the concept of "Rule of Law" and "due process of law" enshrined in Article 21 of the Indian Constitution and enlarging its scope to the extent of encompassing the right to live in a healthy environment[1] However there is growing criticism about the delay in dispensation of justice from the courts.

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1. *The Times of India*, Wednesday, 24 day of January, 2007

AREA OF INQUEST

'Delay' in the context of justice denotes the time consumed in the disposal of a case, in excess of the time within which a case can be reasonably expected to be decided by the court.

In an adjudicatory system an expected life span of a case is an inherent part of the system. No one expects a case to be decided overnight. However, difficulty arises when the actual time taken for disposal of a case far exceeds its expected life span and that is when we say there is delay in the dispensation of justice.

"People of India are simply disgusted with this state of affairs and are fast losing faith in the judiciary because of the inordinate delay in disposal of cases. Before parting with this case we would like to express our anguish at the delay in the disposal of cases in our law courts."[2]

A scanning of the figures show that despite efforts being made at the various levels the gap between the expected and actual life span of the cases if only widening. Chief Justice K.G.Balakrishanan is himself on record stating that almost three crore cases were pending for disposal in various courts in our country. Of this, 98 lakh cases are pending in the high courts and 43000 in the Supreme Court and this figure is multiplying very rapidly which is a cause of grave concern.

In *Kadra Pahadiya* v. *State of Bihar*[3], several under trials were languishing in the jail for 8 years without their trial having made any progress. The Supreme Court commented, "it is a crying shame upon our adjudicatory system which keeps men in jail for years on end with out a trial."

Justice V.R. Krishna Iyer had rightly observed in *Babu Singh's case*[4], "would it be just at all for the courts to tell a person that we have admitted your appeal because we think you have a prima facie case but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal you must remain in jail even though you may be innocent."

The desire for quick and affordable justice is universal. Any increase in the number of cases on account of better awareness of the legal rights is a welcome development and should not be a cause of concern. We, however, owe a duty to find suitable ways and means to cope with the increased load of work on the system. We have to ensure that the fundamental right to a speedy trial does not remain merely pipedream to millions of people. Long delay has also the effect of

2. *Rajendra Singh* v. *Prem Mai*, September 4, 2007, S.C
3. AIR 1981 SC 939
4. *Babu Singh* v. *State of U.P.*, AIR 1978 SC 527

defeating justice in quite a number of cases. The consequence would thus be that a party with even a strong case may lose it, not because of any fault of him, but because of the tardy judicial process.

Concerned over a backlog of more than three crore cases in courts across the country, Chief Justice of India H.L. Dattu has asked the chief justices of all high courts to ensure expeditious disposal of cases pending for five years or more[5]. The problem of delay stares us all and unless we can do something about it, the whole system would get crushed under its weight. I agree to the fact that the courts do not possess a magic wand which they can waive to wipe out the huge pendency of cases nor can they afford to ignore the instances of injustices and illegalities only because of the huge arrears already pending with them.

Some drawbacks and infirmities have crept in our judicial system and to talk about these is not to under-estimate the importance of the system. Every effort should be made to rectify those defects and to improve the system with a view to make it more responsive to the needs of the people. It is high time we make a scientific and rational analysis of the factors behind accumulation of arrears and devise specific plan to at least bring them within acceptable limits.

INCREASE IN THE STRENGTH OF JUDGES

For clearing pending cases an adequate number of judges must be appointed. But in the Indian Judicial system there are number of vacancies existing, which ultimately affects the efficiency of rendering justice.

S.P. Bharucha[6] on this account had said that *"It is only when we have far more trial courts functioning that we shall be able to dispose of more cases than are being filed and thus cut down on arrears."*

It was also suggested by the *127th Law Commission Report*, 1988 that the judge-population ratio should be increased from 10.5 judges per million population (at that time) to 50 judges per million populations within a period of 5 years. It recommended that by the year 2000 the ratio should be increased to at least 107 judges per million populations. *At present in India, the ratio is 12 or 13 judges per million populations where as 12 years ago it was about 41 judges in Australia, 75 in Canada, 51 in U.K. and 107 in United States.* Due to this low judge -population ratio, the courts lack the- requisite strength of judges to decide the cases.

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5. *http://www.ndtv.com/india-news/more-than-3-crore-court-cases-pending-across-country-709595* (last visited on 22/07/15)
6. *The former Chief Justice of India*

The present sanctioned strength of High Court Judges is 726 and the actual strength 588 leaving 138 vacancies. The sanctioned strength of subordinate judges was 14582 and the working strength 11723 on 30th April, 2006, leaving vacancy of2860 Judicial Officers.

The average disposal per judge comes to 2455 cases in the High Courts and 1430 cases in the subordinate courts, if calculated on the basis of disposal in the year 2005 and working strength of judges as on 31st December, 2005. Applying this average, we require 1434 High Court judges and 18376 subordinate judges only to clear the backlog as on 31st December, 2005 in one year. The requirement would come down to 717 High Court -judges and 9188 subordinate judges; if the arrears alone have to be cleared in the next two years.[7]

Article 247[8] enables Union Government to establish additional courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List. This Article is specially intended to establish courts to enable parliamentary laws to be adjudicated upon by subordinate courts but has not been resorted to so far.

So far backlog in subordinate courts is concerned, additional courts must be created and additional judges must be appointed till the backlog is cleared. Ad hoc judges under Article 224A of the constitution should be appointed to clear the backlog. As many as 2860 posts of judicial officers were vacant in Subordinate courts as on 30th April, 2006. Sincere attempts should be made to fill up these vacancies at the earliest possible.

AUGMENTING OF INFRASTRUCTURE

Increase in the number of Judicial Officers will have to be accompanied by proportionate increase in the number of court rooms. The existing court buildings are grossly inadequate to meet even the existing requirements and their condition particularly in small towns and moffusils is pathetic. A visit to one of these Courts would reveal the space constraints being faced by them, over-crowding of lawyers and litigants, lack of basic amenities such as regular water and electric supply and the unhygienic and insanitary conditions prevailing therein.

The national commission to review the working of the constitution noted that judicial administration in the Country suffers from deficiencies due to lack of proper planned and adequate financial support for establishing more Courts and providing them with adequate infrastructure. It is, therefore, necessary to phase

7. The data is based on an article titled "Nearly 30 million cases pending in courts"- *Hindustan Times* 12-29-2007
8. The Constitution of India

out the old and out-date court buildings, replace them by standardized modern court buildings coupled with addition of more court rooms to the existing buildings and more court complexes. In order to ensure that the new buildings meet all the requirements of the courts and their officers, it is desirable to prepare standard building plans and construct buildings accordingly. In order to provide information to the litigants it is necessary to have facilitation centres in each court complex which should be manned by competent court officers and should be linked to the computer network.

In the Ninth Plan (1997-2000), the Centre released Rs.385 crores for priority demands of judiciary which amounted to .071 per cent of the total expenditure of Rs. 5,41,207 crores.

During Tenth Plan (2002-2007), the allocation was Rs.700 crores, which is 0.078 per cent of the total plan outlay of Rs. 893183 crores. Such meager are grossly inadequate to meet the requirements of judiciary.

The government should provide adequate funds at the disposal of the High courts for augmenting the infrastructure.

SHIFT SYSTEM

Establishment of additional courts at any level involves enormous expenditure-capital as well as recurring. If the existing courts could be made to function in two shifts, with the same infrastructure, it would ease the situation considerably and provide immense relief to the litigants.

The accumulated arrears can be liquidated quickly and smoothly. Shift system has been vogue in industrial establishments since long. It was introduced in educational institutions to cope up with increased demand. It is high time to introduce it in courts as well. The existing court buildings, furniture, library and other infrastructure and equipment could be used for the second shift.

VACATIONS FOR THE COURTS

The most debated question relating to the causes for pendency of cases is the vacations of courts. It is argued on a national level as to why the courts should have such long vacations when there is such a huge pendency of cases in all the courts waiting for decades for disposal. In most countries like France & USA there is no provision for vacations for the courts. The judges in these, countries can take leave according to their convenience without affecting the smooth functioning of the courts. In India only Subordinate Criminal Courts work the whole year but the Supreme Court, High Courts and the other Sub-ordinate Civil Courts are closed during the vacation.

Vacations for the High Courts are fixed by each High Court according to their own convenience, bearing in mind the order of the President issued under Section 23(a) of the High Court Judges Conditions of Service Act, which requires each High Court to work for 210 days a year. The total period of vacation of each High Court varies from 48 to 63 days. However, during vacations some Judges sit, on the vacation benches to transact only urgent work. There is also a convention which enables the High Court Judges to take14 days Casual Leave every year. In addition, there are more than two weeks of public holidays every year. High courts judges do not sit on Saturdays and Sundays. Though the High Court is expected to work for 210 days, the judges would be working for a much less number of days when they avail of different kinds of leave.

The Supreme Court should work for 185 days a year. In summer the Supreme Court has an 8 week summer vacation besides these there are public holiday. These vacations ultimately affect the functioning of the courts.

GOVERNMENT LITIGATION

Regarding de-congestion, greater responsibility lies on the shoulders of Governments of State or Centre. They are biggest litigants in the courts. They should approach the courts or contest cases only if necessary and not just to pass on the buck or contest for sake of contesting.

Government is the biggest litigant whether as petitioner or as respondent. Large number of appeals/revisions and other proceedings filed by the Government are dismissed as frivolous and unwarranted. In fact, thousands of Special Leave Petitions and appeals are filed after substantial delays and are dismissed on the ground of delay only.

The cause of such large litigation is unwillingness on the part of the government officers to take decisions which invariably have financial implications.

Section 80 of Code of Civil Procedure is not utilized at all by Government departments, for settling the cases out of the Court as no one wants to take responsibility for the decision. Despite admonition from Supreme Court, there is a tendency on the part of public servants to raise technical pleas, to defeat just claims of the citizens.

All the Governments should develop an in-house mechanism for settling such disputes, to which they are parties, before they reach the court and also by taking a conscious decision whether to litigate or not to litigate by constituting high power committees assisted by former Judges or Legal Advisors of outstanding integrity and independence. They can be requested to act in the redressal cells

voluntarily or on remuneration to be paid by the concerned government departments

The Civil Procedure Code, 1908, as amended in 1976, inserted Rule 5 B in Order XXVII casting a duty on the courts in the suits against the Government or a public officer to assist in arriving at a settlement in the first instance. The potential of this provision does not appear to have been tapped fully. The reason is obvious. Unless the Government or the public officer or their lawyer is prepared to settle the dispute at that stage the trial court can do nothing.

LENGTHY JUDGEMENTS

Besides court time being taken up by the uninhibited verbosity of advocates, the judge seem to delight in producing judgments of unending length. The Keshavananda Bharti case[9] produced a monumental judgment running into 700 closely printed pages. Though it is supposed to be a judgment, in fact it failed to decide any specific issue. At the end of this great exercise in futility the Court passed a two sentence order to the effect that "the cases are remitted to Constitution bench for disposal in accordance with law" and that "the Constitutional Bench will determine the validity of the Twenty-sixth Amendment". There was no majority decision on any significant point that the court was called upon to decide.

In the *Judges Transfer Case*[10], where seven judges heard arguments for five months, the result was separate judgments *by* each of the seven judges running to a total of nearly 1000 printed pages. Though many issues were raised in the judgment, the core problem relevant to the lay citizen was who has the final say in he matters of appointment and transfer of judges of a High court. No lay man reading this convoluted judgment will ever comprehend the answer to this question. In short the Supreme Court handed over the reins to the government. But this judgment came to be known more for an ancillary matter of the right to file writ petitions in public interest.

Lengthy arguments and length judgments all take time. Reading judgments, if one has the patience to do so, one gets an uneasy feeling that our judges suffer from an unfulfilled wish of writing a treatise in law. And that is exactly what a judgment is not meant to be.

ADR METHODS AND LOK ADALAT

Whenever a person has civil dispute, he would go to a lawyer who would advise him to file a case in a court of law for redressal of his grievance. ADR methods

9. *Keshavananda bharti v. State of Kerela*, AIR 1973 SC 1461
10. *S.P. Gupta and others v. President of India and Others*, AIR 1982 SC 149

are only occasionally adopted. Litigation as a method of dispute resolution leads to a win-lose situation. Associated with this win-lose situation is the growth of animosity between the parties, which is not congenial for a peaceful society. In ADR we try to achieve a win-win situation for both the parties. The ADR methods include arbitration, negotiation, mediation and conciliation.

The main problem faced in this regard is that there are not many trained mediators and conciliators. The Code of Civil Procedure has been amended by incorporating Section 89 with a view to bring alternative systems into the mainstream. However, we are yet to develop a cadre of persons who will be able to use these ADR methods in dispensing justice.

MODERNIZATION AND COMPUTERIZATION OF COURTS

In this era of globalization and rapid technological developments, this is affecting almost all economies and presenting new challenges and opportunities. Judiciary cannot afford to lag behind. Inter-court and intra-court communication facilities, developed through the use of Internet not only save time but also increases speed and efficiency.

Using various I.T. tools it is possible to carry out bunching/grouping of the cases involving same question of law. If this is done, all such cases can be assigned to the same court, which can dispose them by common order.

Video conferencing techniques in court will further not only save time which is generally spent in transporting prisoners to the courts but will also simultaneously save travel costs and most importantly will eliminate the security risks involved in taking the prisoners to the courts.

Service of summons: Service of summons upon the parties and/or the witness is probably the most important step in progress of the case and consumes a lot of time of the court. The cases are frequently adjourned on account of non-service of the parties or witnesses. The normal practice is to serve the summon through a process server. Complaints are often made that the process server connives with one party to the case and on that account does not get the service effected.

As far as the civil cases are concerned, Code of Civil Procedure, now provides for transmission of summons not only by registered post but also by courier, fax, or e-mail. Hence the court need not rely exclusively on the process server and can liberally use the alternative modes of service.

INTERLOCUTORY APPLICATIONS

Simultaneously with the institution of civil litigation the process of filing interlocutory

applications commences, which continues till the judgment is pronounced. The court need discourage frivolous and unnecessary applications by dismissing them with exemplary cost. As far as possible such applications should be heard and disposed off on the very first hearing, so that an unscrupulous litigant is not able to gain time and cause delay.

ADJOURNMENTS

A notorious problem particularly in the trial court is the granting of frequent adjournments, many a times on flimsy grounds. This malady has considerably eroded the confidence of the people in the judiciary. Adjournment not only contribute to delays in the disposal of cases, they also cause hardship, inconvenience and expense to the parties and the witnesses.

The Code Of Civil Procedure after its amendment w.e.f. form 1-7-2002, permits adjournment of not more then three times to a party during the hearing of the suit. Recording of reasons is mandatory for granting adjournments. The amendment further enjoins upon the courts to make such order as to costs occasioned by the judgment or such higher cost as the court deems fit thereby making awarding of the cost mandatory and linking it to the actual cost suffered by the opposite party. Therefore the legislature has already given ample power to the court to exercise full control on the hearing and not permit a party to delay the progress of a case.

The grounds or adjournment are numerous. Sometimes the number of cases set down for trial on a day proves to be excessive, sometimes the court has the time to try the case but the party desire adjournment. A number of cases are adjourned only because of convenience of the advocates. Under the law a judge can refuse adjournment on the ground of convenience of the advocates but in practice he rarely does so. A judge becomes unpopular if he refuses adjournment on such ground.

CONCLUSION

We will have more litigation in future when those sections of the society, who have remained oppressed and unaware of their legal rights, become more aware of their rights due to spread of legal literacy, and increased awareness equipped by effective legal aid and advice.

While laying stress on the urgent need of elimination of delay and reduction of backlogs, we cannot afford to act in undue haste so as to substitute one evil for another one. Stress on speed alone at the cost of substantial justice may impair the faith and confidence of the people in the system and cause greater harm than the one caused by delay in disposal of cases.

The numbers of cases which are filed in the Supreme Court are staggering. No other Apex court in the world takes up so many cases as are taken up by the Supreme Court of India. The same is the position of number of cases filed in High Courts and subordinate courts. Our strength is number of cases filed because it shows people's faith. Our weakness is also numbers because of huge pendency.

It is of paramount importance to tackle the problem of long delays at the earliest and provide justice to citizens of this country in a reasonable time. If a criminal case or civil suit or a writ petition takes ten or fifteen years to decide, this may itself amount to denial of real justice.

The judiciary is the only legal forum for adjudicating all disputes between the high and the low. It is, therefore, necessary that the people do not loose confidence in it. The greatest asset of the judiciary is the confidence of the people. The loss of confidence in the judiciary is an end of the Rule of Law. It can lead to anarchy. No democracy can afford anarchy taking over the Rule of Law.

I will conclude by referring to the observation made by Justice Warren Burger, former Chief Justice of the American Supreme Court observed in the American context:

".....the notion that ordinary people want black-roped judges, well dressed lawyers, and fine paneled courtrooms as a setting to resolve their disputes, is not correct. People with legal problems, like people with pain, want relief and they want it as quickly and inexpensively as possible."

Validity of Rules of Acceptance in Digital Contract Formation: A Comparative Study of English Law and Indian Law

Dr. Recta Garg*

INTRODUCTION

Data entry errors often take place in Business dealings, but their effect can be minimized by party communication. However, when errors take place in online dealings, the effect is manifold by the pace at which information is transmitted to and used by customers.[1] When Eastman Kodak erroneously offered a camera for sale on its UK based website for £100 instead of £329, the information disseminated within hours.[2] Eastman Kodak received thousands of orders from customers before it could correct the error. After notifying customers of its error and informing that it would not dispatch the orders, Kodak had no option but to honor the orders or face a lawsuit.[3] Kodak argued that the orders were merely bids rather than offer, the company ignored the key fact that the website had accepted the orders, thereby, formed an online contract.[4] Kodak had to honor the stated prices caused by data entry error costing it US$2 million.[5]

In today's digital age, parties can instantaneously offer, accept, and communicate

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1. Tasks that once required dozens of workers, weeks of preparation, and additional time for delivery may now be completed in minutes by one person using a computer connected to the Internet. Dennis L. Kidd, Jr. and William H. Daughtrey, Jr., "*Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*", *Rutgers Computer and Tech. L.J.*, 26, (2000) p. 215, 217; see also Preston Gralla, "*How the Internet Works*", QUE Publishing, Indiana, 8, (4th ed. 1998).
2. Sung-Ho Park, "*A Comparative Legal Research on Contract Formation via Electronic Means, Time Lag of Contract Creation in the International Sales Transaction*", *Journal of Korea Trade*, 10 Vol. 3 Num., (2009); also available on:- *http://ktra.ecpshost.com/k_board/ view.php?code_id=c12&page=3&code_num=[illegible]* (last visited on 12th June, 2013).
3. *Id.*
4. *Id.*
5. *Id.*

acceptance by striking just few keys. From creating a simple email ID, interacting through social networking site, having access to online information to purchase of goods and services online, everything requires a contract. Whenever information is accessed from a website or a simple click is done on a hyperlink, it leads to a valid contract which a person never thinks while doing so and its legal consequences are rarely pondered upon.

Commercial dealings are nothing more than agreements between the parties to provide goods or services for consideration. An agreement, whether oral or in writing except where writing is mandatory by law as in case of conveyance of property, trading in securities etc. due to which such kind of transactions don't carry legal validity if take place online.

Generally, in international commercial transaction, use of a written document as a contract is preferred to lessen the uncertainty or risk of the transaction and to determine the basic terms and conditions of the contract such as rights and obligations of the parties.

Since the evolution of Internet, the international sales transaction by electronic means has been considerably facilitated. Legally enforceable contracts provide the base for any kind of commercial activity without which consumers may feel exposed.[6]

The Internet is merely a medium of communication and doesn't affect the basic rules of contract formation other than the time and place of dispatch or receipt of communication, thereby affecting the acceptance of offer. Existence of an offer and an acceptance is the basis for the creation of a contract.

SUBJECT MATTER AND TYPES OF CONTRACT

As internet merely provides an online platform, all goods and services traded in traditional market can also be offered for sale in online market. Apart from them, digital goods of many types like music archives, digital libraries or electronic data are also in demand requiring for digital contracts.[7] Keeping in mind the speed with which data travels, web-based communications fall under the real-time category because they can convey messages instantaneously while email

6. Andrew D. Murray, *"Contracting Electronically in the Shadow of the E-Commerce Directive"* in Edwards (ed), *The New Legal Framework for E-Commerce*, (2005), Hart publishing, Oxford.

7. Susanne Guth et al, *"Toward a Conceptual Framework for Digital Contract Composition and Fulfillment"* in International Workshop for Technology, Economy, Social and Legal Aspects of Virtual Goods, (2003), Ilmenau, Germany; available at *http://virtualgoods.tu-ilmenau.de/2003/toward_contract_frmwrk.pdf*. (Last visited on 12th June, 2013).

communication is considered as non-instantaneous communication.[8] Generally, electronic contracts are entered through two main methods: the electronic mail and the click wrap method.[9] A proposed buyer accesses an e-commerce website wherein the seller has placed a product for sale at a prescribed value who places an order, the computer, in turn, checks for the availability of the product in its store and informs the proposed buyer that the order is in place after necessary payment made by the buyer. In such cases, the actual vendor of the product is ignorant of the fact that the order has been placed and a contract has been entered between him and the buyer. The question, here, arises is whether, in absence of any human intervention or knowledge on the part of seller, such contracts are valid.

TRADITIONAL RULES OF ACCEPTANCE

The evolution of the English Law of Contract is almost through the precedents created by the English Courts and the legislature has played a comparatively very small role in their development. The first requisite of a contract is the agreement between the parties. Generally, an agreement is concluded when an offer made by one is accepted by the other. An offer is an expression of willingness to contract on specified terms, made with the intention to be binding on acceptance by the person to whom it is addressed.[10] Intention has to be interpreted in an objective manner that helps in distinguishing the offer and an invitation to offer. The offeror will be bound if his language or his act is such as to make a reasonable man to think that he intends to be bound, even though he may not be intending so. The same principle was held in the case where a university made an offer of a seat to an intending student due to a clerical error.[11] Common examples of offer to treat include advertisements[12] or exhibition of goods on a shelf in a self-service store[13] and now web-advertisements. An acceptance is a final and unqualified expression of assent to the terms of an offer. If it doesn't match the terms of the offer, it is not acceptance but a counter-offer. Acceptance has no legal effect until it is communicated to the offeror. An offer may be

8. see Andrew A. Murray, "*Entering into Contracts Electronically. The Real W.W.W.*," cited in Lilian Edwards and Charlotte Waelde, "*Law and the Internet: a framework for electronic commerce*" (1997), p.18, Hart Publishing, Oxford.
9. Web based contracts are termed click wrap as they are seen as the modern equivalent of shrink-wrap contracts. Bainbridge, "*Introduction to Computer Law*" (4th edn. 2000) p. 254, Longman Pearson Education, London.
10. *Stevenson v Manchester City Council* [1974] 1 WLR 1403.
11. *Moran v University College Salford (No 2)*, The Times, November 23, 1993.
12. *Partridge v Crittenden* [1968] 1 WLR 1204.
13. *Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Ltd.* [1953] 1 QB 410.

revoked at any time before its acceptance, hence, the determination of time of acceptance is very crucial to enforce the contract. The "postal" rule reflects that technology outpaces law.[14] In the early 1800s, English courts were facing the question whether to make an acceptance valid at dispatch or at receipt in case of distant communication. Messages could take days, weeks, or even months to reach their destinations, and the court justified its choice by stating that if, instead, a receipt rule were applied to acceptances sent through the mail,

"[N]o contract could ever be completed by post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*."[15]

The court also theorized that an individual who sends an offer through the mail is effectively reiterating her offer through every moment of the letter's travel. Therefore, at the first moment of acceptance by the offeree, the contract is complete.[16] The offeor will be bound by the acceptance even though it never reaches to him once it is put in the course of transmission and sent to the proper address.

In *Entores Ltd. v. Miles Far E. Corp.*,[17] the perceived similarity between telephone/telex and contracting in person persuaded a majority of the courts to apply a receipt rule to such transactions.

In India, the fundamental law governing contracts is the Indian Contract Act, 1872 which is based on English Law. This statute is a complete code containing all the essentials of the formation of the contract. In the traditional form of contract formation, negotiating parties must come to a "meeting of the minds" on the terms of an agreement and in the process of negotiation, there may be invitations to make offers and counter-offers, but the general rule for the contract formation requires for communication of offer and acceptance to the parties.

There should be a meeting of minds forming an intention to create a legal relationship between the parties to the agreement which should be expressed either orally or in writing. Once these elements are found to be present, an agreement is said to have been arrived at. In other words, offer, acceptance, communication of offer and acceptance and meeting of mind are the essential

14. Henry H. Perritt, Jr., *"Law and the Information Superhighway"* 2 (2nd ed. 2001), Aspen Law and Business, New York.
15. *Adams v. Lindsell* (1818) 1 B, and Ald. 681, 106 ER 250.
16. *Id.*
17. (1955) 2 Q.B. 327, 337 (A.C.).

ingredients to constitute an agreement.

The Indian Contract Act 1872 adopted the postal rule with a significant modification to the principle relating to communication of acceptance from English law and adopted two different timings for completion of communication of acceptance as against the offeror and offeree.

The communication of acceptance is complete against the proposer when it is put in the course of transmission to him so as to be out of the control of the acceptor and as against the acceptor when it comes into the knowledge of the proposer.[18] However, contract is concluded at a place where the letter of acceptance is posted,[19] and there is no disagreement on this point between the Indian law and English Law.

The Supreme Court of India in *Bagliwandas Goverdhandas Kedia v. Girdharilal Purshottamdas and Co.*[20] followed the rule of instantaneous means of communication as was laid in *Entores* by English Courts. The court restricted the application of Section 4 to postal communications and laid down that in cases of instantaneous means of communication, the contract is concluded where acceptance is received.

RULES OF ACCEPTANCE IN DIGITAL AGE

The rules provided in the Indian Contract Act 1872 nowhere restrict the formation of contract to any particular manner or medium which impliedly provides validity to contracts entered online. The answer to legal validity of e-contract is easy to find by applying traditional rules of concluding a contract. However, with the fast development of contracts taking place online, need was felt to create a clear provision to validate electronic contracts. Keeping in mind the global development as to the use of electronic means and the UNCITRAL Model Law on E-commerce, the Information Technology Act, 2000 was passed in India in 2000 which was later amended in 2008.

One of the objectives of the original IT Act mentioned in the statement of objects and reasons was to legalize e-commerce. Surprisingly, there was no express provision in the original IT Act validating contracts executed electronically. Realising this lapse, the IT (Amendment) Act 2008 provided legal enforceability to communication of offer, acceptance, revocation of offer and acceptance by

18. *Brinkibon Ltd. v. Stahag Stahl* (1982) 1 All.ER 293.

19. *Ramdas Chakrabarti v. Cotton Ginning Co. Ltd.* (1887) 9 All Series 366.

20. RIR Abeyratne, "*Auctions on the internet of Airline Tickets*", *Communication Law*, Vol.4 No. 1, 1999, p. 151, see also *Myers v. DPP*, [1965] 1 AC 1001, in which the court held that otherwise no contract would be ever concluded by post.

inserting section 10A. At present, the IT Act contains only 3 sections (section 11, 12 and 13) dealing with attribution of e-record[21], acknowledgement[22] and time and place of dispatch and receipt of e-record.[23] The IT Act is silent as to the rules of acceptance making the postal and receipt rule applicable to online contracts as well. Section 81 provides that the provisions of the IT Act shall have effect, though, inconsistent provisions are provided in any other law, thereby, inferring that all the principles of the Contract Act, 1872 are still applicable unless inconsistent with the IT Act, 2000.

The basic doctrines of contract formation are still the same[24], except for the mode of communication used.[25] Web contracts are as instantaneous as contracts in presence of both parties, thereby makes receipt rule applicable. The use of electronic agents in web contracts eliminated human involvement and thereby the requirement of 'intent'.[26] The moment an acceptance to an offer becomes binding is a matter of great interest because it determines the time at which legally binding contract comes into existence and establishes the duties that did not formerly exist.[27] Electronic technology has intensely reduced the import of the 'meeting of the minds' doctrine and moderated the practical reasons for application of the mailbox rule.[28]

Email as nearly instantaneous means of communication has led the way to obsoleteness of 'dispatch' rule. Emails travels in packets and sometimes never reaches the destination despite the near instantaneous nature of it. If the rule postulated in *Adams v. Lindsell*[29] is applied, offeror will be liable even without receiving the email signifying acceptance. They occupy a functional position somewhere between the traditional letter and telephone communications.[30]

Section 4 of the Indian Contract Act provides for postal rule that states "the communication of offer is complete when it comes into the knowledge of the

21. IT Act, Section 11.
22. *Id.* S. 12.
23. *Id.* S. 13.
24. Chris Reed, "*Internet Law: Text and Materials*", (2000), p. 175, Butterworths, London.
25. *Id.*
26. Jean-Francois Lerouge, "*The Use of Electronic Agents Questioned under Contractual Law. Suggested Solutions on a European and American Level*", *J. Marshall J. Computer and Info. L.* 18, 1999, 403, 404.
27. Sylvia Mercado Kierkegaard, "*E-Contract Formation. U.S. and EU Perspectives*", *Shidler J.L. Com. and Tech.*, 3, 2007, 12, 21.
28. Amelia Rawls, "*Contract Formation in an Internet Age*", *The Columbia Science and Technology Law Review*, Vo. X 2009, p.204.
29. *Supra* n. 15.
30. RIR Abeyratne, "*Auctions on the internet of Airline Tickets*", *Communication Law*, Vol.4 No. 1, 1999, p. 23.

offeree."[31] This was the main reason denying reward to Lalman Shukla in *Lalman Shukla v. Gauri Dutt Sharma*,[32] who had been successful in tracing the boy whose uncle (master of Lalman) had announced a reward of Rs. 501 to the finder of the boy about which Lalman was unaware at the time of tracing him and came to know only later on.

Electronic communications by e-mail are also not directly sent by offeror to the offeree and agreeing parties are connected having several mail servers in between and there generally remain an element of 'store and forward.'[33] The recipient will be aware of the message only when he checks his inbox which is possible only sometime after the receipt of mail in the mailbox[34] whether it was received in an original form or not cannot be known by the sender. The software in certain systems provide for the read or receive receipts, but these receipts as well as 'bounce back error message' do not ensure the originality of the contents of the message received by the recipient.[35]

In case of electronic communications by website, the parties are directly connected as no mail server or intermediary is involved. The communication is almost instantaneous and parties know whether the message has been received or not. If there is a transmission error, a message reading 'server not responding' or 'connection lost' will automatically appear on the sender's system which will enable him to know that the message has not been received by the receiver.[36] Instantaneous nature of the web communications recommend for the application of the receipt rule.[37]

The above discussion makes it clear that there is no uniform rule that can apply in all situations to determine the time for the formation of contract electronically and this uncertainty cannot be resolved by applying the Indian Contract Act's provisions.

In Internet-based e-mail transactions, the probable moments of acceptance are:

1. One possible moment is the receipt of the e-mail into the recipient's inbox.

31. Section 4 of the Indian Contract Act, 1872.
32. (1913) 11 All L.J. 489.
33. Malte Niemann, "*Cyber contracts. A Comparative View on The Actual Time of Contract Formation*", *Communication Law*, Vol.5, No.2, 2000, p. 51.
34. S Jones, "*Trading on the Internet: Contracting in the cyberspace*" (1997) 8(3) P.L.C. 41, 42
35. Gringras, "*The Laws of the Internet*", (3rd edn. 2008), p. 17, Cambridge University Press, Cambridge.
36. The system used for transmitting information will easily be able to know whether information has been received and any error in delivering the message will be easily detected
37. Rosa Julia Barcelo, "*EDI Electronic Contracting. Contract Formation and Evidentiary issues under Spanish Law*". *The EDI Law Review*, vol. 6 no. 2, 1999, p.155-172.

At this point, the e-mail is accessible to the recipient.

2 The next possible moment of acceptance can be the point when the recipient has opened or read the e-mail.

These moments are subject to the agreement between the originator and the addressee. In other words, agreement between the two prevails over the law specified.

The UK Government has adopted Electronic Commerce (EC Directive) Regulations 2002 putting rest to the postal rule argument where various means of communication are used including email by introduction of regulation 11(2)(a) which states that "the order and the acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them".

As per section 13 of the Information and Technology Act, 2000, the offer or acceptance is made, at the time (i) when the electronic record enters an information system (if designated by the addressee), or, (ii) when the electronic record enters the information system of the addressee (if no system is designated) or (iii) , when the addressee retrieves such electronic record (if the electronic record is sent to information system other than designated, unless otherwise agreed between the originator and the addressee.[38] By interpreting section 13(1) (a) of the IT Act, communication is complete when it enters the information system, neither at the time of dispatch (making dispatch rule inapplicable) nor at the time of receipt by the addressee (making receipt rule inapplicable) except when the electronic record is sent to information system other than the designated. However, attributing the receipt by computer system of the addressee to the addressee himself, analogy may be drawn more in favor of the receipt rule.

The rule is more complicated by the introduction of section 12 which require for acknowledgement for the completion of acceptance. Section 13 of the IT Act that provides rules for determining the time of dispatch and receipt of electronic record cannot be read in isolation but has to read in relation with section 12. In other words, section 13 will take effect only when section 12 has been satisfied. Section 12 provides that where the originator has stipulated that the electronic record is binding only on receipt of an acknowledgement of such electronic record by him, then unless acknowledgement has been so received, the electronic record shall be deemed not to have been sent by the originator.[39] Where an electronic record has not been made binding on the condition of receipt of

38 IT Act, s. 13(2).

39. *Id*, s. 12(2).

acknowledgement and the acknowledgement has not been received by the originator within the specified or agreed time or, if no time has been specified or agreed to, within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgement has been received by him and specifying a reasonable time by which the acknowledgement must be received by him and if no acknowledgement is received within the mentioned time limit, he may after giving notice to the addressee treat the electronic record as though it has never been sent.[40]

Where the originator has not agreed with the addressee on a particular mode or method by which the acknowledgement should be sent then the addressee may acknowledge the receipt by (a) any communication, automated or otherwise; or (b) any conduct of the addressee, sufficient to indicate the originator that the electronic record has been received.[41] The receipt of acknowledgement should not be confused with acceptance. It simply evidences that an electronic record has been received and can be equated with a sender's instruction like 'return receipt requested' in postal communications.[42] Whether an acknowledgement of receipt amounts to an acceptance or not, in a given case, depends upon a number of factors including the language used in the receipt, the intention of the party sending receipt and any usage of trade.

ISSUES

Comparison of digital contracts with traditional contracts reflected very clearly the need of specific law applicable to digital contracts which is fulfilled by the IT Act 2000, however, passage of new law, instead of reducing, augmented the complexity. There is no doubt as to the legal validity of electronic contracts. However, the following issues still persist in handling the technological advancement.

1. Sometimes a website accepts the offer when accessed to purchase goods or services due to any technological error, however, fails to fulfill the obligation as has happened in case of Eastman Kodak, law doesn't specify the remedy for a buyer or a seller.

2. As the contract is completed by automated system attributed to the originator, requirement of knowledge still remains as applicable in traditional contracts

40. *Id.*, s. 12(3).

41. *Id.*, s. 12(1).

42. Farooq Ahmad Mir and M. Tariq Banday, *"Emerging Legal issues of E-commerce"*. *Sprouts: Working Papers on Information Systems*, 10(134). Available at: - *http://sprouts.aisnet.org/1231/1/Emerging_Legal_Issues_of_ECommerce_New.pdf* (last visited on 4th may, 2013).

as IT Act doesn't exempt the requirement of knowledge. While in case of electronic contracts, contract is completed by electronic agents without involvement of any human being, thereby, eliminate the necessity of knowledge.

3. The IT Act doesn't specify the applicability of 'Postal rule' or 'receipt rule' to the electronic contracts, however specify that time of receipt shall be when received by information system unless sent to information system other than specified by the recipient in case of which the time of receipt will be when retrieved by the addressee.[43] Receipt by information system eliminates the applicability of both postal and receipt rule.

4. Requirement of acknowledgement is mandatory even though not stipulated by the originator making the communication of offer or acceptance more complicated. If every e-record is to be followed by an acknowledgement, there will be an offer, acknowledgement, acceptance and again acknowledgement to complete a contract.[44]

5. On one side, receipt of e-record is completed when reaches to information system. On the other side, in absence of communication of acknowledgement, electronic record is treated as never been sent.[45] A fact which has already been done cannot be undone.

6. Merely 3 sections of the IT Act deal with the electronic contracts which, too, are ambiguous.

SUGGESTIONS

1. Keeping the *Kodak* case in mind, websites provide a clause that seller has the right not to fulfill the order provided conditions are beyond the control of the seller or the product is out of stock etc. to avoid legal liability to arising out of data communication error in the guise of 'non-availability of stock'.

2. The concept of electronic agents makes the conventional prerequisite for a "meeting of minds" more difficult to prove. With many smaller vendors getting their own e-commerce web site hosted and created by a third party, an external service provider to offload the Internet shopping trolley function through programmes designed specifically to work as electronic agents for the seller leads to absence of meeting of mind. Contracts are concluded

43. IT Act, s. 13(2).
44. Section 13(2) and Section 12(3) read together.
45. *Id.*

exclusively by these electronic agents without requiring any consent, knowledge or meeting of mind on the part of the seller and thereby, making the concept of 'meeting of mind' obsolete in online context. IT Act should incorporate a clear provision making the requirement of knowledge as redundant.

3. Section 13 of the IT Act has completely diverted from traditional law relating to the communication of offer and acceptance where cannot be applicable in case of use of electronic means of communications. These rules are a mid-way between the postal rule and actual receipt rule. However, these rules will not govern electronic communications in all situations as the relevant section does not use the common expression 'notwithstanding anything contained contrary in any Act', also, the parties can decide different timings of receipt of electronic record.[46]

4. Section 12 has complicated the process of offer, acceptance and completion of contract. Requirement of acknowledgement must not be mandatory unless sought by the originator.

5. Even if acknowledgement is mandatory, a fact already happened cannot be undone. Language of section 12(3) should be amended. Instead of 'it has never been sent', it should be 'it has not been accepted'.

CONCLUSION

International laws and rules relating to international sales transactions have tried to bring coherence between legal systems working throughout the world, however, different legal rules still exist. However, with regard to legal validity of e-contract, dilemma is set to rest and all legal systems have given legal recognition to contracts entered online.

English law has adopted both 'mailbox rule'[47] and 'receipt rule'.[48] Indian Law has chosen a mid-way path for online contracts. Being instantaneous, applicability of receipt rule is pretty clear for web-contracts. Keeping also the near instantaneous nature of email in mind, applicability of postal rule will be unjustified. Receipt by information system may be considered as making receipt rule applicable making the requirement of knowledge redundant.

The IT Act provides only 3 sections (under chapter IV) dealing with the

46. Section 13 starts with the words, "Save as otherwise agreed to between the originator and the addressee.

47. For e-mail being non-instantaneous means of communication.

48. For web-based contracts being instantaneous means of communication.

e-contract (regarding attribution of e-record, acknowledgement and time and place of dispatch and receipt of e-record) that are also ambiguous and create confusion. The need is to incorporate more provisions to clarify the legal position regarding e-contracts.

Live in Relationship Vis-à-Vis Marriage: Emerging Legal Issues and Challenges in India

Ms. Rupal Marwah*

ABSTRACT

Live in relationship has been one of the most contentious issue for quite some time especially in country like India which has a rich cultural heritage and values. In India marriage is an eternal union and founding stone of our Indian society and therefore this marital union commands high reverence in the society. However, with the passage of time Indian society has witnessed a lot of change. Indian society has opened its doors for western cultural idea of a live in relationship to seep into its rich cultural values though it has remained immoral and unacceptable to a large section of the Indian society.

This article is an attempt to expound upon the socio- legal aspect of live in relationship in India and recent developments in the outlook of the Indian judiciary in determining the various rights and liabilities of live-in partners. The article also attempts to emphasis upon the need of an adequate legal structure in order to protect the rights of live-in partners in India. A critical assessment of the recommendations given by the Malimath Committee and a deep analysis of the relevant provisions of the Protection of Women from Domestic Violence Act, 2005 shows that the Indian judiciary by its pro active efforts has taken cognizance of women's susceptible position in such conservative form of non-marital unions.

INTRODUCTION

Marriage is considered as an eternal union and sacrament which practiced as a ritual since ages. In Indian society marriage is considered to be a divine concept and assumes a great significance. But over the years marriage is losing its divinity and eternity. With the dawn of western culture in the Indian society the concept of live-in-relationship is gaining popularity. Living in-relationship is slowly

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establishing its firm roots in India. It provides youth an opportunity to break away from the traditional concept of marriage and live a free life without responsibility and commitment as in marriage. Live-in-relationships exclude the loathsome mess of family drama and prolonged complicated court procedures in case couples decide to separate. In India live in relationships are not illegal but they are considered socially and morally unacceptable and reviled by majority of our Indian society.

CONCEPT OF LIVE IN RELATIONSHIP

There is neither a specific law recognizing live in relationships in India nor a strait jacket formula to define live-in relationships. But commonly understood live in relationship means an arrangement between an unmarried couple to live together to conduct a long term relationship in a way that resembles a marriage. The Privy Council in *A Dinohamy v. W. Blahamy*[1] observed that where a man and a woman are proved to have live together as a man and wife, the law will presume that they were lawfully married unless contrary is proved.[2] The honorable Supreme Court of India in *Payal Sharma v. Superintendent, Nari Niketan and other*[3] was of the view that a man and a woman could live together even without getting married if they wished to. In a landmark judgment *Alok Kumar v. State & Others* [4] the Delhi High Court ruled that a live in relationship is a walk in and walk out relationship. Justice S.N. Dhingra noted, *"There are no legal strings attached to this relationship nor does this relationship create any legal-bond between the partners".*[5]

REASONS FOR ENTERING INTO LIVE IN RELATIONSHIP

There may be number of reasons for unmarried couple to enter into a live in relationship. Some of these reasons are explained below.

1. The disrespect of social bonds, the lack of trust and tolerance in relationships have led to increased cases of broken marriages. To avoid this situation live in relationships have come into picture as an alternative to marriage.[6]

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1. AIR 1927 P.C. 185
2. K. Jaishankar & Nutti Ronel, ed., *SASCV 2013 Conference Proceedings*, Manonmaniam Sundaranar University, South Asian Society of Criminology and Victimology & Department of Criminology and Criminal Justice Publication, Abhishekapatti, Tirunelveli, 2013, p.230
3. AIR 2001 All. 254
4. This judgment was pronounced by the honorable Delhi High Court on 10th August 2010. CrLM.C.No. 2997/2009
5. *Ibid.*
6. Poonam A Bamba, *Perfect Marriage- not a mirage*, 1st Ed., Pustak Mahal, New Delhi, 2010, p.186.

2. Other reason may be fear of responsibility and commitment arising out of marital relationships.

3. Financial reasons may also sometimes operate as a reason for entering into live in relationship.

4. Some couples do not believe in the institution of marriage and prefer to stay single at the same time enter into live in relationship to enjoy the sexual pleasures as in case of marriage.

5. Sometimes families of couples are against their marriage due to caste differences, belonging to different religion or other reasons like age difference, status inequality. Therefore couples in such cases may decide to go for live in relationship.

6. Live in relationship is also a best option for those couples who give priority to their career over marriage and do not want to enter into a committed relationship as in case of marriage.

LAW PROTECTING THE RIGHTS OF WOMEN AND THEIR CHILDREN BORN OUT OF LIVE IN RELATIONSHIP IN INDIA

Maintenance of Women :

Indian law does not provide for any specific legislation governing live in relationship. Indian personal law also does not recognize live in relationship. Section 125 of Cr. P. C. provides for maintenance of wife, children and parents, who cannot maintain themselves. Till date there has been a lot of ambiguity regarding the interpretation of this provision with regard to inclusion of women of live in relationships. As per strict interpretation of Section 125 maintenance can only be claimed by a woman who is a wife, has either been divorced or has obtained a divorce, or is legally separated and is not remarried.

With cultural and social changes in the society there has also been a change in the perspective of judges in India with regard to the concept of live in relationships. Courts in India have started interpreting Section 125 of Criminal Procedure Code in a liberal manner to cover the cases of women in live in relationships. Supreme Court of India applauded the recommendation of Malimath Committee and the Law Commission in its 8th report to include women in a live in relationships within the ambit of Section 125, Criminal procedure Code. In *Abhijit Bhikaseth Auti v. State of Maharashtra and Others* [7] the Court observed that marriage is not an essential prerequisite for a woman under Section 125 of the Criminal Procedure

7 AIR 2009 (NOC) 808 (Bom.)

Code to claim maintenance.

In *Chanmaniya v. Virendra Kumar Singh Kushwaha*[8] the Apex Court held that the word 'wife' under Section 125, Criminal Procedure Code should be given an extensive interpretation to include even those cases where an unmarried couple has been living together as husband and wife for a reasonably long period of time. Section 125 of the Cr. P. C, should be interpreted in an expansive manner so as to accomplish the true essence of the constructive provision of maintenance.

Protection to Women in Live in Relationship under the Protection of Women from Domestic Violence Act, 2005.

An attempt was made by the Indian legislature to protect women from domestic violence by enacting the Protection of Women from Domestic Violence Act in the year 2005 (PWDVA, 2005). The Act has been broadly perceived as the first Act to give recognition to the existence of live in relationships in India by including non marital adult heterosexual relations. This is implied from the definition of "aggrieved person" under Section 2(a) of the Act[9]. The Act also defines a 'domestic relationship'[10] under Section 2(f). Thus as per implication of Section 2(f), the Act not only applies to a married couple, but also to a 'relationship in nature of marriage'. The Supreme Court pronounced two landmark judgments in the year 2010 and 2013 respectively wherein it held that live in relationships fall within the ambit of PWDVA, 2005 if some additional criterion as laid down by the Supreme Court are fulfilled.

The PWDVA, 2005 entitles a woman suffering from physical, economic abuse or mental agony to claim remedy under the Act. The accused can be prohibited from committing certain acts by passing orders under Section 18[11] of the Act.

8 (2011) 1 SCC 141

9. Section 2(a), Aggrieved Person - any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any Act of domestic violence by the respondent.

10. Section 2(f), Domestic Relationship - a relationship between two persons who live or have, at any point of time, lived together in a shared house-hold, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

11 Section 18. Protection Orders - The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from- (a) committing any act of domestic violence; (b) aiding or abetting in the commission of acts of domestic violence; (c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person; (d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral

But the Magistrate must be satisfied that woman has been subjected to domestic violence. Magistrate can also pass orders allowing woman abused to claim medical expenses, reimbursement for loss of earnings or property and maintenance."[12]

In *D Velusswamy v. D Patchaiammal* [13] the Apex Court held that if a couple enters into a live in relationship only for sexual pleasure, neither partner is entitled to claim palimony. Certain conditions must be complied with by the live in couple in order to claim palimony.[14] The requisites of such a relationship are:

"*(a) The couple must hold themselves out to society as being akin to spouses.*

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time."[15]

The honorable Supreme Court also observed *"In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'. No doubt the view we are taking would exclude many women who have had a live in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression 'relationship in the nature of marriage' and not 'live in relationship'. The Court in the grab of interpretation cannot change the language of the statute. We cannot interpret the law beyond its words."*[16]

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or written or electronic or telephonic contact; (e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate; (f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence; (g) committing any other act as specified in the protection order.

12. Keyn Advani, *Writings on Human Rights, Law and Society in India: A Combat Law Anthology*, ed. Harsh Dobhal, Human Rights Law Network, 2011, p. 582
13. (2010) 10 SCC 469
14. *http://indiankanoon.org/doc/15218811/* last accessed on 29th May 2015
15. *Supra* n.12 at 14
16. *Supra* n.12 at 15

Supreme Court of India in *Indra Sharma v. VKV Sharma*[17] again enumerated a number of criteria to determine whether a relationship constitutes a live in relationship so that the live in woman can claim beneficial remedy available to her under the PWDVA, 2005. The grounds enumerated by the Apex Court delve deep into the aspects which would bring live in relationship within the purview of 'relationships in the nature of marriage'.

Following guiding principles have been laid down by the Apex Court to determine whether a relationship is live in relationship or not:

"(1) Duration of period of relationship

Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.

(2) Shared household

The expression has been defined Under Section 2(s) of the DV Act and, hence, need no further elaboration.

(3) Pooling of Resources and Financial Arrangements

Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.

(4) Domestic Arrangements

Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or up keeping the house, etc. is an indication of a relationship in the nature of marriage.

(5) Sexual Relationship

Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.

(6) Children

Having children is a strong indication of a relationship in the nature of

17. 2013 (14) SCALE 448

marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

(7) Socialization in Public

Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.

(8) Intention and conduct of the parties

Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship."[18]

The Court in *Indra Sarma v. VKV Sarma*[19] case made it very clear that the guidelines enumerated were merely explanatory and not exhaustive. The judgment of the Apex Court in *Indra Sarma* case to a great extent has cleared ambiguity which arose in interpreting the phrase 'relationship in nature of marriage' under the PWDVA, 2005.[20]

Maintenance and Custodial Rights of Child

With respect to a child born out of live in relationship, he/she is entitled to claim maintenance from his/her parents if he/she is unable to get maintenance under his/her personal laws. There is a pressing need to have a specific law governing custodial rights of child born out of live in relationship. Issue of custodial rights imports significant value when couple decides to part.

Under personal laws, father is considered the natural guardian of his/her legitimate child, whereas mother is considered the natural guardian in case of illegitimate child. However after the milestone judgment of Supreme Court in *Gita Hariharan v. RBI*,[21] both mother and father have been accorded equal rights over the child. Court will grant custody of such child after analyzing facts and circumstances of the case in hand.

Legitimacy and Inheritance Rights of Child

Courts in India have been facing the problem of determining the legitimacy of a

18. *Supra* n. 14 at 52
19. *Supra* n. 16
20. *http://judis.nic.in/supremecourt/imgs1.aspx?filename=41007* last accessed on 28th May 2015
21. (1999) 2 SCC 228

child born out of live in relationship time and again. There is a lack of uniform judgment with respect to shorter relationships in India. Section 16 of the Hindu Marriage Act, 1955 further complicates the situation by according a legal status of legitimacy even to illegitimate children for the purpose of inheritance. Thus the implication of the provision is that children born out of live in relationship have equal right to inherit both ancestral and self-acquired property of their parents in the same way as the legitimate children have.[22] Various judgments that have asserted that a child is legitimate for certain purposes and illegitimate for others have raised questions of parity regarding the perception of Courts in India. In recent pronouncements, Indian courts have ruled that children out of wedlock will be considered legitimate.[23]

CONCLUSION

Live in relationship tend to promote a humanistic and an individualistic approach and secure right to privacy and personal liberty envisaged under Article 21 of the Indian Constitution. Though live in relationships tend to be a strongly rooted in the social fabric of western societies but in India the reality is quite different. Institution of marriage still continues to be preferred over any other form of union in India. However the Indian judiciary has played a proactive role in protecting the rights of live in couples time and again. The laudable efforts of the judiciary are therefore praiseworthy.

In Indian context it is need of the hour to enact a new law governing live in relationships keeping in view the traditions and cultural values which form the founding stone of our Indian society rather than making efforts to bring these relationships within the purview of any existing law. After a substantial period of cohabitation live in relationships should be granted legal status so that the rights of live in partners and children born out of such relationship are protected.

22. *Paravumkandiyal Eravath Kunaprawan Kalliani Amma v. K.Devi*, 1996 SCC (4)76
23. *http://www.legalserviceindia.com/article/article/live in relationship in a marriage centric india-1618-1.html* last accessed on 28th May, 2015

NALSA v. Union of India and Others, AIR 2014 SC 1863

Prof. (Dr.) Meenu Gupta*

National Legal Services Authority (NALSA) v. Union of India and others[1], was mainly concerned with the grievances of the members of Transgender Community (for short 'TG community') who seek a legal declaration of their gender identity than the one assigned to them, male or female, at the time of birth and their prayer was that non-recognition of their gender identity violates Articles 14 and 21 of the Constitution of India. Hijras/Eunuchs, who also fall in that group, claimed legal status as a third gender with all legal and constitutional protection.

INTRODUCTION

Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.

The National Legal Services Authority, constituted under the Legal Services Authority Act, 1997, to provide free legal services to the weaker and other marginalized sections of the society, came forward to advocate their cause, by filing Writ Petition No. 400 of 2012. Poojaya Mata Nasib Kaur Ji, Women Welfare Society, a registered association, has also preferred Writ Petition No. 604 of 2013, seeking similar reliefs in respect of Kinnar community, TG community.

Laxmi Narayan Tripathy, claimed to be a Hijra, got impleaded so as to effectively put across the cause of the members of the transgender community and Tripathy's

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life experiences also for recognition of their identity as a third gender, over and above male and female. Tripathy said that nonrecognition of the identity of Hijras, a TG community, as a third gender, denies them the right of equality before the law and equal protection of law guaranteed under Article 14 of the Constitution and violates the rights guaranteed to them under Article 21 of the Constitution of India.

ISSUES

The PIL filed by NALSA raised an issue of "Gender Identity", which was the core issue. It had two facets, viz.:

(1) Whether a person who is born as a male with predominantly female orientation (or vice-versa), has a right to get himself recognized as a female as per his choice more so, when such a person after having undergone operational procedure, changes his/her sex as well;

(2) Whether transgender (TG), who are neither males nor females, have a right to be identified and categorized as a "third gender"?

ARGUMENTS

Shri Raju Ramachandran, learned senior counsel appearing for the petitioner – the National Legal Services Authority, highlighted the traumatic experiences faced by the members of the TG community and submitted that every person of that community has a legal right to decide their sex orientation and to espouse and determine their identity. Learned senior counsel has submitted that since the TGs are neither treated as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other persons enjoy as citizens of this country. TGs are deprived of social and cultural participation and hence restricted access to education, health care and public places which deprives them of the Constitutional guarantee of equality before law and equal protection of laws. Further, it was also pointed out that the community also faces discrimination to contest election, right to vote, employment, to get licences etc. and, in effect, treated as an outcast and untouchable. Learned senior counsel also submitted that the State cannot discriminate them on the ground of gender, violating Articles 14 to 16 and 21 of the Constitution of India.

Shri Rakesh K. Khanna, learned Additional Solicitor General, appearing for the Union of India, submitted that the problems highlighted by the transgender community is a sensitive human issue, which calls for serious attention. Learned ASG pointed out that, under the aegis of the Ministry of Social Justice and Empowerment (for short "MOSJE"), a Committee, called "Expert Committee on Issues relating to Transgender", has been constituted to conduct an in-depth

study of the problems relating to transgender persons to make appropriate recommendations to MOSJE. Shri. Khanna also submitted that due representation would also be given to the applicants, appeared before this Court in the Committee, so that their views also could be heard.

AN ANALYSIS OF THE DECISION

The Court examined various International treaties, covenants, judgments legislations of foreign countries and particularly Yogyakarta Principles related to human rights standards and their application to issues of sexual orientation gender identity. The Court held that in India due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence it is necessary to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles. The court further justified the need to grant legal protection on the basis of Article 14, Article 15, Article 16, Article 19 & Article 21 of the Constitution of India.

In Paragraph 11 of the case, Justice Radhakrishnan defined "transgender" as an "umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex." After a brief historical excursion into the history of the transgender community in India, he observed, in Paragraph 17, that S. 377 was brought in at at time when transgenders were thought to come within its ambit, and then, in paragraph 18, he noted that "*Section 377, though associated with specific sexual act, highlighted certain identities, and was used as an instrument of harassment and physical abuse...*"

According to me, the most interesting part of the judgment, however, is Justice Radhakrishnan's analysis of Article 19(1)(a). He held that "*Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender.*" (Paragraph 62) After citing a few American cases on point, I come to the heart of the judgment, that is, Paragraph 66:

"*Gender identity... lies at the core of one's personal identity, gender expression and presentation and therefore, it will have to be protected under Article 19(1)(a) of the Constitution. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality.*"

Consequently:

"*The values of privacy, self-identity, autonomy and personal integrity are*

fundamental rights guaranteed to the members of the transgender community under Article 19(1)(a)... and the State is bound to protect and recognize those rights." A standard Article 21 analysis follows (Paragraph 67 onwards).

In a nutshell the Supreme Court recognised the 'third gender' status of Hijras/ Eunuchs which comes under the category of 'Transgender Community' for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature. The bench directed the Centre and state governments to identify them as a third gender and frame various social welfare and educational schemes for their upliftment. The court said that for the purposes of identification as the third gender, psychological and not biological test was to be applied. The Supreme Court also firmly secured the right to equality and equal protection for transgender persons under Articles 14, 15 and 16 by prohibiting discrimination on the ground of gender identity. It has broadened the scope of the term 'sex' in Articles 15 and 16, which till recently meant biological sex of male and female, to include 'psychological sex' or 'gender identity'. Significantly, the Court also declared that no one can be discriminated against on the ground of sexual orientation.

Notwithstanding the confusion in terms/expressions around gender and sexuality apparent in some parts of the judgment, *NALSA* is, on the whole, a historic decision that has both strengthened and advanced fundamental rights. It strikes a fine balance between philosophical, legal and practical considerations that surround the area of gender identity and recognition. The decision in *Koushal v. NAZ Foundation*[2] will require a relook, in light of the specific findings and broader principles laid down in this judgment. The decision will go a long way in stopping egregious police practices of stripping, subjecting transgender persons to intrusive body searches or medical examination to ascertain their gender. Discrimination in the areas of public employment, health care, education and access to services will be open to challenge and redress. Transgender women may be able to seek protection under gender-specific laws for women.

The progressive even if greatly belated judgment of the Supreme Court will not change overnight the destinies of people who do not conform to the sexual practices of the majority of the population. But it reminds us of the unacceptable ways that our society and law treat people of difference with contempt, injustice and violence and paves the way for a more humane and inclusive world for people who may or may not be like you or me, but that in no way makes them less human.

2 2014 (1) SCC 1

K. P. Manu v. Chairman, Scrutiny Committee for Verification of Community Certificate, AIR 2015 SC 1402

Dr. Sanjay Gupta*

In *K. P. Manu v. Chairman, Scrutiny Committee for Verification of Community Certificate*[1], a question of seminal importance was deliberated before the Hon'ble Supreme court that whether a reconvert is entitle to the benefit of caste under the Constitution (Schedule Castes) order of 1950.

FACTS

K.P. Manu got a certificate issued in his name after reconversion from Christianity to Hinduism and got a job on the basis of this certificate. The certificate was challenged by *Sh S. Shreekumar Menon* on the ground that the certificate has been obtained on misrepresentation and in total transgression of law. On the basis of the complaint, a scrutiny committee was constituted which conducted an enquiry and returned with a finding that the certificate was erroneously issued. The respondent, Mr. K.P. Manu's great grandfather belonged to Hindu Pulaya Community and his grandfather got converted to Christianity and got married to a convertee from Hindu religion. His father also followed Christianity and got married to a Christian female. The respondent was born out of this wedlock, but on the attainment of the age of 24 years got reconverted to Hinduism. On the basis of the reconversion, he applied for the caste certificate which was issued in his favour by the revenue authorities. The scrutiny committee came to the finding that the respondent does not belong to the caste as his parents and grandparents got converted to Christianity and there is no material to exhibit that the respondent was following the customs and traditions of the community. On the basis of the report of the scrutiny committee the State government ordered the removal of him from the service and to recover Rs. 15 Lakhs towards the salary paid to him. The same was challenged before the High Court in appeal, but the High Court opined in favour of the finding of the scrutiny committee on the basis that the grandparents and the parents were Christians and he was born out of the same.

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1. AIR 2015 SC 1402

Thereafter the appeal by special leave was filed before the Supreme Court of India.

ISSUES

1) Whether a person can be reconverted to Hinduism after conversion to Christianity?

2) Is it sufficient that the person should be taken in its fold by the original community?

3) Can the person be still denied the benefit after acceptance by the community?

4) How to assess that the person is following the tradition and practices of the caste into which he is converted?

The Hon'ble court rightly found favour with the decision of *G. Michael v. S. Venkateswaran*[2] that once a person converts to another religion, he ceases to belong to the caste to which he originally belong because the caste is the cardinal feature of Hinduism.

However a Hindu may still belong to that caste if the structure of the caste permits it. The caste may exist on economic or occupational considerations, rather than religious considerations. The court has referred to such prevalent practices of South India wherein a person after conversion is regarded as a member of the original caste.

Therefore the court opined that the person after reconversion can be assimilated into hes aboriginal caste, if the persons are ready to take him in the fold: and the objects of the Constitution (Schedule Castes) Order, 1950 would be advanced rather than retarded by such view.

The court upheld the view expressed in the case of *Guntur Medical College v. Y. Mohan Rao*[3], that a person can re-embrace Hinduism even if he is born of Christian parents and the members of the caste are ready to accept him into their fold. However doubts concerning following of a faith for generations were dispelled by the court on the pretext that the decision of adopting a faith of worship depends upon the person who can exercise it on coming to age of exercising discretion. The child blindly follows the faith of his parents and after coming to age of majority, he is in a position to determine the way ahead in matters of faith.

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2. AIR 1952 Mad. 474
3. AIR 1976 SC 1904; See Also, *C.M.Arumugam v. S. Rajagopal*, AIR 1976 SC 979

CONCLUDING OBSERVATIONS

The solidarity of a caste as a unit of social organization is an acknowledged fact. Initially it was the duty of the King to see that the various castes observe their own rules and regulations, and to bring back the erring members to their faith. Furthermore it was the duty of the King to determine disputes according to the customs of the castes and to make laws not at variance with the customs of the castes[4]. Therefore the change of castes and the laws were subservient to the wishes and practices of the castes. Hinduism is the religion which has assimilated in itself peoples belonging to different faiths and has modified and redefined itself with changing times. The definition of the term Hindu is the most difficult because it does not follow one set of rites propounded by one prophet; or follow one dogma, but it is a way of life which does not follow the narrow traditional features of religion or creed[5]. It is based on the idea of universal receptivity. It has borne with and then, so to speak, swallowed, digested, and assimilated something from all the creeds[6].

The effects of conversion and then reconversion to Hinduism are a constant process in India, but the people have continued to remain stuck to their castes[7]. The practice of caste however, is so deep-rooted in the Indian people that its mark does not seem to disappear on conversion to a different religion. If it disappears only to reappear on re-conversion, the mark of caste does not seem to really disappear even after some generations of conversion[8].

This precisely remains the philosophy of emergence and propagation of religions provided it if not forcible or for material gains[9].

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4. G. S. Ghurye, *Caste and Race in India*, 1994, p. 95.
5. *Shastri Yagnapurushdasji v. Muldas B. Vaishya*, SCJ 1966 II 502
6. Monier Williams, *Hinduism*, 1961, p. 1
7. Justice S. D. Wad, *Caste and Law in India*, 1984, p. 23
8. *Id.*, p. 24
9. *Sarla Mudgal v. Union of India*, AIR 1995 SC 153

Rajiv Choudharie (HUF) v. Union of India and Others (2015) 3 SCC 541

Dr. Seema Sharma*

The decision of the Supreme Court in *Rajiv Choudharie (HUF) v. Union of India and Others,*[1] has assumed importance as major landmark judgment in regulating fair compensation related to land acquisition for public purposes. The process of determining and implementing these compensations has been described in Land Acquisition Act 1894 and recently in Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013 to provide just and fair compensation with least disturbance to landowners and other affected families whose land is acquired or proposed to be acquired or those who are affected by such acquisition and to provide adequate provisions for rehabilitation and resettlement. The 2013 Act focuses on providing not only compensation to the land owners, but also extend rehabilitation and resettlement benefits to livelihood looser from the land, which shall be in addition to the minimum compensation. The minimum compensation to be paid to the land owners is based on a multiple of market value and other factors laid down in the Act. The Act forbids or regulates land acquisition when such acquisition would include multi-crop irrigated area.

The appellant in this case is seeking directions and praying for an order for disposal of this appeal in terms of section 24(2) of Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013. The appellant land owner has questioned correctness of judgment and order passed by High Court in 2006 wherein it has dismissed the said petition.

FACTS ARE SUMMARIZED IN BRIEF AS UNDER

The appellant Hindu Undivided Family purchased land measuring 27 bighas situated in the revenue estate of village Bamnauli, Tehsil Mehrauli New Delhi. On application made by the appellant, the Municipal Corporation of Delhi (MCD) on 23-01-1985 sanctioned the plan for constructing a farm house on part of the said

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land. In January 1985, the appellant constructed a farm house on the aforesaid land, which was in accordance with the plan duly sanctioned. After the completion of the construction, the MCD issued a completion certificate dated 06.11.1985 to the appellant. On 26-11-2004, the Government issued notification dated 4-11-2004 under section 4 of the repealed Land Acquisition Act,1894 in respect of land measuring 2100 bighas and 06 biswas in respect of village Mehrauli for public purpose under section 4 of L.A Act for construction of Dwarka Phase 2. The appellant land was also covered in said notification. He filed objections under 5A of L.A. Act opposing proposed acquisition for public purpose. Thereafter, on 10.11.2005, the declaration notification under Section 6(1) of the L.A. Act dated 31.10.2005 was published in the government Gazette in respect of the land sought to be acquired including the land owned by the appellant. The appellant filed Writ Petition on 2006 before the High Court of Delhi at New Delhi, challenging the legality of the notifications under Section 4 and 6 of the L.A. Act. The High Court issued notice and passed an order of "status quo" in respect of the land in question. High Court upon examining the writ petitions on merits dismissed the same with a direction to the land owners that they were permitted to file a representation to the competent authority under Section 48 of the L.A. Act, to de-notify their land. It further held that since their representation for denotification is decided by the NCT, the parties are directed to maintain "status quo" as to nature, title and possession of the land in question. The Court passed an interim order to maintain "status quo" in respect of the possession of the land in question. subsequently the same was made absolute till the disposal of the appeal. Supreme court held in instant case that physical possession of the land belonging to the appellant has neither been taken by the respondents nor compensation paid to him in respect of the land acquired even though more than five years have lapsed since the award was passed on 06.08.2007 and the Act of 2013 came into force. Therefore, the conditions mentioned in Section24(2) of the Act of 2013 are satisfied in this case for allowing the plea of the appellant that the land acquisition proceedings are deemed to have lapsed in terms of Section 24(2) of the Act of 2013. The said legal principle laid down by this Court in the case of Pune Municipal Corporation[2] with regard to the provision of Section 24(2) of the Act of 2013, is applicable with all fours to the fact situation in respect of the land covered in this appeal for granting the relief as prayed by the appellant in the application.

The moot point here is regarding physical possession where compensation has not been paid. Throughout the proceedings before the High Court as well as Supreme Court actual physical possession of the land was never taken by the

2. *Pune Municipal Corporation Anr. v. Harakchand Solanki* (2014) 3 SCC 183.

respondents. Secondly factum of award under Section 11 of the Land Acquisition Act, 1894, must be clearly established. The said Award must predate the commencement of the Act, i.e., 01.01.2014., by at least five years (or more), the Award must have been passed on or before 01.01.2009. In instant case possession is not taken and compensation is not paid so the proceedings shall be deemed to have lapsed. The appellant is protected by interim orders of "status quo" both by the High Court as well as Supreme Court with respect to the possession of the land".

Having regard to the facts narrated and provisions of Section24(2) of the Act of 2013, the land acquisition proceedings in the present case initiated under the L.A.Act have lapsed for the reason that the award under Section 11 of the L.A. Act, which was made by the LAC on 06.08.2007 vide Award No.1/2007-2008 which comes out to be more than five years prior to the commencement of the Act of 2013 (commenced on 01.01.2014) and physical possession of the land in dispute is neither taken nor has the compensation awarded been paid to the appellant in respect of his acquired land so there is no ambiguity that (a) the Award is over five years old and (b) that compensation has not been paid or (c) that possessim of the land has not been taken so the acquisition is liable to be quashed.

While interpreting sub-section (1) of Section 24, it begins with non obstante clause. By this, Parliament has given overriding effect to this provision over all other provisions of 2013 Act. It is provided in clause (a) that where the land acquisition proceedings have been initiated under the 1894 Act but no award under Section 11 is made, then the provisions of 2013 Act shall apply relating to the determination of compensation. Clause (b) of Section 24(1) makes provision that where land acquisition proceedings have been initiated under the 1894 Act and award has been made under Section 11, then such proceedings shall continue under the provisions of the 1894 Act as if that Act has not been repealed.

Section 24(2) also begins with non obstante clause. This provision has overriding effect over Section 24(1). Section 24(2) enacts that in relation to the land

3. 24(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the L.A.Act, where an Award under the said Section has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act.Provided that whether an Award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries specified in the notifications for acquisition under said land acquisition and shall be entitled to compensation in accordance with the provisions of this Act.

acquisition proceedings initiated under 1894 Act, where an award has been made five years or more prior to the commencement of the 2013 Act and either of the two contingencies is satisfied, viz; (i) physical possession of the land has not been taken or) the compensation has not been paid, such acquisition proceedings shall be deemed to have lapsed. On the lapse of such acquisition proceedings, if the appropriate government still chooses to acquire the land which was the subject matter of acquisition under the 1894 Act then it has to initiate the proceedings afresh under the 2013 Act. The proviso appended to Section deals with a situation where in respect of the acquisition initiated under the 1894 Act an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries then all the beneficiaries specified in Section 4 notification become entitled to compensation under 2013 Act. Section 31(1) of the 1894 Act enjoins upon the Collector, on making an award under Section 11, to tender payment of compensation to persons interested entitled thereto according to award. It further mandates the Collector to make payment of compensation to them unless prevented by one of the contingencies contemplated in sub-section (2). The contingencies contemplated in Section 31(2) are: (i) the persons interested entitled to compensation do not consent to receive it (ii) there is no person competent to alienate the land and (iii) there is dispute as to the title to receive compensation or as to the apportionment of it. If due to any of the contingencies contemplated in Section31(2), the Collector is prevented from making payment of compensation to the persons interested who are entitled to compensation, then the Collector is required to deposit the compensation in the court to which reference under Section 18 may be made.

It has been held by honourable court that

"It is clear that the award pertaining to the subject land has been made more than five years prior to the commencement of the 2013 Act. It is also admitted position that compensation so awarded has neither been paid to the landowners/ persons interested nor deposited in the court. The acquisition proceedings in respect of the appellant's land have lapsed.

The said legal principle laid down in the case of *Pune Municipal Corporation and Anr. v. Harakchand Misirimal Solanki & Ors (2014) 3 SCC 183* where it is argued on behalf of the respondents-landowners that in view of Section 24(2) of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short, '2013 Act') which has come into effect on 01.01.2014, the subject land acquisition proceedings initiated under the Land Acquisition Act, 1894 (for short, '1894 Act') have lapsed. The question for decision relates to true meaning of the expression: "compensation has not been paid" occurring in Section 24(2) of the 2013 Act.

In *Union of India v. Shiv Raj*[4] the court clarified the manner in which the new provision is to be interpreted and held that the acquisition lapses.

The legal position has been subsequently reiterated by Supreme Court in *Arvind Bansal v. State of Haryana (2015)* that in the event that there is no ambiguity and the Award is over five years old, compensation has not been paid or possession of the land has not been taken, the acquisition is liable to be quashed.

It has been contended in other Appeals before Supreme court that the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Settlement Ordinance, 2014, issued on 31st December, 2014, clarifies that if possession of the acquired land has not been taken owing to interim Orders passed in this regard the acquisition may be protected and insulated from the purpose and intendment of Section 24 of the 2013 Act. It has been further clarified in *Radiance Fincap (P) Ltd. v. Union of India & Ors.* that Ordinance shall have prospective operation only. This Court therein held as under:

"The right conferred to the land holders/owners of the acquired land under Section 24(2) of the Act is the statutory right and, therefore, the said right cannot be taken away by an Ordinance by inserting proviso to the above said sub-Section without giving retrospective effect to the same."

Hence after the commencement of the Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013 in most of the cases the Appellants changed the tack of their challenge originally framed under the Land Acquisition Act, 1894 by evoking the deemed lapse of proceedings under Section 24(2) of the 2013 Act as held in instant case.

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Emerging Trends in Corporate Governance: Legal Issues and Challenges in India: Prof. (Dr.) B.P. Singh Sehgal: Satyam Law International Print ISBN: 978-93-82823-23-0, Pages: 484, Price: Rs.1200

Prof. (Dr.) Sanjeev Bansal*

In today's time organizations have outgrown their political boundaries and have trusted upon the value of corporate governance. In the last one decade, Importance of Corporate Governance has increased multifold. There has been a growing need to effectively and efficiently manage the company globally as many changes are taking place in the global emerging economy. To address issues in corporate governance related to corporate culture, recent regulatory framework for trade, corporate strategies, and competition law to promote exchange of thoughts, to critically analyze the provision of Companies Act 2013 and to bring common understanding about the issues and recommendation on Corporate Governance, prestigious Amity Law School Delhi conducted a World class Seminar in April 2014. It was inaugurated by Honorable Justice B.A.Khan, former chief Justice of J&K High Court & President SAARC law, India. This book is a resultant of papers presented by students and faculty from various Institutions and universities. This conference proceedings in the form of edited book has beighted the fact that Corporate Governance is an ethically driven business process that is committed to values aimed at enhancing an organization's wealth generating capacity.

This is ensured by taking ethical business decisions and conducting business with a firm's commitment to values, while meeting stakeholders' expectations. It is imperative that the company's affairs are managed in a fair and transparent manner. This is vital to gain and retain the trust of the stakeholders.

CORPORATE GOVERNANCE POLICIES

The corporate governance framework ensures effective engagement of stakeholders and helps to evolve with changing times. It is believed that an active, well-informed and independent board is necessary to ensure the highest

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standards of corporate governance. This book highlights the commitment to follow global best practices, comply with the Euro shareholders Corporate Governance Guidelines 2000, and the recommendations of the Naresh Chandra Committee, the Kumar Mangalam Birla Committee and the United Nations Global Compact (UNGC).

The book comprises of five sections which comprise of various research papers pertaining to the said headers.

Section 1 of the book talks about the contribution of the people who made this conference happen. in the inaugural address Justice B.A KHAN (Former Chief Justice of J&K HIGH COURT and president SAARC Law, India emphasized the need of governing of corporates for welfare of its stakeholders and promotion of a larger public interest.

Section 2 of the book **"Corporate Administratinn & Corporate Social Responsibility"** talks about Coordination and management of legal services. It consists of seven papers. It further lays emphasis on Contract coordination and development - primary resource including policy, training, negotiation and resolution of issues. It also talks about Development of business opportunities and revenue optimization strategies for better corporate governance. One of the papers of this section talks about Global perspective of Corporate Governance.

The 2013 Act provides for the institutions of independent Directors, the manner of their selection, appointment and removal, their role and functions and also for the evaluation of their performance. This act envisages a better auditing system by providing for the rotation of statutory auditors for every 5 years and confers suo moto powers on the National Company Law Tribunal. These facts are very beautifully highlighted in the form of six research papers in section 3 under the heading of **Corporate Governance & Competition Regulation.**

E-governance has gained lot of importance in today's time. E-Governance is the transformation of government to provide efficient, convenient, transparent services to the citizens and conduct business through exchange of information. This section 4 **"E-Governance & Regulatory Framework"** is examining the legal and modern infrastructure issues related to E-Governance with the perspective of developing countries. This section highlights that E-Governance is all about transformation through latest and advanced technologies. Nine papers of this section talks about regulatory framework of E-governance in a precise way. There is a very interesting paper by Agarwal & Bhardwaj, which comments about regulatory securities in reference to case of *Sahara v. SEBI.*

Last Section **"Corporate Dispute Resolutinn System & Capital Formation**

Regulations" consists of seven important research papers and has focused on Capital Formation and Regulation and emphasized on the paradigm shift that has occurred from democratic socialism to democratic capitalism and has stressed the need for corporates to work for the welfare of masses. This section speaks about commercial arbitration and some more prevalent issues.

All the thirty eight papers included in the book are of immense use and contemporary. These papers are articulate, well researched and based upon observations based upon primary and secondary data collected.

I feel honored and privileged to write my views on the said book .As per the words of Dr A PJ Abdul Kalam **"India is trending at the cross roads"** hold very true in the present corporate scenario. Our foreign investments have increased 3 times .Todays *mantra* for corporate governance needs to be the welfare of people at large and to ensure more transparency and accountability in the system. I would fail in my duty if I do not congratulate the organizers of this conference, esteemed member of Editorial board and above all the leadership of Dr B.P Singh Sehgal for these wonderful cooference proceedings.

Wishing this book a great success!

INTEGRATED CLINICAL LEGAL EDUCATION- Shuvro Prosun Sarkar, Anirban Chakraborty, Shounak Chatterjee, Published by Universal Law Publishing Co. Pvt. Ltd., New Delhi

Prof. (Dr.) R. L. Kaul*

The book on "Integrated Clinical Legal Education- Shuvro Prosun Sarkar, Anirban Chakraborty, Shounak Chatterjee, Published by Universal Law Publishing Co. Pvt. Ltd., New Delhi"[1] is recent publication of universal law publishing co. The writing on the subject is in consequence to the introduction of five year law course and establishment of independent law schools to educate and train the students on subject of law. This resulted in setting up fifteen law schools in the country. Besides, the universities/ institutions have also adopted the five year course in addition to usual three year course.

For convenient understanding, the book is divided into unnumbered thirteen logical chapters with forward by Prof. (Dr.) Manoj Kumar Sinha, Director Indian Law Institute in the beginning and "report of the working group on legal education" at the last. The subject has been dealt meticulously in 180 pages. The chapters 1 - 5 have broadly brought out the present Indian Legal Education scenario covering its current status, the historical background, problems, need for reforming legal education so on and so forth. In the chapter under current status space has been devoted to regulatory authorities, reports, bills etc. like Bar Council of India, University Grant Commission, Committee of Judges, 184th Report of Law Commission, national Knowledge Commission report, Rules of Legal Education, Curriculum Development Report and National Law School Bill, 2010. The writing brings forth the deficiencies and recommendations like absence of separate regulator for legal education and for setting up of state universities, enhancing library facilities, improving quality of law teachers besides examination system and clinical legal education.

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1. By Shuvro Prosun Sarkar, Anirban Chakraborty, Shounak Chatterjee, Published by Universal Law Publishing Co. New Delhi.

In the chapter titled as 'clinical legal education', the writer has dealt with the origin, scope and objectives of the clinical legal education covering social justice including legal aid in its different perspectives in the context of integrated clinical legal education. In the writers view the professional responsibility can be inserted in the minds of future generation of lawyers by involving them in activities which has emphasis on providing better socio - economic condition for mass of people. Focus is made on the lack of planning by almost all the 950 law imparting institutions in India on this issue. The report of the Law School Board Legal Aid Clinics, 2011 has very effectively pointed all the lacunas behind non implementation of the legal aid program by the law school clinics. An attention among others is drawn towards the report of 'Juridicare Committee on Legal Aid' which also focused on the curricular objectives of legal education while recommending law schools involvement in legal aid works.

In its onward passage, the chapter captioned as 'Global Clinical Movement' speaks about the clinical legal education having got enough momentum by early 1970's and early 1980's in good number of countries around the world. Authors viewed all the countries situated in the same region have similar social, economic and cultural conditions. The problems of general mass in those countries can be effectively addressed by law schools and students as being similar in nature. So cross country exchanges of clinical teachers have got popularity by early 90's. This was to bring up with the network which will help clinicians to talk about their goals and experiencing the way to reduce common setbacks. The moment in India needs lawyers who are both technically competent and social - justice oriented. The author proceeds to cite the example of China and South Africa. In former case the clinical teaching of law developed by 1990's though the rule of law prevailing in China cannot be at par with rule of law prevailing in other civilized nations. While in later case the clinical legal is very much community oriented. According to the author the age of South African clinical legal education is almost same as India and he prefers the said model to design and develop community clinical program to ensure the social justice mission of clinical legal education. The survey conducted in 2000 of twenty one universities in South Africa traces four obstacles being lack of funding, lack of acceptance of clinical education, lack of clinical teaching skills and balancing Teaching and Community services. The said obstacles are almost similar to other developing countries of the world.

In chapters to follow, the author has taken care to address the scope and objective of live client clinical programmes and also organizing such programmes. Participation of judicial/ quasi-judicial bodies finds mention in such programmes, besides, attention is drawn towards external/ internship/ field placement clinic,

and law reform type clinics. In scope and objective due place has been provided to various types including student- client relationship, direct/ indirect supervision, performance of tasks and provisions for providing feedback to the students regarding their performance. Chapter titled as 'Challenges for Supervision of Clinical Programmes in India' makes emphasis on appropriate supervision. The supervision is stated to be in- house, externship/ internship coupled with the mechanics for Legal Literacy Clinic, Law Reform or Public Policy Clinic etc. the clinical legal education and its curriculum attracted attention from middle of 1970 but debate for introducing reforms to the existing curriculum for legal education intensified from the beginning of 1990. As per the author's observation the major criticism was the gap to train the law students with fundamental professional skills and values essential for any person to join the legal profession. The Bar Council of India in 1997 after a lot of debate introduced 4 mandatory practical training papers called clinical papers.

The rest of last two chapters deal with Model Teaching Manual and Model Practice and Policy Manual both related to clinical education. The chapters cover the vast gamut of clinical education and in a nutshell cover the topics like terms commonly used, professional skills and values, organizing a live client clinic, teaching- learning methodology to be used in any live- client clinic, besides, subject of enhancing the competency and effectiveness of the clinical faculty. In its last chapter, a model of West Bengal National University of Judicature Sciences is provided.

After the chapters, the author provides some appendices as verbatim namely Scheme For Legal Service To Disaster Victims Through Legal Service Authorities, The National Legal Service Authority (Legal Aid Clinic) Regulations 2011, Scheme for project of Para-legal volunteers, national legal services authority (legal service to the workers in the unorganised sector) scheme, 2010, national legal service authority(legal service to the mentally ill persons and persons with mental disabilities) scheme 2010 and the reports of the working group on legal education. The book as a whole gives a better understanding of the Integrated Clinical Legal Education in India and also in few selected countries other than India like China & South Africa. The book offers an insight into the subject of clinical legal education. Being fresh in approach but still makes a good and valuable reading inter alia for law students and teachers alike.

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