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From Editors Desk

Law journals are significant contributors to legal scholarship. Legal Articles offer a meaningfully deep and critical insight into law and developments in various fields of law. The writings clear ambiguities in the understanding of law and bring forth the views and aspirations of stakeholders and their critiques paving way for legal reforms or improve interpretation of existing laws. Many a time the same may be quoted as persuasive legal opinion in judgments that influence legal developments.

The faculty of Law was established in the University of Delhi in 1924 and is the largest institution imparting legal education in India doing yeoman service at negligible fee producing leaders in all fields of law. Our intake is from the best institutions of country and output is unparalleled and thus we are a school of legal thought in the country. All legal luminaries in the country looked towards Delhi Law faculty which also contributed to establishment of Indian law Institute for freedom of opinion and promoting serious academics.

"Delhi Law Review (DLR)" is our flagship Law journal being published since 1978 in its 34th volume. Past 15 years have seen less investment in Law faculty, dwindling number of permanent teachers, poor infrastructure and the Law Faculty losing its sheen. All senior Professors in the country are unanimous that Delhi Law faculty needs restoration to its past glory as it has the potential. DLR 2015 was thus planned as a Special Volume incorporating contribution from legal luminaries and educationists to announce a resolve that the whole country supports Law faculty to find solution to its problems. Each of the articles comprised in this volume has a message for the public. Majority of the contributors are reputed academicians holding high offices and have contributed in shaping the legal education in India.

The DU Faculty of Law has had 26 Deans and all have left an indelible mark on the legal education. The contemporary Deans of last 30 years and Professors are all constructively contributing towards the development of society. Professor/s K.B. Rohatgi, Prof. Upendra Baxi, Prof P K Tripathi are some of the renowned authorities.

I have been holding the office of Head and Dean from April 2013. I came as student in 1971 and joined as faculty in 1978 and from the year 2000 as Professor of Law with stint at Joint Secretary level in the Ministry of Information Technology, Government of India and as Director, Institute of Constitutional and Parliamentary Studies, New Delhi. I also work as IPR Chair of MHRD at DU, with which I am holding Ist IPR seminar after successfully organising 15 seminars myself.

I would lay office in two months and with all humility I seek support of everybody concerned not to let Delhi Law faculty fall from its high pedestal and also plead with Government of India to compare what we do with 2300 student intake in LLB, 110 in LLM and 30-40 in Ph.D. with scant allocation of funds compared to the combined strength of National Law Schools and their allocations. Prof M P Singh who saw

both the worlds did not mince words in stating so on stage not only at DU, but reiterated the same at other fora.

Recently Faculty of Law joined a newly formed alliance of Law Schools on the Chinese initiative, the New Silk Road Law School Alliance (NSRLSA). There exist many such alliances but Delhi Law Faculty is member of none. The alliance is only a framework for academic exchange. Mostly Delhi teachers are dependent for visits abroad on the grants of other institutions which need to be changed. Nonetheless it would help in making applications and acceptance. Within a period of 3 months we have provided the alliance members an opportunity to avail hospitality from DU; correspondingly, in future DU teachers would be able to avail such exchange with members.

I endeavour to present the current volume to encourage my colleagues in the whole country to make an impact on the contemporary legal scenario and contribute to legal professionalism in all three dominant branches academics, judiciary and lawyering. The legal academics must work to discipline its graduates in all the three fields which are public positions. The readers should not shirk to adopt an unconventional approach or to think out of the box not for themselves but to sub-serve aspirations of others and particularly deprived sections.

I have chosen to write a piece on a theme with which I have lived for long time when I joined as lecturer and was given Legislative drafting to teach. I used to live with my paternal uncle who was member of constituent Assembly. The course was new and so got to learn certain facts about governance and how law making is done, which I have sought to bring before you.

I thank all the contributors and my editorial team for their efforts to bring out this volume of 2015 DLR. The authors and my team have done it all in a period of less than 2 months from our Ist request and so am personally indebted.

Happy reading.

Ashwani Kr Bansal
MHRD IPR Chair
Professor of Law
Head and Dean

29th Feb, 2016

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Symbolic and Instrumental Dimensions of Impact Analysis: Some Marginal Notes

Upendra Baxi*

Prefatory

There is a distinctive quantitative turn in social theory of law, especially in the study of the 'impact' of the Supreme Court decisions. This turn has also begun in India and I am particularly glad that this turn now takes place as I tried to encourage an Indian debate as early as 1982; even its provocative title failed to spark any debate![1] 'Better late than never' is a good motto for legal impact studies, if we are not relapse into mere 'before and after studies' and are able to maintain some control over plausible rival hypotheses.

Professor Rosenberg has created a near perfect moral storm by his *Hollow Hopes*[2] and critique of Lani Guinier's work on demosprudence. I am particularly fond of his critique 'Romancing the Court'[3]. His finding that not many Americans know about the concurring or dissenting opinions of the Supreme Court of the United States, and nothing at all of the oral dissents, is borne out by a large number of empirical social studies. I also agree that oral dissents are least cognized, even by law academics. As a general observation, it may even be said that most legal academicians are too 'court-centric'; and do not study the legislatures, the political executive, and the bureaucracy, although studying *not what the judges say but what judges do with what they say* (as Karl Llewelyn was fond of advising first year law students at Chicago) offers a plateful!

But I doubt if anyone else than law academics would systemically study courts and judges; and the changing history and geography and cultures as shaping factors

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This is a revised version of observations made at International Conference on "*The Supreme Court of India and Progressive Social Change*" School of Policy and Governance, Azim Premji University [December 11-12,2015].

[1] Upendra Baxi, "*Who Bothers about the Supreme Court? The Problem of Impact of Judicial Decisions*" Journal of the Indian Law Institute. 24:4, 842(1982).

[2] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, Chicago. Ill.; University of Chicago Press (1991). See for some notable earlier explorations, Stephen L. Wasby, "*The Supreme Court's Impact: Some Problems of Conceptualization and Measurement*", Law & Soc. Rev. 5:41(1970-71); 5. Michael J. Petrick, "*The Supreme Court Authority Acceptance*", Western Political Quarterly 21: 5 (1968).

[3] "*Romancing the Court*', B.U. L. Rev.89: 563 (2009).

of constitutional and legal interpretation. In India most law academics even today study judicial decisions as solitary texts and they teach these acontextually. A few observations of trends need to be made in the present context, although this is neither the time nor place to review the recent trends in Indian legal scholarship.

Doctrinal treatises mostly written by lawyers and justices, though there are many a welcome trend when leading law publishers invite academics to edit editions of such treatises and even write these on their own. Most scholarly work has been qualitative, and some of high comparative worth, and some distinctively socio-legal (empirical) in character. Although calls have been made for jurimetrics type analyses of courts in India, this type of work has not been systemically pursued by Indian scholars. There has been some effort towards quantitative study of the Supreme Court (notably by Indian law scholars like Rajiv Dhavan,[3] Vijay Gupta,[4] Abhinav Chadrachud,[5] Madhav Kholsa,[6] Shyashri Shanakar[7] and some significant others). It is in this context that I welcome more work on the impact of Supreme Court decisions which promise a fresh start. And it is also in this context that I insist that at least in the wake of social action litigation (SAL) in India, one ought to study the inter-sectionality[8] between social movements and courts.

I will shortly come to this aspect but I must at the outset say that: (a) impact studies, in their methods of measurement and ideological aims, are notoriously ambivalent; (b) different conceptions of 'politics' animate qualitative versus quantitative studies;[9] and (c) while we ought to be wary of placing ''uncritically', as Professor Rosenberg states, courts at the 'centre of social movements', we also ought to be equally cautious about any extreme conclusion that there is no social science, or indeed any evidence, of judicial impact on social change or movement towards desired social change.

[3] Rajiv Dhavan, *The Supreme Court of India: A Socio-Legal Analysis of Its Juristic Techniques*, Bombay, NM Tripathi (1977).

[4] Vijay K. Gupta, *Decision Making in the Supreme Court of India (A Jurimetric Study)*: Delhi, Kaveri (1995).

[5] Abhinav Chadrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India*, Delhi, Oxford University Press (2014).

[6] Madhav Khosla, "*Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*" Hastings International and Comparative Law Review 32 :55 (2009).

[7] *Scaling Justice: India's Supreme Court, Anti-Terror Laws, and Social Rights*, Delhi, Oxford University Press, (2009).

[8] See, Dorthe Staunæs, "*Where have all the subjects gone? Bringing together the Concepts of Inter-sectionality and Subjectification*", NORA - Nordic Journal of Feminist and Gender Research, 11:2, 101-110 (2003); Kimberle Crenshaw, "*Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color*" Stanford Law Review 43:6, 1241–99 (1991); Mary John, "*Intersectionality: Rejection or Critical Dialogue?*" I: 72 33 EPW: Economic & Political Weekly (2015); Bronmen Morgan (Ed.) *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship.*, Aldershot, Ashgate (2007).

[9] See Lani Guinier, "*The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*", Harv. L. Rev.122:4, 15-16 (2008) and Robert Post, "*Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*", Boston University Law Review, 89:581 (2009).

May I also restate the obvious facts about social movements? First, even when one thinks that it is possible to construct a meta theory or narrative about social movements, these remain (certainly at meso and micro levels) a deeply culture-bound phenomenon, driven by race/caste, gender, faith and community divide, often accentuated by practices of liberal and illiberal politics, national, geo-political, and international. Second, there is a difference between broadly violent and non-violent social movements, rendered even more complex by issues of ethics of self-determination and legitimacy or otherwise of violent means. Third, there is stated a difference of kind between OSM (old social movements) and NSM (new social movements) and the linkages/interfaces between the old and the new. Fourth, while some social movements crystallize into NGOs, many do not and remain below and often beyond the national politics and social science gaze.[10] Fifth, there is the vexed question about the antipolitical or parapolitical character political NSM, recently illustrated from Czech to Arab Springs.[11] Sixth, not all social movements go to courts and not all courts happen to them; there is a certain distance between juridicalization, or juridification[12] of social movements and their politicization. Seventh, there is question of relative autonomy of social movements from the state and the market.

What Shall 'We" Say Constitutes the 'Impact' of Judicial Decisions?

This is a difficult probelmatique. There is no general answer to this question possible because 'we-ness' itself stands differently constituted and challenged. There exist distinct disciplinary boundaries, borders, and burdens. This trichotomy. Allocating or dividing the space, is much debated by geographers (and to some extent even by historians, at least in terms of periodization) but not fully denied. Impact studies may form a transboundary and multidisciplinary research tradition; thus various social sciences by a conventional (agreed protocols) common method study may constitute as it were a temporary 'we-ness' and thus even constitute new borders; but disciplinary boundaries are otherwise maintained and burdens within these are shared by all the disciplinary specialists. For example, a political scientist studying constitutional courts does not thereby become a legal academic and vice versa. In

[10] Upendra Baxi, *The Future of Human Rights*, Ch.3 ,7,8 (Oxford University Press, Delhi, 2013; Perennial Edition).

[11] As seen recently in the Arab Spring and Occupy movements. See, e.g., *Beyond the Arab Spring: the Evolving Ruling Bargain in the Middle East*, Mehran Kamrava ed., (2014) Vijay Prashad, *Arab Spring, Libyan Winter.*, Delhi, Leftword (2012); Boaventura de souse Santos, available at http://alice.ces.uc.pt/en/index.php/transformativeconstitutionalism/boaventura-de-sousa-santos-occupy-the-law-can-law-beemancipatory/#sthash.mA5r543K.dpuf/.

[12] Lars Chr. Blichner, and Andres Molander, "*Mapping Juridification*" European Law Journal, 14: 36–54. (2008). See also, Mark Bevir, "Juridification and Democracy", *Parliamentary Affairs* 62: 3, 493–498(2009); Roger Masterman, "Juridification, Sovereignty and Separation of Powers ", *Parliamentary Affairs* 62:3, 499-502(2007). See also, W.J.T.Michell, Micheal Taussig, and Bernard E Harcourt, *Occupy: Three Enquires inn Disobedience*(Chicago, University of Chicago Press, 2013); Tara Mulqueen, Anastasia Tataryn, 'Don't Occupy This Movement: Thinking Law in Social Movements' Law & Critique 23:283–298 (2012).

other words, while transdisciplinary research/ study exists to reconfigure the borders. eradicating boundaries (if this was desirable) is a difficult and different enterprise altogether. Provisionally, one must acknowledge certain geographically constituted fact of what Immanuel Kant so long ago described as 'conflict of the faculties'[13] and the temporariness or contingencies of impact studies.

That said, when we probe the notion of impact itself, we find that it has been given many a meaning. The first is a narrow meaning of 'compliance'; the second is 'effectiveness' over a period of time - this relates to the median, and long term *impact constituencies* as I have generally described these (in my 1982 article); the third relates to impact on agencies, institutions, and instruments of co-governance; the fourth essays the impact legal studies, activist assemblages, the media-- agencies that I lump together as the commentariat; the fifth relates to judicial hierarchy, adjudicatory leadership[14], and the internal courtroom bureaucracy; the sixth is the widest category of general public or social impact; the seventh concerns symbolic versus instrumental impact analysis; and finally here (without being exhaustive) the *impact of impact analysis*.

Taking this last first, not too much literary energy has been invested on this issue but obviously it is of some academic and political import, at least from a social epistemology and political economy perspective. Those who write about the impact of judicial decisions have many transdisciplinary concerns about demonstrating extremes that these have great causal impact, or no impact; those showing that these have substantial and moderate impact are stand in between. Scientifically, their basic problem is to avoid naïve 'before-after' type studies and to specify an acceptable test for control of rival casual variables or hypothesis, establishing judicial decision(s) as independent variables. It is also clear that the scholars working in the field of impact aim, epistemologically at least, to establish the borders of their discipline, if not basically alter its boundaries, and act against those tending to police or protect the existing borders and boundaries of a particular disciplinary tradition.

Difficulties arise when we attempt the underlying political concerns or ideologies (on some or other version of what Fredrick Jameson so majestically described as the 'political unconscious' of modernity)[15]; he postulated a trans-individual historical/structural underlying an individual narrative.[16] If so, what animates the impact theories and what, if any, is *their impact* offers a worthwhile field of study. What for example are the social costs and benefits of demystifying impacts, or certain narratives about 'modern' law?

[13] Immanuel Kant, *The Conflict of the Faculties/Der Streit der Fakultäten.*,(trans. Mary J. Gregor; New York: Abaris Books (1979).

[14] Upendra Baxi, 'Public and Insurgent Reason: Adjudicatory Leadership in a Hyper-Globalizing World' in Stephen Gill (ed), *Global Crises and Crises of Global Leadership* 161-178., Cambridge University Press (2011).

[15] Fredric Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act.*, London and New York: Routledge (1981).

[16] *Id.*, at 116

The questions of compliance and effectiveness may not be understood outside a general theory of judicial impact. If compliance is too narrow (smacking of before and after type comparison), effectiveness is too wide a notion as at least encompassing both actual behaviour, general conduct, and changes in belief systems of the targeted individuals or groups and law enforcers and officials. Empirical studies do have to find some measures and protocols of knowing minds or consciousness of persons affected (for weal or woe) by judicial decisions. In a total absence of information about judicial outcome, or reasoning, one may not speak of judicial impact.

It is perhaps for this reason that the Supreme Court of India has developed a jurisprudence of information and legal literacy before Parliament made national laws regarding these measures. The Court's continuing SAL insistence that its orders may be made known by the district judiciary and the executive seem to underscore the importance of legal literacy among the beneficiaries. High courts are not lagging behind: as early as 1982, the Gujarat High Court mandated legal literacy programmes by the South Gujarat University, when an MPhil thesis about the conditions of work and living was filed by me (while in office) as probably the first letter (here a thesis) petition; we continued this work for well over two years. NHRIs (national human rights institutions, as well as state institutions) have also been assigned an important pivotal role in this regard by the Supreme Court and acts of legislatures. What impact did judicial initiatives have in thus promoting legal awareness and literacy is a matter yet not empirically studied. Further, in studying the effectiveness of judicial decisions, as I had urged in 1982, the *intended* as well *unintended* impacts must also be studied: as a SAL Petitioner myself I have had to deal with the situation of unintended consequences, including some socially violent ones.[17]

Impact Communities

There are also the differential impacts judicial decisions depending on the many different communication constituencies.[18] A SAL decision appeals and is judicially intended to reach diverse impact communities-(IC). The social activist groups, the new commenteriat replacing almost the old (media and opinion –writers and I now add the instant public opinion formed in the social media, the new wave and realistic films and television serials, the Blog, Facebook and Twitter folks being foremost, form a growing part of the IC now. Their activities legitimise structural as well social adjudicatory leadership, though occasionally they also contribute to social criticism this or that judicial trend.

The second IC is more traditional; since Article 141 empowers the Supreme Court to declare law that is binding on all courts throughout the territory of India, all Courts (and judicial bodies) are bound to follow the law so made, subject to judicial

[17] I have partially narrated these elsewhere in my reminiscences about the *Mathura Open Letter, Agra Home Case*, the *Bhopal catastrophe*, and the *UP Chamar case*.

[18] See, for this notion, Upendra Baxi, Introduction to KK Mathew, *Democracy, Equality, and Freedom.*, Lucknow, Eastern Book Co. (1975).

powers to discover the 'ratio' of what the Supreme Court may have held and to follow an alternate line of decision embedded in the Supreme Court decisional law as binding. How this is accomplished particularly by the High Courts, opens up a fascinating direction into impact analysis within the juristic hierarchy.

The third IC is the executive-legislature combine. Certainly, this combine has accepted the invention, since 1973, of the basic structure and the essential features of the Constitution; it has also accepted the invention of a judicial collegium for about two decades; and accepted the annulment of a constitutional amendment (99th) and the Parliamentary Law enacting the National Judicial Commission. This means, regardless of comparative constitutional law, studies and perspectives, that the Supreme Court has assumed power of co-governance of the nation (demosprudence, the Indian way).[19] The Court has recognized the plenary powers of Parliament to amend the Constitution and it has rarely invalidated constitutional amendment; yet it has insisted on policing these on the touchstone of basic structure, which really equals judicial review powers and processes. On the whole, Parliament has also very infrequently reversed Supreme Court decisions. As far as 'accommodation' between the two high governance institutions is concerned, so far it has been staggeringly attained. How far this has contributed to the salience of justices and courts and how far it may have depoliticized central rights and justice issues poses some formidable challenges to impact analysis in general.

The situation is the reverse as far as the executive is concerned; if one looks at the growth of administrative law India it is clear that there is a great deal of resistance by civil service to judicial decisions and directions; one is rather surprised at the failure to adhere to a modicum fairness discipline evolved by the courts; the simple rules enunciated by the Supreme Court since the first decades of the Constitution, as the case law reveals, have not even now been internalized by the executive. Systemic governance corruption and police highhandedness continue also to flourish, although judicial normative pronouncements abound. The more recent trend to arrest such political evils by the device of court-monitored investigation shows judicial leadership, both hermetical and organizational, at its zenith; only impact studies may empirically show what this alliance between the Court and social movements holds for the constitutional 'idea of India'.

Finally, the impact seems negative as far as corporations and multinational corporations are involved; here the Court has rendered decisions that incline towards unfair globalization and development (as in the archetypical Bhopal catastrophe judicial settlement) and the systemic reversal of labour jurisprudence. The latter is indeed striking when we consider the fact that the Court since Independence has created itself the magnificent edifice of labour rights and justice. How impact

[19] See, Upendra Baxi, "*Demosprudence v. Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies*', *Macquarie University Journal* 14:3-23(2014); *The Indian Supreme Court and Politics*., Lucknow, Eastern Book Co. (1979); and see *Id.* "*Demosprudence and Socially Responsible/ Response-able Criticism: The NJAC Decision and Beyond*", the 9th Durga Das Basu Memorial Lecture, West Bengal Academy of Juristic Sciences (February 26, 2016); NUJS Law Review (forthcoming, 2016).

analysis may study judicial self-reversal and its general effect on the cornerstone of independence of judiciary (which it so celebrated recently) remains to be seen.

Symbolic and Instrumental Dimensions of Impact Analyses

Borrowing from Robert Gusfeld's sociology in early part of last century, and the work of political scientist Maurice Edelman, who drew our attention to the distinction between the symbolic and instrumental political/ policy action, I said in my 1982 paper that Indian students of judicial impact would do well to study it. India has a great cultural tradition of symbolism and it has served well the postcolonial constitution of ours. The Preamble, the Directive Principles, and Fundamental Duties of Citizens are constitutional texts but are largely significant as symbols of India's commitment to a just, caring, and humane development. Constitutional legitimacy of political action is judged by these egalitarian and dignitarian considerations.

A preliminary or threshold aspect is just this: the symbolic addresses the values and altitudinal disposition, whereas the instrumental addresses overt conduct made subject to legal controls and their meanings (interpretation). If a symbolic legislation is a gesture of values to which an organized polity subscribes and it has a long term educational function, instrumental legal decisions (including judicial decisions) are intended to control behaviour. As has often been acknowledged, the symbolic gesturing is apt for eradicating societal *prejudice* against some people or a group over a long period of time; instrumental action, on the contrary, is directed to control and regulate *discrimination*. This is a distinction of great import for impact analysts for they may not judge by standards apt for the symbolic action by standards belonging to the realm of instrumental action.

Since no political action (justices, too, command a significant degree of legally authorized violence) wears its credentials as being symbolic or instrumental, the impact analyst must make some initial choices. The first decision that an impact analysis student should make is whether the law or judicial action is exhortative or instrumental. But how does one do it? The Sarda Act and the first Dowry Prevention Act were, for example, clearly symbolic; they did not affix liabilities and punishments, such offences as contained therein are declared noncognizable, the definitions of disapproved conduct are amorphous. The amendments to the Dowry Act subsequently changed the situation and made the law enforceable.

The second task is to examine the distinction with great care. Not all unforced laws are therefore symbolic, though juristic and sociological reasons for these happening need to be always discreetly analysed if we are to take, legisprudence seriously. By the same token creeping enforceability, or even a gradually full enforceability, may not be overlooked. Analysing impact across the symbolic/ instrumental divide is not an easy task which may not be advanced by ignoring the law/jurisprudence and legisprudence/ jurisprudence/ demosprudence divide.

Finally, how do we determine the legislative and judicial intention? These are vast questions but this much is clear: the legislative and judicial intent is difficult to

determine yet it matters, and is for the time being decisive.[20] And the province of interpretation matters as much as that of the impact.

[20] It is common knowledge (or should it be?) that *Kesavananda* was originally an advisory opinion as it directed the lesser Bench of the Court to dispose of a batch of petitions in accordance with the law declared in the decision (what the law declared was nutritiously difficult to determine as the decision was 6:6:1 justices of the Full Court); how the soft law became hardened eventually is a question different from the one which concerns the original moment of the decision. Was it initially symbolic and then became instrumental? Similarly, what may we think of advisory opinions which are judicially stipulated as binding? What of the original *Olga Tellis* decision? I have always thought of the case as awaiting a judgment; that is, if we were to raise a fundamental question concerning reasoning plus outcome as a judgment. The trend continues: we had as late as 2014 a judgment of the Supreme Court of India where a two judge Bench decided that it was neither constitutionally nor legally valid to pronounce a fatwa. But, as this very case illustrates, the Court is itself known not to be averse to issue constitutional fatwas from time to time, that is not reasoned decisions where the reasoning matches the result.

What could not be Constitution: Call for *dé-tente* between Parliament and Supreme Court

Ashwani Kr Bansal[*]

The need is to discuss how the provisions of constitution can be utilized to raise standards of living simultaneously with economic prosperity for all by the organs of state

Both Parliament and Supreme Court contest the battle of share in power or supremacy in the name of people of India. We need to devise method to identify the people with which both of above institutions display concern. The purpose of this paper is to exhort the idea to have a ***dé-tent*** and work for the people and keep the deprived people in the forefront in the governance as a whole by the three organs of the State.

Permanent Features of Constitution: Transitional Matters

It is well known that when a Constitution is established it is the manifestation of the dominant ideology reflective of the vision of the people then in power represented in the Constituent Assembly. The Constituent Assembly of India was elected not as per adult suffrage but by electoral colleges. It was mostly dominated by the freedom fighters. The freedom struggle was dominated by the elite of the country, most of whom had learnt the value of liberty and freedom from universities in the U.K. or those established in India by Britishers and they were not averse to UK as they had been in negotiation with decision makers in UK.

It is evident that the Union Government from 1947 to 1950 consisted of persons respected all around as it represented the leaders who had wrested power or obtained independence from British rulers. The whole nation was in a thankful mode. Such a powerful political formation could not devise answers to the following few problems and thus adopted transitional provisions in the Constitution, mostly for 10 or for 15 years, giving power to Parliament for further action. Transitional provisions display the contentious nature of the issues and hint at the necessity of evolving multipronged strategy to overcome the difficulties and reaching at a resolution.

[*] Professor, Head and Dean Faculty of Law, Delhi University, I have had benefit of hearing certain Ist hand experiences of making constitution, while living with Sh Kaka Bhagwant Rai a member of Constituent Assembly of India who was my father's elder brother and represented State of PEPSU, I share some of the same.

My submission is that they are the permanent features of the Constitution whereas the Basic Structure as evolved by the judiciary and accepted by other co-sharers may be considered as negotiable by the dynamic redistribution of the share of power.

(i) Official Language Raj Bhasha

In Article 343(1) Hindi in Devnagari script was declared as Raj Bhasha which was to take effect on the lapse of 15 years. The English language could be extended by Parliament by law. Without any serious question it continues into the 67th year of the Constitution of India.

Supreme Court Jurisprudence gives the impression, as can be witnessed from various Supreme Court Judgments, that lesser evil may be tolerated against contributing to the greater evil. It is a question to be pondered over whose responsibility it is to establish Hindi language as Raj Bhasha as also the link language among all the States and Union Territories of India.

In this regard whatever be the general feeling of the masses, the elites, the decision makers and experts in the field of law need to take lesson from 1967 events in Tamil Nadu and other non-Hindi states when the country saw such vehement agitations that endangered fragmentation or cession from India.

(ii) Reservations for Schedule Castes (SCs) and Scheduled Tribes (STs)

Similar was the situation in relation to reservations for Schedule Castes (SCs) and Scheduled Tribes in the year 1949-50. The reservations under Article 334 were accepted for 10 years i.e. upto 26th January 1960 in the Ist instance. Anybody who knows the parliamentary proceedings has definite information that the amendment to extend the period to continue reservations is passed every 10 years without debate and without any difficulty. It may also be noted that out of the organised groups in the country Dalits are the best organised section of the society. , No wonder they are allured by political parties and Governments at the Union level and in the States, commonly referred to as vote bank politics.

It appears from the statistics of quality of applications for jobs that in relation to reservations for the specified number of positions for SCs, the number of candidates is much higher and there is a competition among them. The number of SCs who go into the general category, of course based on merit is not counted in reservation. This facet needs revision either now or sometime in future. It cannot continue for indefinite period or else it would not meet the test of basic structure as applicable which presently cannot be amended by interpretation as well.

The justification for reservations for OBC and certain other reservations in select states, has been derived from the transitional or enabling provisions of giving reservations to SCs and STs under the Constitution.

There is a need to declare a period of moratorium when the masses of the country and the development -- economic and social, should enjoy precedence rather than revising share of power or the structure of elite. The Parliament and Supreme Court should come together to reduce the disparities among various classes of population not based on caste but on education and poverty.

(iii) Article 370: Special status to Jammu & Kashmir

Irrespective of various controversies in relation to Maharaja of Kashmir joining hands with Pakistan for certain things and also joining with India for the same as well as more matters and the armed skirmishes at the borders, protection to Raja Hari Singh's state on the condition of accession to India by Indian Army and later ceasefire resolutions by UN, Article 370 was adopted in the Constitution of India. Later the Constitution for the state of Jammu & Kashmir was also adopted by the legislative assembly of Jammu & Kashmir. The nomenclature of Sadar-e–riasat and Prime Minister were replaced by Governor and CM on 30 March 1965. Thus various issues in relation to state of Jammu and Kashmir are in the transition phase giving opportunity to stakeholders to contest various claims.

(iv) Parliamentary privileges

Privileges of Parliament, State Legislatures, and members is another area which has witnessed a debate with the judiciary. Mostly, Parliament is considered to be representing the people but in relation to cases on parliamentary privileges, the Supreme Court was found to be representing the people against the alleged high handedness of Legislative assembly or Parliament represented by the Speaker of the House in each case and exercising jurisdiction as a High Court.

It appears that in cases of variance between judiciary and Parliament, mostly it has been conflictive equilibrium in which the distribution of share in the power among constituents of elite is sought to be reallocated. Somehow, in the sphere of Privileges the *dé-tente* is achieved with comparative ease than as manifested in certain other struggles.

The privileges continued to be the same as enjoyed by the House of Commons of British frozen on the date of commencement of Constitution, later declared as privileges of Parliament on the commencement of the 44thConstitutional Amendment of 1978. The Union Government of India could not pilot a precise bill detailing with the privileges but declared them equivalent to those enjoyed by Parliament in 1978. In 1978 its privileges were that of House of Commons as they existed on 26 January 1950.

(v) Privy Purse(s)

The only transitional provision which could be converted to transitory provision by Mrs. Indira Gandhi were the Privy Purses of the erstwhile princely states, which she could abolish successfully. This has made a great contribution in building of a unified democratic polity in India. The kind of power Mrs. Gandhi displayed in 2-3 actions after the 1969 split of Congress and the thumping mandate in March 1971 has demonstrably shown that the political will can deliver the results; (establishment of Bangladesh included). However, which of the factors or actions contributed to the reprehensible Internal Emergency in 1975 remains a point to ponder over.

(vi) Uniform Civil Code and other Directive principles

Besides transitional provisions there were certain other goals which the Constituent Assembly wanted to attain. The targeted uniform Civil Code remains a mirage. The Civil code poses the dangers of a great vertical divide in the country. Thus parallel to

the implementation of Hindi, the target of uniform civil code would be achieved by educating the masses and bringing about a national identity amongst various religions in the country or it would remain an issue which would linger on over generations to come.

Contest between Parliament and Judiciary

It is to be noted that the whole contest between judiciary and Parliament/ Government is a struggle for share in the power rather than the norms or values which are normally projected in the judgements or in the matter projected before the Court.

Parliament and the Supreme Court of India have been contesting over the supremacy or share of power over people in one form or the other from about Mid-1960s. Early enough one noticed the cases of *Rohtas Industries, Barium Chemicals,* re *Kesav Mills* on one hand and *Golaknath and Re Keshav Nandan Bharti* on the other. The mention of these cases brings to fore the contest and also more importantly what type of contest is it? Certainly it is not ascendency of one over the other as separation of powers doctrine gives definite roles to the three with media being the fourth pillar. Is it conflictive equilibrium or is it seeking more power for a section or its followers?

The petitioners who got judicial review introduced in the country were those t belonging to the higher strata of population and had economic power to engage the most competent advocates, those well versed with the language of judges and could establish that the argument as justifiable among the elite, and commoners or un-educated did not matter much.

Rule of Law and Separation of Powers

The rule of law implies that the three organs enjoy complete rule over the population, howsoever they may share power amongst them. The techno-structure of separation of powers has been accepted, always trying to undermine the other. The jargon of accountability has been accepted to the extent that no one from the government or bureaucracy has renounced it and they have not been able to make the judiciary accountable, so much so many questions are raised about making the lawyers accountable. One weakness displayed by legal business comprising all three academics, judiciary and profession is that all have failed to display any conviction to uphold any exemplary goal for the population.

Supplying the governance Gap

The weak majority of government in Lok Sabha in 1967 saw the advancement and assertion by the Supreme Court of the doctrine of judicial review. After the death of Pandit Jawahar Lal Nehru in 1964 and even before, various allegations had started coming up against the Government and certain Commissions were constituted.

If one organ of the State is becoming weak, the other seeks to elevate its position and starts asserting. Whenever the political administration became weak, the Judiciary stepped in and introduced the concept of strengthened Judicial Review

from 1967 onwards. Through Judicial process the judiciary continuously enhanced its powers till the year 1973 and established the 'Basic Structure Doctrine.'

In 1971 the court shared the power with populace and put its first step to control the bureaucracy by introducing the concept of 'fair hearing' in A K Kraipak following *Ridge* v. *Baldwin, even though it was in same series of cases.*

In 1971, the Indira Gandhi Government had returned with a thumping majority in the Lok Sabha. It turned the tables and the majority in April 1973 in K.N. Bharati was debating what to concede and could muster 7 :6 majority to restrain Parliament from taking back the power to amend in full as an undefined basic structure was not to be amended by Parliament; six judges had favoured the whole power of amendment. In the appointment of Chief Justice, four Senior Judges of the Supreme Court were ignored and Sh A.N. Ray who had favoured full power to Parliament to amend the Constitution was appointed bypassing Justices J.M. Shelat, K.S. Hegde and A.N. Grover who were senior to Sh A N Ray and the convention of the senior most judge being appointed as CJI was dispensed with.

Under the stewardship of Justice S M Sikri in *Keshava Nanda Bharti* case the Supreme Court overturned a danger to itself by finding a basic structure in the Constitution which was not there from 1950 to 1973.

Pliable Basic Structure

From the points which have been submitted as transitional provisions it can be opined that the Constitution has been amended about 100 times and mostly upheld by the Supreme Court. The basic structure doctrine has not come in the way and it appears as is shown in illustrations anything can be amended if various groups of the elite are willing to accept.

Another concept is that the Constitution of India is supreme and it is apparent that the Three Organs are created by the Constitution. About 100 Constitutional Amendments have been successfully made without question. The basic structure is to be found from the document of Constitution of India but it is the conflictive equilibrium mostly converging at Supreme Court and Government in Parliament which has to be adjusted among the elite. It is apparent that from the year 1950 to March 1973, there was no basic structure of the Constitution of India. It was found by a constitutional bench for the first time in 1973. If a Bench in *Keshavanand Bharti Case* can find the basic structure of the Constitution overruling *Golak Nath case* then another larger Bench can again allow the basic structure doctrine to eclipse.

The question which remain unanswered is that how and under which provision the judiciary can negate the exercise of constituent power in accordance with the procedure prescribed in the Constitution.

Constituent Power to Government: The partial commencement of 44th Amendment raises a pertinent question, can the constituent power be kept in suspended animation by inserting a commencement clause in the text of amendment, whereby the Union Government may commence certain clauses in the Constitution stacked in a rack or in memory (the 44th Amendment Act, 1978), thus elevating as also camouflaging the third organ – Union Government into the realm of constitution making?

Myth of "We the People of India"

"We the People of India" is a fiction well understood. The Elite at a given point of time is 'We the People of India'. There should be no quarrel if "we the people of India", is considered synonymous with elite of the country at the time of passing the constitution in November 1949, and can always be referred to the same, keeping in mind the dynamism displayed. Another test is the people who are able to organize themselves. Thus, on the advent of year 2016, it appears that even out of the political parties only the RSS and CPM who have the cadres, can be considered as others can go into oblivion very fast. Mostly the population is able to organize sporadically with the only exception of Dalits who are a force to reckon with.

Constituents of the elite: A major constituent of the elite is the section of persons vested with political power in political parties or otherwise. In India one has to distinguish between the cadres based political parties and those who can organise the movements which may cripple the life of the society in a given time frame how so ever small it might be.[1]

Mostly, the elite is considered to include the persons who enjoy economic power comprising business or capital, represented by industry including the agricultural lobby or the landed aristocracy. It is also inclusive of the persons who control wealth as also who display entrepreneurship.

The other major representation of power is considered to be the armed forces or war lords and similar formations of organized crime.

The fourth major constituent of the elite are people with intellectual power which includes the bureaucracy and media.

(vii) Myth of Democracy* v. *Oligarchy

The ruling parties at union level which now for 20 years is projected as coalition politics omits to state that coalitions have not only talked among themselves but have generally kept the opposition parties in loop. The examples are anti-defection law passed by Sh. Rajiv Gandhi Government as the fifty second Constitution amendment in 1985 in the wake of massive mandate in 1985. The passing of National Judicial Appointments Commission by ninety ninth Amendment Act 2014 and its striking down by the Judiciary on 16 Oct 2015, refusing to endorse the executive primacy in the matter of judges' appointment as it disturbed the 23 years of self perpetuation by Judiciary. The above are glaring examples of the negotiable character of the 'dynamic basic structure'.

One instance is that the electors of one State were allowed to be elected from the Legislative Assembly Constituency of another State. It was not an action which could be done under the Constitution as it was established consisting of Rajya Sabha electors in a State and the Legislative Assembly of a State could send their Representatives to Rajya Sabha. But as the political parties felt the need towards

[1] The recent agitations in Gujarat led by youthful Mr. Hardik Patel, and more recent of February 20th in Haryana when Delhi was cut off from Northern portions asking for reservations.

adjusting their Senior Leaders from a particular State who could not be sent up to the Parliament through Lok Sabha and did not have majority to send them to Rajya Sabha in the particular State then political parties sought to send them to Rajya Sabha through another State Assembly.

The amendment in RP Act 1951 in 2003 permitting electors of another state to represent Legislative Assembly of a state in Rajya Sabha should point to disturbing the federal structure, but as it answered the needs of all political parties without any re-distribution of power with the Supreme Court, it did not raise any eye-brows.

I believe that for about last 20 years Indian governance reflects the traits of oligarchy rather than democracy. Mostly, the Governments have been keeping other political parties appeased by permitting maintenance of their essential power bases. The Law Commission of India in its 170th report on "Reform of the Electoral Laws" has said that there is need to bring about a sense of discipline and order in the working of the Political parties. The same was endorsed by National Commission to Review the Working of the Constitution in chapter 2.24 in the following words:

"Political parties play a great role in the working of the Constitution and its democratic institutions. Issues of the organization, functioning, inner-party-democracy, transparency of funding, ethical standards are all matters of vital public concern. There is no comprehensive law regulating their functions and operations which are crucial to the welfare of the nation and, indeed, to the very survival of the democratic spirit and tradition."

It is submitted that reforms in the Political party system are more desirable than the electoral reforms.[2] It is submitted the above four-five matters (transitory Provisions) are not only contentious but compulsive as no solutions are offered but the government and judiciary are always willing to negotiate the basic structure of constitution and adjust accordingly.

(viii) Collegium and Parliamentary Committees are Contemporary

The country knows that the Supreme Court wrested the power to appoint the judges from Government to themselves by establishing collegiums. However, it is not in wide public knowledge that the Lok Sabha and Rajya Sabha or Parliament started functioning through committees about the same time in 1993.

The difference in the working of the two houses and the committees is that the proceedings before the parliamentary committees are confidential and are not to be disclosed to public. Even though strict vigilance has not been kept but in theory, all the proceedings before the committees cannot be released to public. It is also seen that budget or the details thereof are not debated in the Lok Sabha and Rajya Sabha and thus Budget cannot be said to be validly passed. The application of guillotine to passing of budget may be alleged as non-democratic.[3]

[2] See Bansal, Ashwani K 'Legislation for Political Parties' (2007) 41 JCPS 168, New Delhi.

[3] Bansal, Ashwani K 'Union Budget and Economic Administration: "Convening Economic Sessions of Parliament', Collection of Essays in Honour of Prof S K Goyal, Sept 2009, Book was released by Sh. Manmohan Singh, the then Prime Minister of India in Nov 2010.

(ix) Myth of Insertion of Socialist in Preamble

Government was more socialist till the word Socialist_was incorporated in the Preamble to constitution of India. It is curious that Government of India displayed its socialist nature under Pt. Jawahar Lal Nehru at its extreme when India adopted the labour legislation of west providing for exemplary Rights without much exertion. The Supreme Court was not lacking and continuously lent a helping hand to Trade Union movement and by interpretation contributed to betterment of Labour.

After the 42nd Amendment, when the word "Socialist" was inserted in the Preamble, thereafter it is noticed that the country went much more into capitalist mode. In 1991, when India adopted liberalization under the Narsimha Rao Government, the economy saw both types of influences. The liberalization saw impetus to the industry but the inequalities got accentuated. Post-W.T.O., i.e. after 1995, all the benefits extended to labour class has been reversed and the workmen and other employees are governed by contractual terms rather than rules which used to be pro-labour. From the year 2000, 30% employees in the Government are working as contractual employees – drawing less than half the pay than their regular counterparts. It proves that the nomenclature or the slogan or insertion of 'socialism' in preamble has nothing to contribute in the governance of India.

Non-addressing of Crucial Issues -Is it a Basic Structure

Certain evils which are essentially issues of governance has not been attended by any of three organs of State. The governance ignores with impunity the judicial delays. The bureaucracy is not willing to take responsibility for its wrongs. It is unwilling to be fair and not ready to accept *audi alteram partem*. The educated middle class having power to articulate does not assert or speak up, what to talk of poor. The educated middle-class has been conditioned through various media and governmental action that questioning the superiors or the persons with authority can be counter-productive and would not give any redress.[4]

Non-monitoring of Top Management and Right to Information Act

Mostly the developing countries have not been able to monitor and regulate their economies to their advantage. They either prohibit or leave wide open. The auditing of decisions and actions is lacking.

RTI is another public reform postulated to empower public but is a shrewd mechanism to make middle management accountable to top management, but leave the top management or elite free. The Companies Act provides sufficient teaching how to deal with oppression of dissenting or independent as also dealing with mismanagement of undertakings, but same is not invoked in relation to public corporations including universities.

4 See Bansal, Ashwani Kumar 33 DLR 2014 p-1-8, how the delay in relief suppresses the questioning of the actions of superiors.

Cyber Space & Internet Security Laws in BRICS – An Ephemeral Assessment

Prof. Venkata Rao[*]

Introduction

Securing internet technology and cyber space against its abuse is a major concern of the day for every country and their legal systems. Attempts in this regard are made at international, regional and national level by framing and implementing laws and policies and by constituting institutions to combat cyber security threats. Approaches of ensuring internet security and combating threats to cyber security in form of cyber-crimes, illegal e-surveillances, etc. often requires trans-border coordination between and amongst nations. The more the convergence of technology and sharing of technology between the states, the more is the need for such coordinated efforts. Hence laws of one state in this regard become a matter of interest and importance for the other.

The recently announced BRICS Cable which is a 34000 km (Note: SANRAL manages roads of a total 16,700 km), 2 optical fibre pair, 12.8 Tbit/s capacity, fibre optic cable system – will be linking Brazil, Russia, India, China and South Africa (the BRICS economies) and the United States. It will interconnect, amongst others, with the WACS cable on the West coast of Africa, and the EASSY and SEACOM cables on the East coast of the continent.[1] This new cable will directly link the BRICS economies[2] and hence will spread the internet access between them.

This platform of interaction between BRICS parties is also a reason for the raise in concerns relating to internet security which if unchecked may hamper the effective utilisation of the connected infrastructure. Laws and policies of respective countries are one of the ways through which such concerns of internet security are also dealt with.

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1 Dr Khomotso Kganyago, *Cybersecurity Agenda – How are we doing in South Africa*? available on http://kganyago.org/2012/05/18/cybersecurity-agenda-how-are-we-doing-in-south-africa/, last visited on 21st April 2015.

2 http://subtelforum.com/articles/brics-cable-unveiled-for-direct-and-cohesive-communcations-services-between-brazil-russia-india-china-and-south-africa/ last visited on 21st April 2015.

Internet Security

Internet security, being a wider term, covers issues relating to security for transactions made over the Internet. Security of such transactions further includes browser security, the security of data entered through a Web form, and overall authentication and protection of data sent via Internet Protocol.[3] It involves creation of "rules and actions" in order to ensure that "attacks over the Internet" are regulated.[4]

Securing internet primarily aims at securing internet on the whole and at securing browser, network, operating system, etc. internet security can be achieved by resorting to both technical as well as legal measures and approaches. While technical approaches measures such as encryption, cryptographic methods and protocols, firewalls, cyber forensics, anti-virus tools and kits, internet protection software, etc. On the other hand, legal approaches are adopted by way of enacting laws, implementing polices and adjudicating such laws and policies through judicial precedents.

BRICS Country and Internet Security[5] - Legal Measures of Ensuring Internet Security

Brazil

Brazil's new set of Internet regulations came into effect in a bid to tighten security after the espionage scandal exposed by former US intelligence contractor Edward Snowden.[6] This recent law, titled *'Marco Civil da Internet'* that is the "Brazilian Civil Rights Framework for the Internet" outlines the rights and duties of netizens and governs the usage of internet in the country. According to this law, providers can sell Internet access services based on maximum speed, but cannot restrict content and in order to ensure users' privacy on the web, Internet providers, companies, etc. are forbidden from spying on the content that their clients access and from selling personal data of people.[7] The law recognizes right to freedom of expression of netizens and provides for non-removal of net contents, unless a court order provides for the same. The law aims "to secure equality of access to the Internet in Brazil, i.e., Net Neutrality and provide privacy protections for Brazilian users of the Internet" and "balances the rights

[3] http://www.techopedia.com/definition/23548/internet-security, last visited 28th April 2015.

[4] See: http://www.yourdictionary.com/internet-security

[5] For the purpose of this paper, internet security is considered same as cyber security, thus including issues relating to securing network, communication and transactions on internet or cyber space including that of privacy and data protection.

[6] *Brazil Unveils New Regulations to Tighten Internet Security, Indo Asian News Service*, 24 June 2014, available at http://gadgets.ndtv.com/internet/news/brazil-unveils-new-regulations-to-tighten-internet-security-546947, last visited 2nd May 2015.

[7] *Ibid.*

and duties of users, government and corporations while ensuring the Internet continues to be an open and decentralized network."[8]

Under the law, companies such as Google Inc and Facebook Inc will be subject to Brazil's laws and courts in cases involving information on Brazilians, even if the data is stored on servers abroad.[9] This law establishes "principles, guarantees, rights and obligations for the use of the Internet in Brazil and provides for guidelines for the actions of the Union, the States, the Federal District and the Municipalities in this regard."[10] The discipline of internet use in Brazil is founded on the basis of respect for freedom of expression as well as[11]

i. the recognition of the global scale of the network,
ii. human rights, personality development and the exercise of citizenship in digital medias,
iii. plurality and diversity,
iv. openness and cooperation, free enterprising,
v. free competition and consumer protection and enterprising,
vi. social purpose of the network,

The discipline of internet use in Brazil is based on the following principles:[12]

I. guarantee of freedom of speech, communication and expression of thought, in accordance to the Federal Constitution;
II. protection of privacy;
III. protection of personal data, pursuant to law;
IV. preservation and guarantee of network neutrality;
V. preservation of stability, security and functionality of the network, via technical measures consistent with international standards and by encouraging the use of best practices;
VI. the liability of the agents according their activities, pursuant to the law;
VII. preservation of the participative nature of the network;
VIII. freedom of business models promoted on the internet, provided they do not conflict with the other principles set out in this Law.

The law also declares that the principles expressed in this Law do not exclude others set out under other Brazilian laws related to this matter or in the international

[8] Robert Stankey , *Brazil Enacts "Internet Bill of Rights," Including Net Neutrality and Privacy Protections*, Global,Technology, May 14, 2014, available at http://www.privsecblog.com/2014/05/articles/global/brazil-enacts-internet-bill-of-rights-including-net-neutrality-and-privacy-protections/., last visited on 2nd May 2015.

[9] Anthony Boadle, Reuters, *Brazilian Congress passes Internet bill of rights*, April 22, 2014, available at http://articles.chicagotribune.com/2014-04-22/business/sns-rt-us-internet-brazil-20140422_1_internet-bill-brazilian-users-internet-constitution, last visited on 2nd May 2015.

[10] Article 1

[11] Article 2

[12] Article 3

treaties of which the Federative Republic of Brazil is part. Thus this Internet Constitution of Brazil[13]:

- Provides for freedom of expression and of content on the internet while also limiting the amount of metadata that can be gathered on Brazilian Internet users;
- Includes broadly worded protections for privacy on the internet;
- Makes it mandatory to get informed consent of an internet user in order to make disclosure of personal data to third parties, except under a valid court order;
- Companies which collects personal data from residents of Brazil is made subject to Brazil's laws and courts in cases involving information on Brazilians, even if the data is stored on servers abroad;
- It requires ISPs to retain Internet access logs for a period of one year;
- The personal data protection bill was described as containing "an EU-style adequacy standard that would prohibit data transfers outside of Brazil unless the recipient country ensures an adequate level of data protection.

Further, Brazil has an interesting legal component empowering parents in ensuring cyber space security for their kids. Article 29 provides "The user shall have free choice in the use of software in his/hers own device to enforce parental control over content that the user understands to be improper to his-hers minor children, to the extent that the principles set forth in this Law and in Law no. 8.069, of July 13, 1990 are respected."

The law further states that the "The government, together with providers of connection services and internet applications, as well as with civil society, shall promote educational initiatives and provide information about the use of the software referred to in this article, as well as establish good practices for digital inclusion of children and teenagers. According to Article 30, the defense of the interests and rights set forth in this Law may be exercised either individually or collectively, in the form of the law.

Russia

Russia resorted to legal regulation of internet and its contents through various laws from late 2011 with wide scope for regulation of internet usage. The Federal Law No. 89417-6.8 initially known also as the law "On the Protection of Children from Information Harmful to Their Health and Development" and also as the "Blacklist Bill" of 2012 allowed blocking of sites with child porn contents, materials relating to drug abuse, and other crimes. It allowed internet censorship and surveillance.

The 2014 law popularly known as the "Bloggers Law" imposes more obligations on internet users it requires all web-based writers with posts that exceed 3,000 page views to register with the government, as they are considered to fall under the

[13] *Supra* at no.8.

umbrella of media outlets.[14] The law also implements scanning software that allows the Russian government to review all content posted on the Internet, regardless of daily page hits or classification and the software scans the Internet for undisclosed curse words that, if found, are reason enough for the site to be blocked or taken down. Violators are subject to fines or suspension of business.[15]

In June 2014, the Russian government passed a law that limits the re-dissemination of content they believe to be extremist or threatening. Dubbed the "Law against Re-tweets," this piece of legislation gives the government the right to imprison—for up to five years—any individual deemed a disseminator or re-disseminator of "extremist materials"; its main aim is to target and punish "extremist re-tweeters."[16]

In July 2014, Russia's parliament passed a new law according to which Internet companies are obliged to store Russians' personal data inside the country through which social networking sites can be compelled to transfer user information to the Government. The law requires Internet companies—including American technology giants such as Google, Twitter, and Facebook—to locate servers handling Russian Internet traffic inside the country and to store their users' data on these locally based servers for a minimum of six months. Companies have until September 2016 to comply or be blocked by the government.[17]

On July 31, 2014, a bill was signed that places further restrictions on Internet freedom and prohibits anonymous access to Internet in public spaces, under which Russians must now register with their phone number to use public WiFi.

Russia is also considering the "kill switch" approach for the Russian Internet in case of crisis, under which in cases of a government-defined disaster situation [including times of war, large scale civil protests], the government will be able to temporarily shut down portions of the Internet hosted in Russia and redirect all domestic Internet traffic to servers within the country. Utilizing the kill switch would give the government control over Russian servers, require all websites with '.ru' in their IP addresses to host their users' content in Russia, and prevent foreign IP addresses from accessing Russian networks.[18]

Thus, as far as cyberspace is concerned, Russia is most worried about the threat posed by content and 'Internet sovereignty', i.e. the ability of the state to have control

[14] Natalie Duffy , *Internet freedom in Vladimir Putin's Russia: The noose tightens*, AEI Research, January 2015

[15] *Ibid*

[16] *Ibid*

[17] *Ibid*

[18] *Ibid*, quoting Jeff Stone, "*Kremlin Mulls Internet 'Kill Switch' to Knock Russia Offline during Emergencies*," International Business Times, September 23, 2013. www.ibtimes.com/kremlin-mulls-internet-kill-switch-knock-russia-offlineduring-emergencies-1693840.

over the information space, is a fundamental concept in Russia.[19] Some of the special features of Russian cyber security approach include:[20]

- Well-developed tools for total evidence-collection; furthermore it is easy for officials to close down internet resources at will and without a court order;
- Private information security companies in Russia work closely with the law enforcement authorities and augment their capabilities; e.g. 30-40% of the work of Group IB is requested by the police;
- Freedom of expression is generally accepted on the internet in Russia;
- The use of distributed denial of service (DDoS) attacks against media outlets critical of the government is not unusual, but at the same time it would be easy and entirely legal for the authorities to close down entire websites if it were felt necessary;
- Several Russian intelligence bodies are concerned with national cyber defence and offensive capabilities. The Russian government tends by default to present its cyber activity as entirely defensive, i.e. as a measure necessary for countering external threats.

In addition to the approaches, Russia confers gives priority to information security. The Russian Federation's 2006 Law on Information, Information Technologies and Information Protection[21] primarily aims at promoting and protecting information security. It governs the relationship pertaining to

1) Exercise of the right for searching, receiving, transferring, generating, and distributing information;
2) Information technology application; and
3) Information security.

According to Article 8 rights are conferred upon individuals and institutions to access information. According to this provision,

- Citizens (natural persons) and organizations (legal entities) (hereinafter referred to as organizations) shall have the right to search and obtain any information in any forms from any sources subject to observance of the requirements established by the present Federal Act and other federal acts.
- Citizens (natural persons) shall have the right to obtain the information from state authorities, local self-government bodies, their official persons, if this influences directly their rights and liberties, in accordance with the procedure established by the legislation of the Russian Federation.
- Organizations shall have the right to the information from state authorities, local self-government bodies, if it directly refers to the rights and responsibilities of this organization or is necessary because of interaction with these bodies at performance of the authorized activities by this organization.

[19] Keir Giles, *"REP Roundtable Summary Russian Cyber Security: Concepts and Current Activity"*, Conflict Studies Research Centre, 6 September 2012.
[20] *Ibid.*
[21] No. 149-FZ of July 27, 2006

- The access may not be restricted to:
  1) normative legal acts influencing rights, liberties and responsibilities of man and citizen and setting the legal status of the organizations and powers of the state authorities;
  2) information on the state of the environment;
  3) information on the activity of state authorities and local self-government bodies, as well as on usage of the budget resources (except for the data representing state or official secrets);
  4) information accumulated in open funds of libraries, museums and archives, as well as in state, municipal and other information systems created or intended for delivery of this information to citizens (natural persons) and organizations;
  5) other information, if inadmissibility of restriction of access thereto is established by federal acts
- State authorities and local self-government bodies should provide access to information on their activity in the Russian and state language of the corresponding republic within the Russian Federation in accordance with the federal acts, acts of the subjects of the Russian federation and normative legal acts of local self-government bodies. The person wanting to get access to this information should not explain the necessity of obtaining thereof.
- Decisions and actions (inaction) of state authorities and local self-government bodies, public associations, official persons breaching the right to access to information may be protested against to a superior authority or in court.
- In the case of any losses incurred as a result of illegitimate refuse of access to information, unpunctual delivery thereof, delivery of deliberately unreliable information or non-corresponding to the content of the request, these losses shall be reimbursed in accordance with the civil legislation.
- The following information shall be delivered free of charge:
  1) on the activity of state authorities and local self-government bodies placed by these bodies in information-telecommunication networks;
  2) concerning rights and responsibilities of the interested person established by the legislation of the Russian Federation
  3) Other information established by law.
- Setting of payment for delivery of information on the activity of state authorities or local self-government bodies shall be possible only in the cases and on the terms established by federal acts.

Under Article 9, restriction of access to information shall be established by federal acts or purposes of protection of the constitutional system, morality, health, rights and legal interests of other persons, provision of the defense of the country and security of the state. It further states:

- Observance of confidentiality of information access to which is restricted by federal acts shall be obligatory.

- Protection of information representing state secrets shall be provided in accordance with the legislation of the Russian Federation on the state secret.
- Federal acts shall establish the terms of referring of information to the data representing commercial, official and other secret, obligatory character of confidentiality of this information and responsibility for disclosure thereof.
- Information obtained by citizens (natural persons) while performing their professional duties or organizations while performing certain types of activities (professional secret) shall be protected, if these persons were entrusted with the responsibilities on observance of confidentiality of this information by federal acts.
- Information representing a professional secret may be delivered by the third parties in accordance with the federal acts and (or) by court judgment.
- The term of the performance of responsibilities for observance of confidentiality of information representing a professional secret may be restricted only with consent of the citizen (natural person) which delivered information about himself.
- It shall be banned to require from the citizen (natural person) delivery of information about his private life, including information of personal or family secrecy and obtain this information apart from the will of the citizen (natural person), unless otherwise provided by the federal acts.
- The procedure of access to personal data of citizens (natural persons) shall be established by the federal act on the personal data.

According to Article 12, State regulation in the sphere of application of information technologies shall provide:

1) Regulation of relations connected with search, obtaining, transmission, production and distribution of information involving information technologies on the basis of principles established by the present Federal Act;
2) Development of information systems of various purpose in order to supply citizens (natural persons), organizations, state authorities and local self-government bodies with information, as well as provision of interaction of these systems;
3) Creation of conditions for efficient usage of information-telecommunication systems in the Russian Federation, including the Internet and other similar information-telecommunication systems.

In accordance with their competence the state authorities, local self-government bodies shall:

1) Take part in the development and implementation of target programmes of application of information technologies;
2) Create information systems and provide access to the included information in Russian and the state language of the corresponding republic within the Russian Federation.

Further, according to Article 17, Violation of the requirements of the present Federal Act shall entail disciplinary, civil-legal, administrative or criminal responsibility in accordance with the legislation of the Russian Federation.[22]

Thus Russia has its own strong mechanism of securing internet though it has features of aloofness and is distinct from the approaches adopted by the rest of the states' most of which on the other hand considers internet as a domain of all thereby justifying free and unrestricted usage of the same.

India

India has enacted the Information Technology Act, 2000 in order to protect internet and related technologies and also to regulate the abuse of these technology, apart from legally recognising and promoting e-commerce and e-governance. The original Act of 2000 failed in effectively tackle cyber-crimes as it was more inclined towards facilitating Electronic commerce. However the amendments made to the original Act through the Information Technology [Amendment] Act of 2008 has brought some changes into the cyber law framework of the Country. It has brought forth considerable reformations in the existing law, thereby making Cyber Crime a much more serious offence than it was perceived earlier.

The 2008 amendment has attempted to fill in the gaps which existed in the earlier 2000 enactment. The amendment has resulted in:

- Expansion of cyber wrong regulation provisions, by way of bringing under its ambit more forms of cyber-crimes and cyber civil wrongs. Current law also has provisions to deal with identity theft, child pornography, breach of confidentiality, leakage of data, etc.
- States power to monitor and intercept interactions and communications on and via the technology for the certain permitted purposes such as investigation and regulation of crimes, protection of sovereignty and public interest, etc.
- State's power to block websites and access to certain websites, also on certain permissible grounds

[22] According to Article 17, Persons, whose rights and legal interests were breached because of disclosure of information of restricted access or other illegitimate usage shall have the right to appeal to court to protect their rights according to the established procedure, as well as to sue for reimbursement of losses, compensation for moral damage, protection of dignity, honour and business reputation. The requirement of reimbursement of losses may not be satisfied if it is made by the person who did not take measures ensuring confidentiality of information or breached legally established requirement on information protection, if these taking of these measures and observance of these requirements were a responsibility of this person.
If distribution of certain information is restricted or banned by federal acts, civil-legal responsibility therefore shall be borne by the person rendering the following services:
transfer of information provided by another person subject to transfer thereof without changes and corrections;
Storage of information and provision of access thereto, provided this person could not know on the illegal character of distribution thereof.

- Establishment of cyber appellant tribunal
- Etc.

The amendment has also to an extent made the cyber law explicit by way of removing certain ambiguities that existed under the parent IT Act. Some of the wrongs imposed with civil liability under the earlier enactment [23] have now also been criminalized. [24] Some of the important provisions covered under the current IT Act[25] are as follows:

- Criminal liability for dishonestly receiving stolen computer resource or communication device under Section 66 B of the IT 2008 Act.
- Criminal liability for identity theft,[26]
- Criminal liability for committing an offence of cheating by personation committed with the use of any means of communication device or computer resource,[27]
- Criminal liability for infringement of privacy right of another[28] and
- Criminal liability for child pornography[29] under Section 67B.

The current Act imposes obligations upon people lending internet and its related services. Criminal liability can be imposed upon a person including an *'intermediary'* who while providing services under the terms of lawful contract, gets secured access to any material containing personal information of another person, intentionally or with the knowledge of causing wrongful loss or wrongful gain or in breach of a lawful contract, discloses such information to another person without the consent of the such person.[30] Making any misrepresentation or suppressing material fact from the Controller or the Certifying Authority while obtaining any license or Electronic Signature Certificate is criminalized under section 71. The new law also makes imposes punishment for acts amounting to 'cyber terrorism' under section 66 F. Sections 84A and 84 C punish abetment and attempt of crimes, respectively. Corporate liability is also imposed upon companies for offences committed by companies under Section 85.

[23] Section 43 of 2000 Act.

[24] Section 66 of the present enactment criminalizes a wrong which was under the earlier law regarded only as a civil wrong if it is committed 'dishonestly' or 'fraudulently'.

[25] Section 66 A of IT Act which used to deal with the offence of causing annoyance or any kind of inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will to another by sending any information which is grossly offensive or has menacing character or which the knows to be false by making use of such computer resource or a communication device or any other electronic mail or electronic mail message" stands repealed now being declared as against the constitutionally guaranteed Fundamental right to freedom of speech and expression, according to the decision of Supreme Court in Writ Petition (Criminal) No. 167 of 2012, decided on 24/03/2015.

[26] Section 66C

[27] Section 66D

[28] Section 66E

[29] Section 67B

[30] Section 72 A

India's Central Bureau of Investigation has developed a specialized structure which is followed while tackling computer related crimes. The specialized structure includes:[31]

a) Cyber Crimes Research and Development Unit, which is responsible to keep a track on latest developments in information technology.
b) Cyber Crime Investigation Cell, which provides for link amongst State Police forces and helps them to collect information and investigate cases of cybercrime reported to them. It keeps a track of all follow up actions taken by such forces and provides link between software experts and Investigating officers, to recognize areas requiring attention of the State Police Forces so that cybercrimes are prevented and detected effectively.
c) Cyber Forensics Laboratory, which provides for the media analysis required in support of criminal investigations conducted by CBI and other law enforcement agencies. It endows on-site assistance during search and seizure of computers upon request by investigating agencies and gives consultations on investigations and provides expert testimony whenever required. It also conducts research and development related programmes in the field of Cyber Forensics.
d) Network Monitoring Centre, is set up to conduct policing in the cyber space [on internet] by using a Network Monitoring Tool developed by IIT, Kanpur and other similar tools.

The 'Indian Computer Emergency Response Team' [CERT-In][32] has been established by the Department of Electronics and Information Technology. It is entrusted with the duty to collect, analyse and disseminate all relevant information relating to incidences of cyber crime, provide forecast and alerts the investigating teams regarding threats to cyber security. It provides co-ordination to all cybercrime investigating teams, issues relevant information relating to security practices and procedures and also responds to cybercrime incidents by taking necessary measures in case of emergency.

In addition to the above legal and institutional approaches, India has adopted the Cyber Security Policy in 2013,[33] which aims to protect both private as well as public cyber infrastructure. It aims at protecting "information including personal, financial, etc. including critical information data." One of the objectives of the policy is "to enhance and create national and sectoral level 24x7 mechanisms for obtaining strategic information regarding threats to ICT infrastructure, creating scenarios for response, resolution and crisis management through effective predictive, preventive, protective, response and recovery actions." It also aims to "develop suitable indigenous security technologies through frontier technology research, solution oriented research, proof of concept, pilot development, transition, diffusion and

[31] http://www.cbi.gov.in/aboutus/manuals/Chapter_18.pdf

[32] This became operation from January, 2004.

[33] Available at http://deity.gov.in/sites/upload_files/dit/files/National%20Cyber%20Security%20Policy%20%281%29.pdf

commercialisation leading to widespread deployment of secure ICT products or processes in general and specifically for addressing national security requirements..

Thus, India's cyber security policy of 2013 aims to "enhance global cooperation by promoting shared understanding and leveraging relationships for furthering the cause of security of cyberspace." Further the mutual agreements signed by Computer Emergency Response Team of India [CERT-In] along with the CERTs of other counties is an indication of the fact that India believes in working with coordination of its friendly states in ensuring protection of cyber space and internet infrastructure. Further, India is also ensuring that it cooperates with other BRICS nations in various aspects through National Security Advisors.[34]India's cyber security approach "envisages a multi-layered approach to ensure defence in depth and a clear delineation of functional responsibilities amongst stakeholders, while stressing coordination and sharing of real-time information and also seeks to strengthen our assurance and certification framework to address supply-chain vulnerabilities, hardening networks, and promoting Research and Development in cyber security with an emphasis on capacity-building."[35]

The National Security Council has approved to set up a national cyber-security architecture to protect critical information infrastructure and other networks, which will involve monitoring, certification and assurance of networks by designated agencies and bodies in accordance with the law.[36] In addition to this, recently, the Government of India recently also created the position of cyber-security chief. The chief will be heading the national cyber coordination centre (NCCC) to be soon set up with a budget of Rs 1,000 crore. [37]

China

On February 27, 2014, Chinese President Mr. Xi Jinping acknowledged the role of cyber security as a strategic national priority and announced the formation of the Central Cyber security and Informatisation Leading Small Group to be under his direct supervision. President Xi emphasized that "Without cyber security, there won't be national security" for China.[38] China "in order to strengthen the security and the

[34] See: http://www.pib.nic.in/newsite/erelcontent.aspx?relid=106695.

[35] Speech by ShriShivshankarMenon, National Security Advisor at Fourth International Meeting of High Level Officials Responsible for Security, Vladivostok, July 4 2013 available at http://mea.gov.in/Speeches-Statements.htm?dtl/21907/Speech+by+Shri+Shivshankar+Menon+National+Security+Advisor+at+Fourth+International+Meeting+of+High+Level+Officials+Responsible+for+Security+Vladivostok, last visited on 4th May 2015.

[36] India setting up cyber-security architecture: National Security Advisor, Indo-Asian News Service, 22 January 2013, http://gadgets.ndtv.com/internet/news/india-setting-up-cyber-security-architecture-national-security-advisor-320571, last visited on 4th May 2015.

[37] Varun Aggarwal, Gulshan Rai becomes first chief of cyber security; post created to tackle growing e-threats, ET Bureau, 4 Mar, 2015, available at http://economictimes.indiatimes.com/ news/ politics-and-nation/gulshan-rai-becomes-first-chief-of-cyber-security-post-created-to-tackle-growing-e-threats/articleshow/46449780.cms

[38] Jing De Jong Chen, *U.S.-China Cybersecurity Relations: Understanding China's Current Environment*, Georgetown Journal of International Affairs, September 15, 2015.

protection of computer information networks and of the Internet, and to preserve the social order and social stability" has adopted the "Computer Information Network and Internet Security, Protection and Management Regulations – 1997" which have established on the basis of the "PRC Computer Information Network Protection Regulations," the "PRC Temporary Regulations on Computer Information Networks and the Internet" and other laws and administrative regulations. [39]

The Computer Management and Supervision Organization of the Ministry of Public Security are made responsible for the security, protection and management of computer information networks and the Internet. This organisation is required to "protect the public security of computer information networks and the Internet as well as protect the legal rights of Internet service providing units and individuals as well as the public interest." Further the regulations impose obligations on different parties to secure internet. Some of such provisions are:

- Article 4, which provides - "No unit or individual may use the Internet to harm national security, disclose state secrets, harm the interests of the State, of society or of a group, the legal rights of citizens, or to take part in criminal activities."
- Article 5 according to which "No unit or individual may use the Internet to create, replicate, retrieve, or transmit the following kinds of information:
  - i. Inciting to resist or breaking the Constitution or laws or the implementation of administrative regulations;
  - ii. Inciting to overthrow the government or the socialist system;
  - iii. Inciting division of the country, harming national unification;
  - iv. Inciting hatred or discrimination among nationalities or harming the unity of the nationalities;
  - v. Making falsehoods or distorting the truth, spreading rumors, destroying the order of society;
  - vi. Promoting feudal superstitions, sexually suggestive material, gambling, violence, murder;
  - vii. Terrorism or inciting others to criminal activity; openly insulting other people or distorting the truth to slander people;
  - viii. Injuring the reputation of state organs;
  - ix. Other activities against the Constitution, laws or administrative regulations.
- Article 6 according to which "no unit or individual may engage in the following activities which harm the security of computer information networks:
  - a. No-one may use computer networks or network resources without getting proper prior approval

[39] http://www.lehmanlaw.com/resource-centre/laws-and-regulations/information-technology/computer-information-network-and-internet-security-protection-and-management-regulations-1997.html. last visited on 2nd May 2015.

b. No-one may without prior permission may change network functions or to add or delete information
c. No-one may without prior permission add to, delete, or alter materials stored, processed or being transmitted through the network.
d. No-one may deliberately create or transmit viruses.
e. Other activities which harm the network are also prohibited.

- Article 7 ensures protection of "freedom and privacy of network users". Article 8 imposes obligations upon the units and individuals engaged in Internet business to accept the security supervision, inspection, and guidance of the Public Security organization. They are also obligatedto provide "to the Public Security organization information, materials and digital document" and to assist "the Public Security organization to discover and properly handle incidents involving law violations and criminal activities involving computer information networks."

According to Article 9, "The supervisory section or supervisory units of units which provide service through information network gateways through which information is imported and exported and connecting network units should, according to the law and relevant state regulations assume responsibility for the Internet network gateways as well as the security, protection, and management of the subordinate networks."

Connecting network units, entry point units and corporations that use computer information networks and the Internet and other organizations under Article 10 are obliged to assume the following responsibilities for network security and protection:

(1) Assume responsibility for network security, protection and management and establish a thoroughly secure, protected and well managed network;
(2) Carry out technical measures for network security and protection. Ensure network operational security and information security;
(3) Assume responsibility for the security education and training of network users;
(4) Register units and individuals to whom information is provided. Provide information according to the stipulations of article five;
(5) establish a system for registering the users of electronic bulletin board systems on the computer information network as well as a system for managing bulletin board information;
(6) If a violation of articles four, five, six or seven is discovered than an unaltered record of the violation should be kept and reported to the local Public Security organization;
(7) According to the relevant State regulations, remove from the network and address, directory or server which has content in violation of article five.

In order to ensure internet security at national level, Article 14 requires the units involved in matters such as national affairs, economic construction, building the national defence, and advanced science and technology to be registered and obliged to take appropriate measures in order to ensure the security and protection of the computer information network and Internet network links of the such units.

According to Article 20, for violations of law, administrative regulations or of Article 5 or Article 6, the Public Security organization gives a warning and if there income from illegal activities, confiscates the illegal earnings. A fine not to exceed 5000 RMB to individuals and 15,000 RMB to work units may be assessed. Further, for serious offenses computer and network access can be closed down for up to six months, and if necessary Public Security can suggest that the business operating license of the concerned unit or the cancellation of its network registration. Activities contravening public security management regulations are punishable in accordance with provisions of the public security management penalties articles. The provision also requires that where crimes have occurred, prosecutions for criminal responsibility should be made. Similarly violations of the provisions of these regulations are made punishable offences inviting legal sanctions including imposing of fine as well as other restrictive orders. [40]

Apart from the above mentioned regulation, China also has implemented an internet security policy of China. The policy provides for guidelines to maintain overall information security, strengthen security management for all its information assets, and ensure their confidentiality, integrity, availability, authentication, and non-repudiation, in response to the needs of business operations for proper support of legislators to exercise their authority of office according to law.[41] According to this policy[42],

- Confidentiality ensures only those people who have been authorized can have access to information assets.
- Integrity ensures the accuracy and integrity of handling methods for information assets.
- Availability ensures that authorized users may use information assets when they need them.
- Authentication ensures the identity of an entity on the Internet is true to what he declares or the information received via the Internet is really sent by the sender.
- Non-repudiation refers to the undeniability of the information which the sender end agrees to send, or the transaction behavior he has completed.

Protection of personal data on the internet is ensured in China through the Personal Data (Privacy) Ordinance (the "Ordinance") which prohibits the transfer of personal data to places outside Hong Kong unless one of a number of conditions is met.[43] The purpose of such cross-border transfer restriction is to ensure that the transferred personal data will be afforded a level of protection comparable to that under the Ordinance.[44] Further, the Office of the Privacy Commissioner for Personal

[40] Under Chapter IV of the Regulations.
[41] http://www.ly.gov.tw/en/policy_s01.jsp.., last visited on 3rd May 2015.
[42] *Ibid.*
[43] Guidance on Personal Data Protection in Cross-border Data Transfer, Office of the Privacy Commissioner for Personal Data, Hong Kong.
[44] Guidance on Personal Data Protection in Cross-border Data Transfer, Office of the Privacy Commissioner for Personal Data, Hong Kong.

Data, Hong Kong has notified the Guidance on Personal Data Protection in Cross-border Data Transfer, the practices recommended under which are considered as "part of their corporate governance responsibility to protect personal data."

China's Ministry of Industry and Information Technology (MIIT) in 2013 released a plan, "Prevent and Combat the Hacker Underground Supply Chain," which advocated a comprehensive, integrated response to reduce damages of the hacking economy and enhance information security.[45] As a part of the 11th Five Year Plan (2006-2010), China began investing in the protection of government information systems and its government defined and implemented a Multilevel Protection Scheme (MLPS) with mandatory security controls for all government systems and Internet services considered critical to the economy.[46] The 12th Five Year Plan for Informatisation published by the Ministry of Industry and Information Technology (MIIT) was released on September 29, 2013 and continued to list information security as a top priority.[47]. China has adopted to control the Internet and reduce abuse and fraud was the enforcement of a Real Name Registration requirement for the use of the public Internet and later further accelerated the process to issue information security regulations that required Internet service providers to enhance the protection of their services and the personal information of their users. Other similar approaches of China include the following:[48]

- In December 2012, MIIT released "Provisions and Supervisions for the Internet Information Service Market,"
- In February 2013, the China National Security Standards Committee released the "Public and Commercial Service Information System Personal Information Protection Guidance,"
- In March 2013, the National Administration for the Protection of State Secrets updated and released "Measures for PRC Computer Information System Security Protection," and
- In July 2013, MIIT issued the regulation, "Telecommunication and Internet Personal Information Protection."

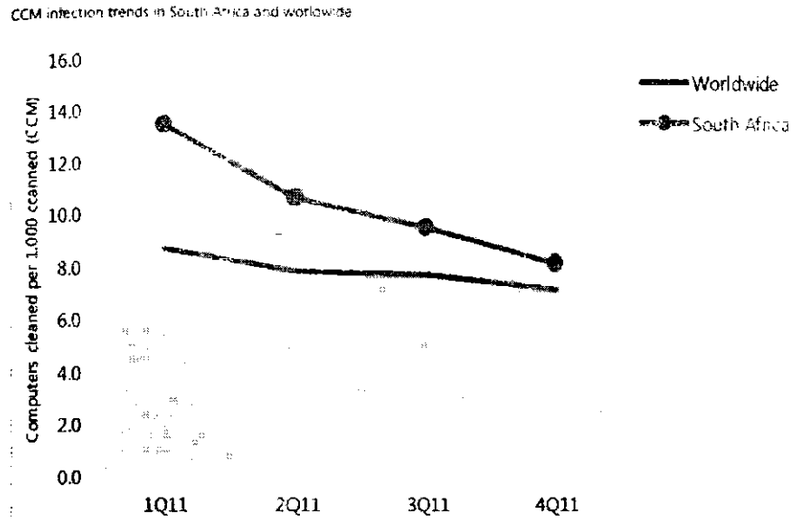
Thus, china has adopted numerous internet security and related policies along with legal enactments. China, quite famously, has strongly indicated that it believes in the internet being subject to its national laws. [49]

South Africa

The new (mentioned earlier) BRICS Cable connectivity will give the BRICS countries immediate access to 21 African countries and give those African countries

[45] *Supra* 38.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*
[49] Mahima Kaul, Science, Technology and Security Forums, http://stsfor.org/content/lessons-brics-developing-indian-strategy-global-internet-governance, last visited on 22nd March 2015.

access to the BRICS economies.[50] Thus it is interesting as well as important to understand South Africa's legal approach of securing internet.



Source: Dr Khomotso Kganyago, Cybersecurity Agenda – How are we doing in South Africa?51

The Electronic Communications and Transactions Act [ECT] of 2002 is one of many sources of law which impact on electronic communications and transactions and must not be read in isolation of relevant statutory and common law.[52] The Act provides for the facilitation and regulation of electronic communications and transactions; the development of a national e-strategy for the Republic; promotion of universal access to electronic communications and transactions and the usage of electronic transactions by SMMEs; human resource development in electronic transactions; prevention of abuse of information systems; encouraging the usage of e-government services; and similar and connected matters.

The Act aims to "to maximise the benefits the Internet offers by promoting universal access in under-serviced areas and ensuring that the special needs of particular communities, areas and the disabled are duly taken into account". This Act similar to Indian Information Technology Act, apart from dealing with e-commerce and legalizing e-communications and transactions also:

- Obligates cryptography providers. The Act requires suppliers (not users) of "cryptography" services or products to register their names and addresses,

[50] Dr Khomotso Kganyago, Cybersecurity Agenda – How are we doing in South Africa? Available on http://kganyago.org/2012/05/18/cybersecurity-agenda-how-are-we-doing-in-south-africa/, last visited on 21th April 2015.
[51] https://khomotsok.files.wordpress.com/2012/05/image11.png
[52] Michalsons. Guide to the ECT Act in South Africa, September 25, 2008, available at http://www.michalsons.co.za/guide-to-the-ect-act/81, visited last on 3rd May 2015.

the names of their products with a brief description in a register maintained by the Department of Communications, without which they cannot provide their services or products in South Africa. The motive behind mandatory registration is to allow investigative authorities such as the SAPS, to identify which organisation provide the encryption technologies intercepted by them in terms of the State's monitoring and interception laws, which further enables the investigative authorities to approach such service providers to assist with deciphering the encrypted messages.

- In order to protect critical data, the Act empowers the Minister for communication to prescribe matters relating to the registration of critical databases and require certain procedures and technological methods to be used in their storage and archiving.
- Regulates cyber-crimes [Chapter XIII] including hacking, DoS attacks, illegal interception of data, cyber fraud, extortion, forgery, etc. abetment and attempt of such offences are also included under the act for which criminal liability can be imposed.
- Imposes liability and obligations upon internet service providers for failure to ensure cyber security. .
- Ensures with consumer protection on line.
- Regulates Spams under section 45 which provides that recipients of unsolicited communications are able to opt-out of future communications and may request information on where their contact details were obtained.[53]
- Ensures personal information and privacy protection. According to the Act, Collectors of personal information (data collectors) may subscribe to a set of universally accepted data protection principles, though on voluntary basis.
- Ensures protection of domain names, for which it has established a Domain Name Authority (the .za Domain Name Authority (Zadna)) to assume responsibility for the .za domain name space, etc.

According to chapter XII, the Department of Communications is authorized to appoint cyber inspectors, who shall monitor Internet websites in the public domain and investigate whether cryptography service providers and authentication service providers comply with the relevant provisions. The inspectors are granted powers of search and seizure, subject to obtaining a warrant. Inspectors can also assist the police or other investigative bodies, on request.

Other relevant pieces of South Africa's Legislations in this regard include:

The Protection of Personal Information Act

This Act which received president's assent on 19th November 2013, was enacted to "promote the protection of personal information processed by public and private bodies; to introduce certain conditions so as to establish minimum requirements for the processing of personal information; to provide for the establishment of an Information Regulator to exercise certain powers and to perform certain duties and functions in terms of this Act and the Promotion of Access to Information Act, 2000;

[53] http://ispa.org.za/spam/south-african-law/, last visited on 22nd April, 2015.

to provide for the issuing of codes of conduct; to provide for the rights of persons regarding unsolicited electronic communications and automated decision making; to regulate the flow of personal information across the borders of the Republic; and to provide for matters connected therewith."[54]

Regulation of Interception of Communications and Provision of Communication -Related Information Act, 2002

This Act was enacted to "regulate the interception of certain communications, the monitoring of certain signals and radio frequency spectrums and the provision of certain communication-related information; to regulate the making of applications for, and the issuing of, directions authorising the interception of communications and the provision of communication-related information under certain circumstances; to regulate the execution of directions and entry warrants by law enforcement officers and the assistance to be given by postal service providers, telecommunication service providers and decryption key holders in the execution of such directions and entry warrants; to prohibit the provision of telecommunication services which do not have the capability to be intercepted; to provide for certain costs to be borne by certain telecommunication service providers; to provide for the establishment of interception centres, the Office for Interception Centres and the Internet Service Providers Assistance Fund; to prohibit the manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment; to create offences and to prescribe penalties for such offences; and to provide for matters connected therewith."[55]

King III Report on Governance for South Africa

The report titled, the Report for Corporate Governance for South Africa and the Code of Governance Principles, released on 1 September 2009 aims to ensure that "information assets are managed effectively" including the protection of information, that is "information security".

Telecommunications Act, 1996

This Act aims to provide for the regulation and control of telecommunication matters in the public interest

Thus, South Africa's legal approach of security cyber space and internet technology is quite comprehensive covering under its ambit laws dealing with varies issues relating to cyber security.

Conclusion

Exploration of the legal approaches resorted individually by BRICS through their laws and policies, indicates that each country's methods of securing cyber space and internet technology differs from the other to some extent. In the course of securing cyber space and internet technology, while some countries give importance to

[54] See for details: http://www.justice.gov.za/legislation/acts/2013-004.pdf
[55] The Act can be accessed at http://internet.org.za/ricpci.html

privacy and other rights of netizens, the other gives precedence to government surveillance and regulation of cyber space. Irrespective of the differences in their individual approaches, BRICS grouping, aside from Brazil, seems to have moved closer to the US position and share a certain affinity in their view of the global governance system, but for vastly different reasons.[56] As was pointed out by Russian President Vladimir Putin[57]

> "Our countries' leaders condemned the mass electronic surveillance and personal data collection that has been practised by particular countries' security services. We consider this a direct violation of national sovereignty and human rights, especially the right to inviolability of private life..."

BRICS partners share few common concerns including illegal external electronic surveillance, attacks on critical infrastructure, breach of privacy and data, etc. Securing internet technology and cyber space is thus the priority for all BRICS partners today. BRICS's laws are required to address matters affecting respective State's sovereignty as well as allied concerns of cyber security through coordinated effort other partners. Such coordinated efforts are essential to extend the application of one country's laws in the other, in cases of need, thereby making network of nations a factual probability.

BRICS partners must unite to frame a collaborative regulatory framework so as to address their commons concerns of all. BRICS partners along with UN are already attempting to work out schemes and plans "guaranteeing international information security."[58] Such attempts must continue.

> *"While cyber space is a source of great opportunity, cyber security has become a major concern. BRICS countries, should take the lead in preserving Cyber Space, as a global common good."*
>
> -- India's Prime Minister Narendra Modi[59]

[56] *Supra* 49.

[57] During the Security Council meet in Moscow, Russia on 1st October 2014

[58] Working with BRICS, UN on internet security: Putin October 1, 2014, 6:24 pm, http://thebricspost.com/working-with-brics-un-on-internet-security-putin/#.VUc0hPCtGI8, last visited on 2nd May 2015.

[59] Prime Minister Shri Narendra Modi's statement in 6thBRICS Summit on the Agenda – "*Political Coordination: International Governance & Regional Crises*", Prime Minister's Office, http://www.pib.nic.in/newsite/erelcontent.aspx?relid=106695, last visited on 2nd May 2015.

Secularism in India: An Appraisal

Prof. B.C. Nirmal[*]

Introduction

The Constitution of India has been through many upheavals. Some of the foundational tenets of the Constitution have been tested to the core, time and again. The uniqueness of the Constitution is reflected in the fact that for nearly seven decades it has continued to be a living and dynamic document in a society beset with complex diversity in terms of language, religion and culture. Now and then, we come across a moment that compels us to pause and ponder about some of the foundational principles on which our Constitution rests. Such a moment often springs out of the diversity and plurality of our society. Such a moment is also reflective of the changing dynamics of our societal set up. And, India today is experiencing one such moment, which compels us to think about issues like secularism and religious intolerance, in an emerging India, an India which aspires to be at the forefront in the world community.

In recent times, we have witnessed that a furore has been created over the issue of growing intolerance in India. There has been a constant uproar on the part of certain section of the society that intolerance has increased in recent times. The issue of growing intolerance in India has assumed a mammoth space, and is being discussed fervently both in the media and by the public, in India and also abroad. The New York Times recently reported: "Intolerance is on the rise in India, where the number of attacks on minorities, particularly Muslims, and on secularist intellectuals by Hindu chauvinists is part of a disturbing trend."[1] Rival arguments abound as regards the question of growing intolerance in India. However, what remains crucial and debatable is the religious tinge that issue carries. The religious aspect of intolerance debate in India today needs to be debated and discussed in view of the overarching constitutional principle of secularism that remains so adorably embedded in the constitution, both in terms of text and spirit.

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[1] Sylvie Kauffmann, "*India, France and Secularism*", The New York Times dated 27.10.2015

The ensuing discussion primarily tries to unravel the some of the important facets of secularism. The aim is to analyse how the framers of the constitution dealt with issue of secularism, how it is being practised and how our conception of secularism differs from western notion of secularism, and, most importantly, how the Supreme Court has dealt with the issue of secularism in India.

Meaning of Secularism

The term 'secularisation' was found used in 1648 at the end of thirty years war in Europe, to refer to the transfer of Church properties to the exclusive control of the princes. And, later in 185 1, George Jack Holyoaked coined the term 'Secularism.'[2] In the words of Chishti, "Secularism certainly may mean a doctrine having true religious morality, tolerance and reasonable margin for freedom of worship and faith to each and all the citizens of a country irrespective of their colour, caste, sex, sect, religion, faith, nationality and other conditions of faith."[3] As regards the notion of a secular state, D E Smith says, "The secular state is a state that guarantees individual and corporate freedom of religion, deals with the individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion, nor seeks either to promote or interfere with religion."[4] As it is said, "Secularism... emerged as a reaction against excess of religion and excessive religiosity or orthodoxy in the West. So it is essentially a product of the conflict between religion, society and politics that arose in the medieval period in the West."[5] To quote Smith,[6]

> "The proper approach of the secular state in matters of religious reform is as follows. Religious reform per se is not a valid function of the secular state; it is not the business of the secular state to concern itself with religious matters. Furthermore, any such interference is likely to violate religious liberty, lead to the state promotion of religion, or both. Religious reform should never be the motive behind state legislation. Valid reforms of religion by the state are the incidental results of the state's protection of the public in cases where religious practices clearly tend to injure human beings physically or morally, where religious institutions grossly misuse offerings and endowments made by the public, or where social institutions connected with religion violate basic human rights."

Be that as it may, Marc Galanter holds the view that "If we take the three principles which comprise Professor Smith's "working definition" of the secular

[2] S.M.A.W. Chishti, "*Secularism in India: An Overview*", LXV The Indian Journal of Politica Science 2(2004) at 183.
[3] *Id.* at 184
[4] D E Smith, "India as a Secular State", in Rajeev Bhargava (ed) ,*Secularism and Its Critics*, 177, Oxford University Press 2009, originally excerpted from D E Smith, *India as a Secular State*, Princeton University Press 1963.
[5] A. M. Rajasekhariah, "*Jawaharlal Nehru's Contribution to Secularism in India-An Estimate*", 48 The Indian Journal of Political Science 2 (1987) at 212
[6] D E Smith, *India as a Secular State*, 233, Princeton University Press 1963.

state--Freedom of Religion (Individual and Corporate), Equality (i.e., state indifference) among religions, and Separation (i.e., neither promotion nor interference) - we find that they are not a harmonious set of mutually reinforcing principles by which we can determine the extent to which given political arrangements are in fact secular. Instead, they are a set of potentially incompatible principles which may conflict in concrete situations."[7]

Indian Secularism *vis-à-vis* Western Secularism

The English word 'religion' does not fully convey the Indian concept of religion. Hindus believe in Vedas. The word 'Dharma' has a very wide meaning. *Rig Veda* describes *Dharma* as *Athodharmani Dharayan*. In this concept of religion or Dharma, different faiths, sects and schools of thoughts merely are different ways of knowing truth which is one.[8] It needs to be emphasised, as Nagendra Singh says, that "A survey of the ancient history of India reveals that no distinction between believers and non-believers was recognised in regard to inter-State conduct .... This universality of application which is a distinct Indian contribution to the development of international law dates back two thousand years. It was perhaps the outcome of universalism of thought and it gave birth to several basic principles of international law, some of which, originating from India, took centuries to evolve before they could be universally recognised in the world."[9] Ashoka believed that "... all living beings should have security of existence for which men should exercise self-control and not to take by force what others possess. All should enjoy peace of mind by co-existence and not by mutual interference and recrimination."[10] Moreover, Kautilya introduced a concept of secularism that led further to a secular concept of the law of inter-sovereign conduct[11] Hinduism, as a verse in *Atharva Veda* suggests, rests upon the belief that "Let us have concord with our own people, and concord with people who are strangers to us....May we unite in our minds, unite in our purposes, and not fight against the divine spirit within us. Let not battle cry rise amidst many slain, nor the arrows of the War-God fall with break of day."[12] Hinduism not only teaches universal brotherhood and peace but also teaches religious tolerance, secularism and human solidarity. It always held the view that all religious paths lead to the same reality.[13] Ashoka in one of his edicts clearly highlights the importance of *religious tolerance* thus[14]

[7] Marc Galanter, "*Secularism, East and West*", 7 Comparative Studies in Society and History 2(1965) at 153.
[8] *Ms. Aruna Roy* v. *Union of India*, Writ Petition (Civil) No. 98 of 2002 (*Per* Dharmadhikari, J)
[9] Nagendra Singh(ed), *Encyclopaedia of International Law*, 237,239(1984).
[10] *Id.* at 241.
[11] See, B C Nirmal, "*An Ancient Indian Perspective of Human Rights and Its Relevance*," 43Indian Journal of International Law 3(2003) at 458
[12] *Id.* at 460
[13] *Ibid.*
[14] *Id* at 461

> The King, beloved of the Gods, honors every form of religious faith but considers no gift of honor so much as the increase of the substance of religion, whereof this is the root, to reverence one's own faith and never to revile that of others. Whoever acts differently injures his own religion while he wrongs another's.

During Mughal Period, as Justice Katju points out, "The Emperor Akbar held discussions with scholars of all religions and gave respect not only to Muslim scholars, but also to Hindus, Christians, Parsis, Sikhs, etc. Those who came to his court were given respect and the Emperor heard their views, sometimes alone, and sometimes in the Ibadatkhana (Hall of Worship), where people of all religions assembled and discussed their views in a tolerant spirit. The Emperor declared his policy of *suleh-e-kul*, which means universal tolerance of all religions and communities. He abolished *jeziya* in 1564 and the pilgrim tax in 1563 on Hindus and permitted his Hindu wife to continue to practise her own religion even after their marriage. This is evident from the JodhaBai Palace in FatehpurSikri which is built on the Hindu architectural pattern."[15]

James Chiriyankandath says, "Indian secularism represent(s) the outcome of contradictions: between the secular form of the modern state and a religious society; between contending visions of what India should be, embodied by some of the principal figures involved in drawing up the Constitution – Nehru, Patel, Prasad, Ambedkar; between the anxieties of minority religious groups and the majoritarian inclinations of many Hindu Congressmen; between the enthusiasts for Hindi and the fears of the non-Hindi speaking majority; and between the demands of a putative nation and the pressures of a diverse federal polity. These contradictions have not disappeared."[16] According to Galanter, "If the concept of secularism was first formulated in the West, the concept of the religious state was most intensely practiced there. India can be said to have as long or longer a tradition of secular government in many respects than most of Western Europe or North America."[17] "In the West, secular state has evolved out of many different kinds of historical situations; many different and conflicting motives lie behind its development. In France the secular state emerged from centuries of struggle between church and state... In the United States... the secular state was achieved with no hostility towards religion as such, and it has continued to evolve on a basis of mutual good feeling

[15] *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33 at 50 (*Per* Markandey Katju, J)

[16] James Chiriyankandath, "*Constitutional Predilections*", Seminar, available on http://www.india-seminar.com/1999/484/484%20chiriyankandath.htm (last accessed on 27.12.2015)

[17] Marc Galanter, "*Secualrism, East and West*", 7 Comparative Studies in Society and History 2(1965) at 158. Historically, the seeds for secularism are found to have been sown in the early medieval controversy between the Church and the State. The fourteenth century political thinker Marsiglio of Padua was actually delineating two components of the secular state when he declared: "The rights of citizens are independent of the faith they profess and no man may be punished for his religion". *Supra* note 8 at 214.

between Church and state."[18] In western tradition, the notion of secularism is seen through two models, the French Model and the American Model. As regards the French model, it needs to be noted that "... French Republic is founded on the principle of separation of state and religion ... *Laïcité* excludes religion and religions of the state; it prohibits the state from collaborating or cooperating with one religion, either in directing its organization or its functioning, or in allowing its clerics to meddle in public affairs."[19] In law, *laïcité* is always defined as the separation of church and state.[20] It is said that among Western states, the only state in company with the French Republic in the camp of truly secular states is the United States.[21] As Elisabeth Zoller says,[22]

> The secular cultures of France and the United States share an explanation for this secularism: the same Enlightenment philosophy nourished their respective revolutions. France is the daughter of Jefferson, as the United States is the heir of Voltaire. The essential teaching of these philosophers on the relationship between church and state is that religion is a private affair and must remain such, and that religion cannot expect from the state anything other than perfect neutrality.

In the United States, the principle of separation of church and state requires the state to adopt perfect neutrality toward all religions. The neutrality of the state is always negative in the sense that the state can never oppress nor advance a religion.[23]

According to Rajeev Bhargava, though it appears that the state in India is constitutionally bound to follow Smith's model of western secularism, further examination of the constitution reveals this impression to be mistaken. He cites a number of examples thus,[24]

> To begin with, Article 30(1) recognises the rights of religious minorities and therefore, unlike other Articles applicable to citizens qua individuals, it is a community-based right...Second, Article 30(2) commits the state to give aid to educational institutions established and administered by religious communities. Also permitted is religious instruction in educational institutions that are partly funded by the state. These are significant departures from the 'wall of separation' view of the secular state. Even more significant are Articles 17 and 25(2) that require the state to intervene in religious affairs.

[18] *Supra* note 4 at 183

[19] Elisabeth Zoller, "*Laïcité inthe United States or The Separation of Church and State in a Pluralist Society*", 13 Indiana Journal of Global Legal Studies 2(2006) at 562

[20] *Id* at 561.

[21] *Id* at 563.

[22] *Id* at 564. Emphasis added.

[23] *Id* at 570-571.

[24] Rajeev Bhargava, "*What is Secularism For*", available at http://law.uvic.ca/demcon/victoria_colloquium/documents/WhatisSecularismforPreSeminarReading.pdf (last accessed on 28.12.2015)

Bhargava therefore concludes, "These features of the Indian constitution depart from the stereotypical western model in two ways. First, unlike the strict separation view that renders the state powerless in religious matters, they enjoin the state to interfere in religion. Second, more importantly, by giving powers to the state in the affairs of one religion, they necessitate a departure from strict neutrality or equidistance. This power of interference may be interpreted to undermine or promote Hinduism. Either way it appears to strike a powerful blow to the idea of non-preferential treatment."[25] The Indianness of Indian secularism is derived entirely from its strong link with home-grown traditions and that therefore India had worked out its own conception of secularism that is neither Christian nor western. For example, secularism for many means '*sarva dharma sambhava*': (a) religious coexistence or (b) inter-religious tolerance or finally (c) equal respect for all religions.[26] Partha Chatterjee[27] points out some of remarkable distinguishing points as regards the conception of secularism in India *vis-à-vis* western secularism. According to him, the 'wall of separation' doctrine of US constitutional law can hardly be applied to the present Indian situation. Moreover, "the cultural and historical realities of the Indian situation call *fora* different relationship between state and civil society than what is regarded as normative, in western political discourse, at least in the matter of religion." And lastly, in Indian conditions, the neutrality principle cannot apply; the state will necessarily have to involve itself in the affairs of religion.[28]

Constitution and Secularism

The idea and hallowed principles of secularism in deeply embedded in our constitutional edifice. Constitutional framework reflects how secularism remains entrenched in the constitutional provisions. It is an integral part of the basic structure of the constitution. However, it is interesting to see how the framers of the constitution dealt with the issue of secularism, especially in view of the fact that the word "secular" was added to the preamble by 42nd amendment in 1976. Therefore, the discussion that follows focuses upon the constitutional text and the history behind its framing as regards the question of secularism in Indian Constitution.

Constitutional Text

As to the question, whether India is a secular state, Smith says that the question must be answered in terms of a dynamic state which has inherited some difficult problems and is struggling hard to overcome them along generally sound lines. However, there

[25] *Id.* at 23
[26] *Id.* at 39.
[27] Partha Chatterjee, "*Secularism and Toleration*", Economic and Political Weekly, Vol. 29, No. 28 (Jul. 9, 1994) at 1772
[28] *Ibid.*

is no denying the fact that the ideal of secular state is clearly embodied in the Constitution of India and is being implemented in substantial measure.[29]

The preamble to the Constitution of India declares India to be a secular state, though the word secular was added to the preamble through an amendment in 1976.[30] However, even prior to the amendment of the preamble, constitution of India did contain provisions that amply display the secular underpinnings of Indian constitution. Articles 14, 15, and 16 of the Constitution promises equality, and non-discrimination on grounds of religion. Article 25 of the Constitution of India provides for freedom of conscience and free profession, practice and propagation of religion. It provides that all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.[31] However, it also provides that nothing in this article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.[32] Article 26 of the Constitution recognises the freedom to manage religious affairs, and in includes, *inter alia*, the right of "every religious denomination or any section thereof" to establish and maintain institution for religious and charitable purposes, and to manage its own affairs in matters of religion.[33] Such religious denominations also have the right to own and acquire movable and immovable property and to administer such property in accordance with the law.[34] Article 28 clearly states that no religious instruction shall be provided in any educational institution wholly maintained out of state funds.[35] Moreover, article 30 of the constitution recognises the right of minorities to establish and administer educational institutions. It states that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice and the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.[36]

Constituent Assembly Debates

As Shefali Jha points out in her study on 'Secularism' in the Constituent Assembly Debates, "All the members agreed ... on the necessity of establishing a secular state. Most shared an understanding of history in which the "movement for the separation of religion and state was irrevocably a part of the project for the democratisation of the latter."[37] H.V. Kamath in the Constituent Assembly said, "when I say that a state

[29] See, Donald E. Smith, "*Secularism in India: A Rejoinder*", 7 Comparative Studies in Society and History 2(1965) at 170
[30] Constitution (Forty-second Amendment) Act, 1976
[31] Article 25(1), Constitution of India
[32] See, Article 25(2)(a), Constitution of India
[33] See, Article 26(a) and (b), Constitution of India.
[34] See, Article 26(c) and (d), Constitution of India.
[35] Article 28, Constitution of India
[36] See, Article 30, Constitution of India
[37] ShefaliJha, "*Secularism in the Constituent Assembly Debates, 1946-1950*", Economic and Political Weekly, Vol. 37, No. 30 (Jul. 27 - Aug. 2, 2002) at 3180

should not identify itself with any particular religion. I do not mean to say that a state should be anti-religious or irreligious... to my mind, a secular state is neither a Godless state nor an irreligious state."[38]During the discussions in the Constituent Assembly, we do come across a wide and diverse range of opinions as regards the word "secular", the principle of secularism, and its place in the Indian Constitution that was being drafted during those three years from 1946 to 1949.

"When the preamble to the Constitution was discussed in the Constituent Assembly on October 17, 1949, disagreement and acrimonious debate over the incorporation of the principle of secularism took up most of the Assembly's time. The positions spelt out on secularism on that day show up clearly the lines of difference that had been developing on this issue during the three years of the Constituent Assembly debates."[39] As regards the omission of the word "secular" in the original text of the preamble, "The debates saw Dr. B.R. Ambedkar reason that there was no need to include the term 'secular' as the entire Constitution embodied the concept of secular state, which meant non-discrimination on rounds of religion and equal rights and status to all citizens."[40]Prof K T Shah speaking on the issue said,

> "...as regards the Secular character of the State, we have been told time and again from every platform, that ours is a secular State. If that is true, if that holds good, I do not see why the term could not be added or inserted in the constitution itself, once again, to guard against any possibility of misunderstanding or misapprehension. The term 'secular', I agree, does not find place necessarily in constitutions on which ours seems to have been modelled. But every Constitution is framed in the background of the people concerned. The mere fact, therefore, that such description is not formally or specifically adopted to distinguish one state from another, or to emphasis the character of our state is no reason, in my opinion, why we should not insert now at this hour, when we are making our constitution, this very clear and emphatic description of that State."[41]

He further emphasised that "...by this description (that is, secular) the character and nature of the state which we are constituting today, which would ensure to all its peoples, all its citizens that in all matters relating to the governance of the country and dealings between man and man and dealings between citizen and Government the consideration that will actuate will be the objective realities of the situation, the material factors that condition our being, our living and our acting. For that purpose and in that connection no extraneous considerations or authority will be allowed to interfere, so that the relations between man and man, the relation of the citizen to the

[38] Constituent Assembly Debates, vol. VII, at. 825-6.

[39] Jha *op.cit* at 3180

[40] Krishnadas Rajagopal, "*Debates Show Why Preamble's Original text Left Out the Two Words*", The Hindu (29.01.2015). Emphasis added. According to Subhash Kashyap, "The word 'secular' was obviously meant for the minorities in the context of the birth control programmes of the emergency period. It was not as if the Constitution was not secular or socialist before the words were added. India has been secular before the 42nd Amendment and continues to be secular after it." *Ibid.*

[41] Constituent Assembly Debates - Volume VII, Monday, the 15th November, 1948

state, the relations of the states inter-se may not be influenced by those other considerations which will result in injustice or inequality as between the several citizens that constitute the people of India."[42]

According to James Chiriyankandath, "Some of the most uncompromising proponents of a secular state belonged to religious minorities – notably the Christian Minister of Health Rajkumari Amrit Kaur, the Parsi (and erstwhile socialist) Minoo Masani, the socialist economist K.T. Shah (a Jain), Tajamul Husain, a Shia Muslim landlord, and Frank Anthony. Among the others were two Congress-women (Hansa Mehta and Renuka Ray), a former leader of the defunct National Liberal Federation (H.N. Kunzru) and a newspaper editor from Madras who led the opposition to the imposition of Hindi as the sole national language (K. Santhanam)."[43] Another important and notable point is that given the complex and paradoxical social condition prevailing then; it was a "daunting challenge to conceive of a secular state in a country that had just been partitioned on the basis of religion. Where, while there were over 50 million Muslims, Christians and Sikhs, and another 78 million belonged to Scheduled Castes or Tribes, nearly 85% of the population of 361 million was classified as 'Hindu' in the 1951 census."[44] Moreover, in the Assembly itself, there were misgivings regarding the idea of India as a secular state. There were doubting voices and critical apprehensions as well. For example, Loknath Misra (from Orissa) was apparently apprehensive about the notion of a "secular state" as he said, "our 'secular State' is a slippery phrase, a device to by-pass the ancient culture of the land."[45]

Be that as it may, when the Constitution took its final shape, a deep imprint of secularism was writ large on the text of the constitution. During the debates, one of the most influential voices in the Assembly then, Sardar Patel, while moving the Report of the Advisory Committee on Minorities, said,

> "...it is up to the majority community to create by its generosity a sense of confidence in the minorities; and so also it will be the duty of the minority communities to forget the past and to reflect on what the country has suffered due to the sense of fairness which the foreigner thought was necessary to keep the balance between community and community. This has created class and communal divisions and sub-divisions, which in their sense of fairness, they thought fit to create, apart from attributing any motives. We on our part, taking this responsibility of laying the foundations of a free India which shall be and should be our endeavour both of the majority—largely of the majority—and also of the minority community,

[42] *Ibid.*

[43] James Chiriyankandath, "*Constitutional Predilections*", Seminar , available on http://www.india-seminar.com/1999/484/484%20chiriyankandath.htm (last accessed on 27.12.2015)

[44] *Ibid*

[45] Constituent Assembly Debates, 6 December, 1948

have to rise to the situation that is demanded from all of us, and create an atmosphere in which the sooner these classifications disappear the better."[46]

B.R. Ambedkar in the Constituent Assembly said,

"In this country both the minorities and the majorities have followed a wrong path. It is wrong for the majority to deny the existence of minorities. It is equally wrong for the minorities to perpetuate themselves. A solution must be found which will serve a double purpose. It must recognise the existence of the minorities to start with. It must also be such that it will enable majorities and minorities to merge someday into one."[47]

He further reminded the Assembly that,

"To diehards who have developed a kind of fanaticism against minority protection I would like to say two things. One is that minorities are an explosive force which, if it erupts, can blow up the whole fabric of the State. The history of Europe bears ample and appalling testimony to this fact. The other is that the minorities in India have agreed to place their existence in the hands of the majority. In the history of negotiations for preventing the partition of Ireland, Redmond said to Carson "ask for any safeguard you like for the Protestant minority but let us have a United Ireland". Carson's reply was "Damn your safeguards, we don't want to be ruled by you." No minority in India has taken this stand. They have loyally accepted the rule of the majority which is basically a communal majority and not a political majority. It is for the majority to realise its duty not to discriminate against minorities."[48]

It is also a notable fact that elections were held to the Constituent Assembly in July 1946 in accordance with the Cabinet Mission plan of May 16, 1946. The plan had stipulated that "the cession of sovereignty to the Indian people on the basis of a constitution framed by the assembly would be conditional on adequate provisions being made for the protection of minorities."[49]

Judicial interpretation

Supreme Court has reiterated time and again that the Preamble of the Indian Constitution read in particular with Articles 25 to 28 emphasises that the concept of secularism embodies in the constitutional scheme is a creed adopted by the Indian people, and hence it is a basic feature of the Constitution.[50] The concept of secularism, according to the Court, is one facet of the right to equality woven as the

[46] Constituent Assembly Debates, Wednesday, 25 May, 1949
[47] Constituent Assembly Debates, Thursday, 4 April, 1948
[48] *Ibid.*
[49] Rochana Bajpai, "*Constituent Assembly Debates and Minority Rights*", Economic and Political Weekly, Vol. 35, No. 21/22 (May 27 - Jun. 2, 2000) at 1838
[50] See, *M. Ismail Faruqui (Dr)* v. *Union of India*, (1994) 6 SCC 360;*Pramati Educational & Cultural Trust* v. *Union of India*, (2014) 8 SCC 1; *Ms. Aruna Roy &Ors* v. *Union of India*, Writ Petition(Civil) No. 98 of 2002

central golden thread in the fabric depicting the pattern of the scheme in our Constitution.[51] The constitutional scheme guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasising that there is no religion of the State itself.[52]

In *Kailas* v. *State of Maharashtra*[53], the Supreme Court observed that since India is a country of great diversity, it is absolutely essential if we wish to keep our country united to have tolerance and equal respect for all communities and sects. It was due to the wisdom of our Founding Fathers that we have a Constitution which is secular in character, and which caters to the tremendous diversity in our country. Thus it is the Constitution of India which is keeping us together despite all our tremendous diversity, because the Constitution gives equal respect to all communities, sects, lingual and ethnic groups, etc. in the country. The Constitution guarantees to all citizens freedom of speech (Article 19), freedom of religion (Article 25), equality (Articles 14 to 17), liberty (Article 21), etc.[54]Secularism, therefore, is the essence of our democratic system. Secularism and brotherhoodness is a golden thread that runs into the entire constitutional scheme formulated by the framers of the Constitution.[55]

As regards the religious freedom under articles 25 and 26 of the Constitution, in *A.S. Narayana Deekshitulu* v. *State of A.P.*[56], the Supreme Court observed that religion as used in these articles must be construed in its strict and etymological sense. Religion is that which binds a man with his Cosmos, his Creator or super force. It is difficult and rather impossible to define or delimit the expressions 'religion' or "matters of religion" used in Articles 25 and 26. Essentially, religion is a matter of personal faith and belief of personal relations of an individual with what he regards as Cosmos, his Maker or his Creator which, he believes, regulates the existence of insentient beings and the forces of the universe.[57] The Court said: "whatever binds a man to his own conscience and whatever moral or ethical principles regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amity, fraternity and equality of all persons which find their foothold in secular aspect of the Constitution."[58] In the present case, the Court distinguished between secularism and secularisation thus,

"There is a difference between secularism and secularisation. Secularisation essentially is a process of decline in religious activity, belief, ways of thinking and in restructuring the institution. Though secularism is a political ideology and strictly may not accept any religion as the basis of State action or as the criterion of dealing with citizens, the Constitution of India seeks to

[51] *M. Ismail Faruqui (Dr)* v. *Union of India*, (1994) 6 SCC 360 at 403
[52] *Ibid.*
[53] (2011) 1 SCC 793;*PrafullGoradia* v. *Union of India*, (2011) 2 SCC 568 at 574; *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat* [(2008) 5 SCC 33 : AIR 2008 SC 1892
[54] (2011) 1 SCC (Cri) 401 at 801
[55] *Sindhi Education Society* v. *Govt. (NCT of Delhi)*, (2010) 8 SCC 49, para108.
[56] (1996) 9 SCC 548
[57] *Id.* at 592
[58] *Id.* at 593

synthesise religion, religious practice or matters of religion and secularism. In secularising the matters of religion which are not essentially and integrally parts of religion, secularism, therefore, consciously denounces all forms of supernaturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practices. In other words, non-religious or anti-religious practices are antithesis to secularism which seeks to contribute in some degree to the process of secularisation of the matters of religion or religious practices. For instance, untouchability was believed to be a part of Hindu religious belief. But human rights denounce it and Article 17 of the Constitution of India abolished it and its practice in any form is a constitutional crime punishable under Civil Rights Protection Act. Article 15(2) and other allied provisions achieve the purpose of Article 17."[59]

It is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasising that there is no religion of the State itself. The Preamble of the Constitution read in particular with Articles 25 to 28 emphasises this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.[60]

In *S.R. Bommai* v. *Union of India*[61], Supreme Court observed that, "religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution."[62]Secularism is a part of the basic structure of the Constitution.[63] In *T.M.A. Pai Foundation* v. *State of Karnataka*[64], the Supreme Court held that "In one country, secularism may mean an actively negative attitude to all religions and religious institutions; in another it may mean a strict 'wall of separation' between the State and religion and religious institutions. In India the State is secular in that there is no official religion. India is not a theocratic State. However the Constitution does envisage the involvement of the State in matters associated with religion and religious institutions, and even indeed with the practice, profession and propagation of religion in its most limited and distilled meaning."[65]

In *Shree Tapagachiya Atma Kamal Labhdisuriswarji Gyanmandir Trust* v. *Bombay Mutton Dealer Assn.*[66] the Supreme Court observed that,

[59] *Id. at* 594
[60] *M. Ismail Faruqui (Dr)* v. *Union of India*, (1994) 6 SCC 360 at 403.
[61] (1994) 3 SCC 1
[62] *Id* at 147
[63] *Id.* at 149
[64] (2002) 8 SCC 481 at651
[65] *Id.* at 651
[66] (2016) 1 SCC 798

"All religious ceremonies and festivals are duly respected in India. There are holidays already fixed and noted in every calendar. Respective religious and cultural sentiments and food and food habits differ from community to community throughout India for various reasons. The respective demand and supply and availability of all sorts of foods are governed by the respective licensing authorities in every part of our country. To be vegetarian or non-vegetarian is a matter of individual choice and habit."[67]

Conclusion

Again to quote D E Smith. "There are many deeply religious Indians - Hindus, Muslims, Christians, Sikhs, Buddhists, Jains, etc. - who feel that they are part of a common Indian nationality. The recognition (especially by the majority community) of others as equal citizens, the realization that the state belongs to all - these are the attitudes which must be cultivated... if the secular state is to survive."[68] Therefore, it is incumbent upon we, the people to realise the aspirations so well outlined in the constitution into reality. Intolerance towards any section of people will only strain the social and political fabric of the country leading to unpleasant atmosphere, which can be avoided if we follow the time honoured tradition of tolerance that has been a hallmark 'Indianness' since time immemorial. And, in this context, law needs to be responsive to the emerging challenges as Lord Scarman said, "The purpose of the law must be not to extinguish the groups which make the society but to devise political, social and legal means of preventing them from falling apart and so destroying the plural society of which they are members."[69] It has been rightly observed that "In a pluralist, secular polity law is perhaps the greatest integrating force. A cultivated respect for law and its institutions and symbols; a pride in the country's heritage and achievements; faith that people live under the protection of an adequate legal system are indispensable for sustaining unity in pluralist diversity."[70]The lives of Indian people have been enriched by integration of various religions and that is the strength of this nation. Whatever kind of people came to India either for shelter or as aggressors, India has tried to accept the best part of their religions. As a result, composite culture gradually developed in India and enriched the lives of Indians. This happened in India because of capacity of Indians to

[67] *Id.* at para 24
[68] Donald E. Smith, "*Secularism in India: A Rejoinder*", 7 Comparative Studies in Society and History 2(1965) at 172.
[69] *Quoted in M. Ismail Faruqui (Dr)* v. *Union of India*, (1994) 6 SCC 360 at 403
[70] M.N. Venkatachaliah, *Law in a Pluralist Society*, quoted in *M. Ismail Faruqui (Dr)* v. *Union of India*, (1994) 6 SCC 360 at 403.Venkatachaliah further says: "To those that live in fear and insecurity all the joys and bright colours of life are etched away. There is need to provide a reassurance and a sense of belonging. It is not enough to say: 'Look here ... I never promised you a rose garden. I never promised you perfect justice.' But perfect justice may be an unattainable goal. At least it must be a tolerable accommodation of the conflicting interests of society. Though there may really be 'royal road to attain such accommodations concretely'. Bentham alluded to the pursuit of equality as 'disappointment-preventing' principle as the principle of distributive justice and part of the security-providing principle." *Ibid.* Emphasis added.

assimilate thoughts of different religions. This process should continue for betterment of multi-religious society which is India.[71] As the Supreme Court has reminded that religious pluralism is opposed to exclusivism and encourages inclusivism.[72] The great Urdu poet Firaq Gorakhpuri wrote,[73]

सर ज़मीने हिंद पर अकवामे आलम के फिराक
काफिले गुज़रते गए हिन्दुस्तान बनता गया

It means that in the land of Hind, the caravans of the people of the world kept coming in and India kept getting formed.

[71] *Ms. Aruna Roy &Ors* v. *Union of India*, Writ Petition(Civil) No. 98 of 2002
[72] *Ibid.*
[73] Quoted in *Hinsa Virodhak Sangh* v.*Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33 at 50

The Law of Non-Profit Companies for Extending the Institutional Support to Social Functions

P. Ishwara Bhat[*]

Introduction

Non Profit Company (NPC) is the corporate sector's significant organizational contribution to charity. Its genesis involved innovation of unique conceptual framework that combines the ethos of philanthropy, facility of the corporate personality and flexibility of its functional norms to give best of the legal environment for a variety of social service activities. While the concept of company itself has revolutionised the business world's competence to bring to the forefront the economic energy of the polity and muster the entrepreneurial ability for producing unprecedented economic output, taking a new turn towards helping the social capital through its new organizational prototype, unusually without a profit orientation, is undoubtedly a positive development. Keeping the driving force of profit motive aside, and tapping the capability of the organizational strength, this new type of legal entity has entered into the key area of service sector ranging from education, health, dalit empowerment, tribal development, cultural activities, gender justice, child protection, health service, information and news, and promotion of commerce to environmental protection, calamity handling and safeguard to human rights.[1] They may involve in business or may wholly concentrate on charitable acts but they have primary social objectives of enhancing the level of people's access to various good things in the domain of charity religion or culture. They reinvest the surplus for greater and long term good of the community rather than distribute the profit that has temporary benefit.[2] Hence the mission-driven responsible acts of the non profit

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[1] For a list of the section 25 companies, which include companies in various social service spheres, see http://www.mca.gov.in/Ministry/pdf/Section25_Companies_6nov2008.pdf visited on 1.1.2016; there are 4878 Non Profit Companies registered under section 25 of the Companies Act of 1956 out of which 1774 registered in National Capital of Delhi, 1460 in Maharashtra, 416 in West Bengal, 370 in Tamil Nadu, 313 in Gujarat, 244 in Uttar Pradesh, 187 each in Andhra Pradesh and Karnataka. The National Scheduled Tribes Finance and Development Corporation established in 2001 under section 25 of the Companies Act, 1956 is one such example; for an account of NPC and NGO contribution in managing the natural calamity in Chennai in December 2015, see Ilangovan Rajasekaran, "*How the city braved it out?*" Frontline, December 25, 2015, pp 14-18.

[2] Section 8 of the Companies Act, 2013; section 25 of the Companies Act, 1956

companies are crucial for achieving the social goal for the masses.[3] Having an extremely lovable human side, the theoretical links between the group action and individual human interest or between corporate solidarity and human justice determine the nature of corporate life and the method of balancing the power equation amidst the competing individuals and groups. The social initiative of NPVOs in the corporate sector resulted in voluntary assumption of corporate social responsibility in the beginning, which ultimately culminated in the mandatory legal requirement for big companies.[4]The social function of corporate institutions like NPC has instrumental role in effectuation of welfare ideologies and cultural endeavours.

The social presence of NPC during a period more than a century has witnessed both the facilities for widely spread out social functions and some practical difficulties and incoherence that have legal complications. First, the Central Government's power of licensing the NPC is sometimes used to issue directions which interfere with the autonomous functioning of the NPC. While the judiciary has provided remedies against encroachment of the right of management of the NPC,[5] apprehension of undue monitoring continues. Second, the scope for oppression and discrimination is worrisome. The Articles of Association of NPC are not alterable without the prior permission of the Central Government.[6] But oppressive and parochial policies are not excluded or filtered out in the Articles of Association, as a result of which arbitrary measures against members who dissent or criticise are left without remedies.[7] Possibility of creation of ghettos and allowing them in the name of autonomy has created problem.[8]Thirdly, conversion of NPC into normal company or vice versa, although done under the supervision of the central Government,[9] disturbs the social expectations. While flexibility may be required, whether the change management is fair and subject to adequate safeguard is debatable. Fourthly, opportunity of merger of business companies with NPC is allowed by relying on the powers of the Central Government to deal with the matter in appropriate way. Possibility of callous approach such as ignoring the suggestion of the Registrar to provide for decentralization of the new corporate entity is problematic.[10] Fifthly, the link between political party and NPC in such a way that the former provides fund collected from the general public to the latter as loan, and then transfers the debt to another NPC which gains control over the erstwhile NPC without the consent of the

[3] Kerry O'Halloran, *Religion, Charity and Human Rights*, Cambridge: Cambridge University Press, 2014 p.92.
[4] Section 135 of the Companies Act, 2013
[5] *Apparel Export Promotion Council* v. *Union of India* AIR 1994 Mad 57
[6] Section 8 (4) (i) of the Companies Act, 2013
[7] *G S Mayawala* v. *Motion Picture Association*, (2006) 132 Com Cases 388: (2005) 122 DLT 185 (Del); *Leela Kumar (L)* v. *Government of India*, (1997) 27 Comp L A 145 (Mad); *Jalandhar M Reddy* v. *Madras Boat Club*, (2008) 146 Com Cases 366 (Mad)
[8] Apprehending the possibility of extending the approach in *Zoroastrian Co-operative Housing Society Ltd.* v. *District Registrar, Co-operative Societies (Urban)* AIR 2005 SC 2306
[9] Section 8 (4) (ii) of the Companies Act 2013
[10] *Walvis Flour Mills Co. Pvt. Ltd., Re* (1993) 76 Com Cases 376 (Bom)

General Body of the concerned NPC has posed the problem of lack of accountability, abuse of Party Fund and violation of rule of law.[11] Finally, while so many formalities are dispensed with in case of NPC and procedure is made simple and fast, in the matter of winding up of the NPC delay persists. Apart from inquiring into these matters, systematic exposition of the law in its theoretic, historical and social context will be attempted in this paper.

Theoretical considerations

Theories on 'legal person' have begun their analysis by looking into the functional aspects of corporate body: corporate sole to facilitate continuation of official position with perpetual succession and common seal, and corporate aggregate having instinctive tendency to unify groups.[12] The present discussion will focus on the latter, that too in the field of non-profit sector. Unlike the business sector where company is a vehicle of profit oriented enterprise, here aggregation occurs for achieving one or more social goals. It is the love of humanity, society driven causes and concern for culture, and not the ruthless motive to amass profit that binds them. It is either the inclination to combat against injustice and marginalization, or aspiration for welfare and will to assert community's identity that brings them together. Purpose, which is a strong cementing force, is crucial for the organization in dovetailing the common aspiration. Beneath it is the issue of human right, social welfare and claim for justice. The capabilities approach to justice would bring realization of the whole gamut of intrinsic qualities of human being for safeguarding against deprivation and making access to them on fair principle a possibility.[13]Since operation of legal system shall promote the cause of multi-dimensional justice, the links of the NPCs with these values shall be supported by the law of NPC. The institutional approach (i.e., stakeholder oriented and not shareholder oriented) emerging from this perspective will result in holistic execution of the motives by and for which the company is established.[14]

Most of the conventional theories on legal personality looked into the protection of the interests of the company or its shareholders and not into the interests of beneficiaries for whom the NPC has to act as the helping hand. This can be further clarified by examining them from this angle. The traditional 'purpose theory' focused more on distinguishing between human persons and legal persons in recognising entitlement within the personality than on realising the purpose through the instrument of person.[15] Duguit's concept of social solidarity for attainment of purpose and testing the validity of any act in light of the purpose gives convincing

[11] *National Herald case* where the two NPCs, AJL and YIL, and the Congress Party are involved.
[12] R W M Dias, *Jurisprudence* 5th ed,New Delhi: Aditya Books Pvt Ltd., 1994 p.253
[13] Martha Nussbaum, *Frontiers of Justice* (2006) p.70; 'Capability and Well-being' in M Nussbaum and Amartya Sen, The Quality of Life (1993) pp. 30-53; Amartya Sen, *The Idea of Justice*, London: Penguin and Allen Lane, 2009,Pp. 243-4.
[14] Michel Tison et al., *Perspectives in Company Law and Financial Regulation*, Cambridge: Cambridge University Press, 2009, p. 21.
[15] R W M Dias, pp 265-6; Gierke, Natural Law and Theory of Society.

guidance, although his conception of social solidarity is debatable on empirical reasons.[16] 'Enterprise Entity' theory requires law's approval for launch and working of the enterprise as a condition for its legal entity.[17] This can also partly explain the conceptual basis of NPC. Concession theory glorifies the role of the State, and considers the legal personality as a gift of the law.[18] This approach ignores the social effort, and undermines social enthusiasm underlying NPC. 'Bracket theory' advanced by Ihering by focusing only on human persons to be bracketed ignores the category of environment and animals, which are important areas of non profit actions.[19] The analysis by Hohfeld would protect it as a procedural form whereas Kelsen favours recognition of rights and duties of persons within the corporation as a matter of law.[20] Fiction theory also fails to arouse confidence as the objects are practically realistic.[21] Realist theory of Gierke by explaining that groups tend to become unit and function like that argues for cohesive group, which a multicultural society may contest in view of pluralism.[22] Regarding NPC, the analysis should transcend these traditional approaches, and has to examine the issues from social function perspective with a readiness to decipher human elements in the structure of purpose and assist the beneficiaries.

While NPC does not perfectly fit into any of the specific models as it aspires to achieve vital social goals, it is more fruitful to find a theoretical basis for control of power in the functioning of NPC. The fact that unity yields strength of power is to be addressed by adequate countervailing measures that would guard against abuse of power. The means employed for attaining this aim include: separation of ownership of corporate property from ownership of 'notional' property and nationalization of or extensive social control over the company.[23] Another means of control could be the control of associational liberty by invoking 'lifting of the corporate veil'.[24] There is a long followed constitutional doctrine that content of associated freedom (or rights of the organization emerging after the exercise of freedom of association) cannot exceed the right to form association based on analogical reasoning that the stream could never raise above the source.[25] This gives a free hand to the State to regulate the abuses occurring by crossing the limits of associated freedom. The doctrine also means that the formation of association is product of numerous individual choices which got united under the umbrella of common purpose. Linking of the structure of the company with that of purpose is achieved by exposing the true colour of the

[16] Duguit, *Progress of Continental law in the 19th Century,* Pp. 87-100 cited in RWM Dias, p 266.

[17] Berle, '*The Theory of Enterprise Entity*' (1947) 47 Columbus Law Review 343; also see RWM Dias, p 266.

[18] *Ibid*

[19] Ihering cited in RWM Dias, p 266.

[20] RWM Dias, p 267.

[21] RWM Dias, p 268.

[22] *Ibid* 269.

[23] *Ibid* 255

[24] *Ibid* 256

[25] *All India Bank Employees' Association* v. *The National Industrial Tribunal (Bank Disputes), Bombay,* AIR 1962 SC 171

company. Thus, various undersides of NPC need to be dealt by both control of power and control of liberty by addressing their abuses. Examining of the social site in which the NPC had evolved, having an overview of the human right/welfare/justice going to be promoted and scrutiny of the linguistic expression of purpose as found in the constitutive documents of the NPC would provide insights about the embedded objectives. Karl Renner suggests that for understanding any legal concept one has to penetrate its economic base. Scrutiny of social life helps in this task. However, he cautions, "Social life is not so simple that we can grasp it, open it and reveal its kernel like a nut, by placing it between the two arms of a nutcracker called cause and effect."[26] One has to consider the whole trajectory of economic life of the polity and examine how it helps the social life. A peep into history of NPC will unravel their socio-economic and cultural base and legal path.

A peep into the history of NPC

Historians have noted the instances of guilds and economic associations perpetually helping the cultural activities in ancient India. The corporate economic life was not averse to social help. Ancient Indian thoughts on subordination of economic acts and property to the cause of justice, along with high morals on donation had logically carved out space for group acts supporting charity, art and religion.

The idea of companies not for gain was prevalent from the inception of the colonial law on companies in India. Section 26 of the Indian Companies Act 1882 had provided for Local Government's power of licensing the companies established for promoting commerce, art, science, charity, or any other useful object, without any intention of making profit and prohibiting distribution of dividend to dispense with the use of the word 'Limited' in their name and with the privilege of not filing return of lists of members and directors.[27] Under section 26 of the Companies Act 1913, it was provided,

> "where it is proved to the satisfaction of the Local Government that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, charity, or any other useful object, and applies or intends to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Local Government may, by license under the hand of one of its Secretaries, direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly."

The Local Government had the power of imposing conditions in such license and enforcing it as part of the memorandum or articles of association. In case of

[26] Karl Renner, The Institutions of Private Law and their Social Functions (1949) extracted in MDA Freeman (Ed.), *Lloyod's Introduction to Jurisprudence* 8th ed. (London: Sweet and Maxwell, 2008) 1192.

[27] http://bombayhighcourt.nic.in/libweb/oldlegislation/1882.06.pdf; visited on 1/1/2016; the Indian Companies Act 1866, which this legislation had repealed was the first extensive statute on the subject which, it appears, had similar provision.

breach of conditions it had the power of revoking such license. The Associations Not for Profit had the privilege of dispensing with the word 'Limited' in their name and exempted from filing the list of members and directors with the Registrar.[28]

With the enactment of the Companies Act, 1956 the regulatory power was shifted from local government to the Central Government. More privileges were added that included concessions and relaxations in holding meeting, duration of notice, account keeping and borrowing etc.[29] Judicial decisions recognised the transactions between members and the NPC as only internal and not amounting to sale, thus suggesting greater cohesion.[30]The majority of the Supreme Court Bench in *Surat ASCM Association* case[31] applied the dominant object test under the relevant provisions of the Income Tax act, 1961 and held that the predominant object of the concerned NPC was general public utility of promoting commerce and not making profit. P N Bhagwati J observed, "The profit of the assessee could be utilised only for the purpose of feeding this charitable purpose and the dominant and real object of the activity of the assessee being the advancement of the charitable purpose, the mere fact that the activity yielded profit did not alter the charitable character of the assessee."[32] It is the purpose scrutiny which saved identity of the NPC and its privilege.

In *Felix Thamba*case[33] the Jharkhand High Court held the Government Circular that had prohibited the members Scheduled Tribes from obtaining loan by mortgaging their land as unreasonable and obstructing access to right to education or residential accommodation. While the Chotanagpur Tenancy Act had given the opportunity of raising loan by mortgage of land for limited duration of 5 years, the absolute ban under the circular was liable to be nullified. In view of the fact that National Scheduled Tribes Finance and Development Corporation, a NPC established by the Central Government, was ready to advance the loan and other

[28] http://www.thinklegal.co.in/viewexternalfile20092010/acts_6232009_radc286d.pdf visited on 1/1/2016

[29] Exemptions from publication of name (sec147); exemption from filing of annual return about membership [sec166 (2)]; liberty to hold general body meeting on public holidays or outside the business hours [sec166 (2)]; reduction of time length of meeting notice to 14 days instead of 21 (sec 171(1)); requirement to keep books of account of past four years instead of eight years (sec 209(4a)); exemption from the requirement of Central Government's permission for enhancing the number of directors (sec 259); relaxation in holding Board meeting (once in six months instead of three months)(sec 285) and its quorum (sec 287); competence of the Board to decide about borrowing of money, investing of funds or making of loan by circulation instead of by holding meeting (sec292);exemption from the requirements of intimating to the registrar the particulars about change in the composition of the Board (sec 303); relaxation in the matters of quantum loan or purchase of shares that can be made by the company without central government prior approval (sec 370 & 372)

[30] *Commissioner of Income-tax, Bihar* v. *M/s. Bankipur Club Ltd.* AIR 1997 SC 2312

[31] *Additional Commissioner of Income-tax, Gujarat, Ahmedabad* v. *Surat Art Silk Cloth Manufactures' Association, Surat,* AIR 1980 SC 387

[32] *Ibid* 404. A P Sen J.dissented.

[33] *Felix Tamba* v. *State of Jharkhand*, 2009 Jharkhand 1

Banks were also prepared to give loan, the absolute restriction on mortgage became arbitrary and hence, unconstitutional. The Court elaborated about the expansion of right to education in its constitutional status, width and efficacy and indirectly hinted how the NSTFDC has strong human right orientation,[34] which could not be lowered through the circular. Although the judicial treatment of the linkage between human right and the NPC is not very clear, the effect of the judgment was definitely towards that end. With a more systematic linkage of these factors and clarity about their human right role, the NPCs are likely to don the mantle of human right protection more effectively.

Both the judgments continue to be in force as the erstwhile legal policy is retained by section 8 of the Companies Act, 2013. The *Surat* case gave internal strength to the NPC by purpose scrutiny whereas *Felix Thamba* enhanced the pro-human right competence of the NPC. From the perspective of institutional support to social justice, both are positive developments.

Analysis of section 8 of the Companies Act, 2013

The policy of economic liberalization, privatization and globalization had great impact upon the economy and socio-cultural life in India. The conflicts introduced by these policies and their adverse impact upon labour, environment, consumers and the marginalised sections had to be addressed by making the corporate governance more efficient, socially accountable and humane. The legal environment of NPC had to take these factors into account along with making NPCs vibrating instruments of social service. The text, context and relations shall be traversed to understand their implications.

Nature of NPC

Section 8 states that a Non-profit making Company is a Company which: (a) has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;(b) intends to apply its profits, if any, or other income in promoting its objects; and(c) intends to prohibit the payment of any dividend to its members. Protection of environment, which was not there in the earlier Act, is finding an explicit place in the objects owing its increased use, acceptance and importance in social service acts. Further, the reference to objects is inclusive, allowing similar objects within its ambit.[35]The omission of the word 'useful' prefixing object in the new Act has its own significance as it avoids the need to prove that the object is useful. Moreover, useful is a vague expression having several dimensions. It is important to note thatit

[34] The objectives of the Corporation, *inter alia* are identification of economic activities of importance to the Scheduled Tribes so as to generate employment and raise their level of income, up gradation of skills and processes used by the Scheduled Tribes for providing job training, providing financial support for undertaking procurement and marketing of minor forests produce etc.

[35] The rule *ejusdem generis* can be invoked to identify the new objects.

is the presence of characteristics (b) and (c) mentioned hereinabove which gives an identity crucial for NPC.

Procedure of Formation

According to section 8 (1) of Companies Act 2013,where it is proved to the satisfaction of the Central Government that a person or an association of persons want to register themselves under section 8 as a limited company for the furtherance of above mentioned objects, the Central Government may, by license issued in prescribed manner allow that person or association of persons to be registered as a limited company without the addition to its name of the word "Limited", or as the case may be, the words "Private Limited". If the Central government allows such registration then the Registrar shall, on application, in the prescribed form, register such person or association of persons as a company under Section 8 of the Companies Act. It should be noted that section 25 of the Act of 1956 contemplated association forming limited company, which meant that the initiation shall be by two or more persons. Although the use of the expression 'a person or an association of persons' provides scope for initiation by single person, as per Rule 3 (5), One Person Company cannot be incorporated or converted into company under section8 of the Act. The detailed procedure laid down in Rule 19 and 20 of the Companies (Incorporation) Rules, 2014 guides its formation. The requirement of submission of digital signature of the Managing Director or Director or Manager or Secretary of the Company,[36] obtaining of Director Identification Number under section 153, and obtaining of name of the NPC on the basis of request,[37] preparation of Memorandum of Association and Articles of Association,38 and submission of application along with all necessary enclosures[39] to the Registrar for grant license to establish NPC are the specific steps involved in the formation of the NPC.

[36] Digital Signature Certificate shall be obtained from authorized DSC issuing Company

[37] Section 4(4) read with Rule-9 of Companies (Incorporation) Rules, 2014, provides for application for the reservation/availability of name shall be in Form no. INC.1; name shall include the words foundation, Forum, Association, Federation, Chambers, Confederation, council, Electoral trust and the like.

[38] The main objects should match with the objects shown in e-Form INC.1.

[39] (a)The draft Memorandum of Association as per Form no. INC.13 of the proposed company; (b)The draft Articles of Association of the proposed company (c) The declaration in Form No.INC.14 by an Advocate, a Chartered Accountant, Cost Accountant or Company Secretary in practice, that the draft memorandum and articles of association have been drawn up in conformity with the provisions of section 8 and rules made and that all the requirements of the Act and the rules made there under relating to registration of the company under section 8 and matters incidental or supplemental thereto have been complied with; (d) The declaration by each of the persons making the application in Form No. INC.15; (e) the draft Memorandum of Association as per form no.INC.13 of the proposed company (f) an estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure.

Checks and Balances on the NPCs

The Companies Act provides a number of checks and balances to make sure that the Section 8 Companies are being run taking into account their special status as not for profit companies. The first is present in Section 8 (4) (i) which states that a company registered under the said section shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.

Secondly, Section 8(6) provides for the revocation of license. The said section provides that the Central Government may, by order, revoke the licence granted to a company if the company contravenes any of the requirements of the section or any of the conditions subject to which a licence was granted or the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest. Without prejudice to any other action against the company, the Central Government may direct the company to convert its status and change its name to add the word 'Limited' or 'Private Limited' to its name and there upon the Registrar shall, without prejudice to any action that may be taken, on application, in the prescribed form, register the company accordingly. Such order shall not be passed unless the company is given reasonable opportunity of being heard. A copy of such order is to be given to the Registrar.

The Central Government may direct the company, the licence of which has been cancelled, if it is satisfied that it is essential in the public interest, to be wound up or amalgamated with another company registered under this section. Such order shall be passed only after giving a reasonable opportunity of being heard to the company whose license has been cancelled.

As per section 8 (10), a company registered under this section shall amalgamate only with another company registered under this section and having similar objects. In case of amalgamation the Central Government may provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and such liabilities, duties and obligations as may be specified in the order.

In case of winding up or dissolution of a company, the debts and liabilities, any asset of the said company may be transferred to another company registered under this Section and having similar objects, subject to such conditions as the Tribunal may impose or may be sold and proceeds thereof credited to the Rehabilitation and Insolvency Fund formed under Section 269.

Thirdly, Section 8(11) provides that if a company makes any default in complying with any of the requirements laid down in this section, the Company shall, without prejudice to any other action under the provisions of this section, be punishable with fine and which shall not be less than Rs 10 lakh which may extend to Rs 1 crore and the directors and every officer of the company, who is in default shall be punishable with imprisonment for a term which may extend to 3 years or with fine which shall not be less than Rs 25,000/- but which may extend to Rs 25 lakhs or with both.

When it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under Section 447 which provides

punishment for fraud. The punishment may be imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud. Where the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.

Other Statutory Provisions Related to the NPCs

Firm as a member of Non-Profit Making Company

As per section 8(3) a partnership firm may become a member of the non-profit making company registered under section 8. Membership of such firm shall cease upon dissolution of the firm. However, partners of the dissolved firm may continue to be the members of such company in their individual capacity.

License for existing companies under Section 8

There is also a provision for conversion of existing Companies into a Non-profit making company under section 8 read with Rule 20 of Companies (Incorporation) Rules, 2014. Rule 20 states that for an existing company to get a license an application needs to be made and the formalities of Form No. INC 14 and Form No.INC 15 must be complied with. Along with that notice in Form No. INC 26 must be sent to Registrar and published as provided in Rule 20.

Conversion of Section 8 Companies to company of another kind

A Non-profit making company can be converted into any other Company by following the procedure given in Rule 21 and 22 of Companies (Incorporation) Rules, 2014. This procedure requires a special resolution to be passed at a general meeting approving such a conversion. Along with the notice of general meeting that is called to pass such resolution an explanatory statement must be annexed stating the reasons for opting for a conversion. This explanatory statement must contain details of (amongst others) the privileges and concessions enjoyed by the company (such as tax exemptions, foreign contributions, property bought at concession etc) as well as details of the impact of the proposed conversion on the members of the company including any benefits they may receive. The Notice and explanatory statement must be filed with Registrar in Form No. MGT. 14. The company will also have to obtain a 'No objection certificate' from any authority or organization or governmental department from which it has obtained any special status privilege or benefit. Such a conversion will only be approved under the condition that the company must give up any privileges it enjoyed as being a section 8 company including paying the difference in the price of any property acquired at a concessional cost and utilizing any accumulated profit or unutilized income to pay its debts.

No Change in AOA and MOA

A company registered under this section can only alter the provisions of its memorandum or articles with the approval of the Central Government.

Revocation of License by Central Government

As per section 8(6), the Central Government may, by order, after giving the company a reasonable opportunity of being heard, revoke the license granted to a company registered under this if the company contravenes any of the requirements of this section or any of the conditions subject to which the license is issued or the affairs of the company are conducted fraudulently or in a manner violating the objects of the company or prejudicial to public interest. The Central Government will then direct the company to convert its status and change its name to add the word "Limited" or the words "Private Limited", to its name and thereupon the Registrar shall, without prejudice to any action that may be taken under sub-section (7), on application, in the prescribed form, register the company accordingly.

Winding up of Company

As per section 8(7), where a license is revoked under sub-section (6), the Central Government may, by order, after giving the company a reasonable opportunity of being heard, if it is satisfied that it is essential in the public interest, direct that the company be wound up under this Act or amalgamated with another company registered under this section.

Penalty for violation of Section 8

If a company makes any default in complying with any of the requirements laid down in section 8, the company shall, without prejudice to any other action under the provisions of this section, be punishable with fine which shall not be less than ten lakh (10,00,000) rupees but which may extend to one crore (1,00,00,000) rupees and the directors and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than twenty-five (25,000) thousand rupees but which may extend to twenty-five (25,00,000) lakh rupees, or with both.

When it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under Section 447 which provides punishment for fraud. The punishment may be imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud. Where the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.

Advantages of being NPC

There are several advantages for a body registered as NPC. The purpose of the law is to allow some amount of relaxation from procedural rigmaroles so that group work would be facilitated with an atmosphere of ease, comfort and informality required for non-commercial activities of the community.

Firstly, by using a non-commercial nameplate, the NPC can establish popular relations in the public life. A.Ramaiya views, "License to drop the word 'Limited' as

the last word of the name of the company and yet enjoy the protection of limited liability is an advantage to the company in itself."[40]

Secondly, opportunity to the firms to participate in the activities of NPC on their own right has enhanced the usefulness of NPC.[41]

Thirdly, the requirement of having minimum paid up share capital is not applicable in case of NPCs, whether registered as private or public limited company (Section 2(68) and 2 (71)).

Fourthly, there are relaxations of norms relating to general body meeting of NPCs so that procedural rigidity would not obstruct the working ambience. They have liberty to hold general body meeting on public holidays or outside the business hours [sec 96 (2)].They are entitled to reduction of time length of meeting notice to 14 days instead of 21 (sec 101(1)). Further, section 118 about minutes of the proceedings of the general meeting or meeting of board of Directors is not applicable except that minutes may be recorded within thirty days of the conclusion of every meeting in case of companies where the articles of association provide for confirmation of minutes by circulation.[42] While members in other companies are entitled to supply of copies of consolidated financial statement (audited) of accounts 21 days prior to the date of general body meeting, in case of NPCs, such duration shall be 14 days (section 136 (1)).

Fifthly, law permits NPCs to have more than fifteen directors, and for this purpose special resolution by shareholders is not a requisite (Section 149 (1)). The requirements relating to independent director and provisions related thereto are not applicable in case of NPCs (Sections 149, 150, 152). The provision in section 160 to the effect that retired director shall not be eligible for contesting for the position of director by ballot is not applicable in case of NPCs. For the purpose of counting directorship, the position held as director in NPC shall not be counted (section 165).

Sixthly, the requirement under section 173 (1) to the effect that in every year there shall be minimum number of four meetings and that between two consecutive meetings there shall not be intervention of more than 120 days shall not be applicable to NPCs but that there shall be two meetings in a year and between the two consecutive meetings there shall not be intervention of more than six months. Regarding requirement of quorum of meeting of the Board of Directors under section 174 instead of the requirement of not less than one-third of strength of the directors, shall not be applicable for NPC, in whose case it shall be either 8 members or twenty five per cent of total strength of directors whichever is less. However, it shall not be less than 2 directors.

Seventhly, under section 179 the requirement that matters relating to finance shall be decided by the Board meeting and not by circulation is not applicable to

[40] A. Ramaiah, *Guide to the Companies Act*, Part I 14th ed., Nagpur: Wadhwa & co 1999, p.283

[41] The Company Law Committee has viewed so pointing out economic contribution of the business firms to the NPCs.

[42] Notification No. [F No 1/2/2014-CLI]

NPC. It is permissible for NPC to arrive at the Board decision in the matter of borrowing of money, investment of fund of the company, and grant loan or give guarantee or provide security in respect of loans.

Eighthly, the requirements under sections 184 (2) and 189 to the effect that the directors shall disclose their interest or shall have their contracts registered with the company in any of the transactions shall stand modified in case of NPC in such a way that they shall be under such obligation only in case the condition of contract or arrangement exceeds Rs one lakh.

Finally, registration under section 8 is a prima facie proof that the body is not for profit and there is no element of sale when a club serves refreshments to the members and hence, Sales Tax is not applicable.[43] Further, the section 8 companies are exempted from India Stamp Act 1899 vis-à-vis Memorandum and Article. Registration fee is also nominal.

Difficulties and Problems: Legal Responses

When the NPCs are victims or authors of abuse or mischief, occurrence of the undersides in this domain has been the usual experience. Whether the law has fairly responded to the difficulties or problems cropping up due to this factor or their possibilities is a matter taken up for discussion here. First, NPC becomes target of undue interference by the Central Government when the latter, in the guise of exercising the power of issuing direction in course of licensing disturbs the autonomy of the NPC. In *Apparel Export Promotion Council* case[44] the question was whether such direction issued by the Central Government under Article 101 of its Articles of Association purporting to divest the Executive Committee (equivalent to Board of Directors) of the Company of its powers to deal with the staff and to take any steps or decision to transfer staff and Officers, sanction tour, initiating and discharge of disciplinary matters and order of suspension of any of the officials was *intra vires*. The Company was a NPC established under section 25 of the Companies Act, 1956 mainly with the object of promoting export of garments manufactured in India to various countries with a view to earn valuable foreign exchange and to provide considerable employment within the country. The Madras High Court observed, "No doubt, the Council is the creation of the Government. But in so far as it is an autonomous body, the Government cannot tinker with the power of the Executive Committee of the Council by way of issuing directions, under Article 101 of the Articles of Association. Simply because a change /alteration or a modification in the Articles of Association has to be made with the approval of the Government, it does not mean that the Government itself will create a situation where Articles of the Articles of Association get altered." Holding that such an action was arbitrary the Court quashed the direction as invalid under Article 14 of the Constitution. The judgment has the effect of emphasizing that the interests of the stakeholders or beneficiaries rather than that of shareholders is paramount. It rejected the argument

[43] *Cosmopolitan Club* v. *Deputy Commercial Tax officer*, AIR 1952 Mad.814

[44] *The Apparel Export Promotion Council, New Delhi* v. *Union of India* AIR 1994 Mad 57

based on the concession theory, and also demonstrated the impact of constitutional law on the NPVO law.

Secondly, the principle of equal membership and democratic management is one of the cardinal principles of NPVO. Deviation from this ideal and indulging in groupism, discriminations and oppressions is a matter of serious concern, as can be gathered from the case law. In *G S Mayawala*,[45] a case decided by the High Court of Delhi, the question involved was the method of protection of minority members against oppression by the majority which had control over the management for a long time and also alleged to be involved in financial mismanagement. The minority sought at the general body meetings of the company, a change in the relevant Article of Association (24) so that persons who occupied the position of members of the executive committee consecutively for two terms shall be disqualified to re-contest for election to the membership of the EC for one year. The effort became futile as the majority by more than 75 per cent vote rejected the proposal for change. Even the EC meeting conducted under the supervision of the court through two different lists of voters also did not help in the past.[46] The petitioners sought judicial order directing the disqualification of members of EC who served for two years or more from contesting for re-election in view of prevalent mismanagement by the majority and oppression of the minority. The court declined to provide the remedy on the ground that alteration of Article Association is the domain of the company, and that in the circumstance it was futile to go against the majority. But the Court suggested that petition under sections 397 and 398 to remedy oppression of the minority and mismanagement by the majority is suitable course of action. The general power of issuing directions for the smooth functioning of the company under section 402 could not be effective since such directions for restraint on right to contest election on the part of some members of the majority group would not obstruct the other members of the same group to contest the election. The Court distinguished the issue of voting right of the majority from the issue of oppression and mismanagement. In *Jalandhar Reddy* case,[47] the Madras High Court had to deal with a dispute between the two infighting groups on the issue of registration of a Boat Club under section 25 of the Companies Act or section 4 of the TN Society Registration Act. The prevalence of two classes of membership viz., rowing members and lawn members with difference in voting right and dominance of the former because of the original purpose, functioning and activities of the Madras Boat Club had complicated the matter. The dominant view was in favour of registration under section 25 rather than under the TNSRA. The minority apprehended about the possible oppression of the minority by the majority and sought court's intervention against holding of the extraordinary general body meeting of the Club, and in view of a resolution passed in open house discussion nine years ago in favour of registration under TNSRA, status quo shall be maintained. The Madras High Court declined to intervene as the Club

[45] *G S Mayawala* v. *Motion Pictures Association* 2005 (83) DRJ 361 Delhi High Court

[46] *B R Kundra* v. *Motion Pictures Association* (1978) 48 Company Cases 536; *Motion Pictures Association, in re* v. *Mayawala* (1984) 55 Comp. Cases 375

[47] *Jalandhar M Reddy* v. *Madras Boat Club* 2008 SCC On Line 736; (2008) 146 Comp Cas 366 Madras High Court

had the autonomy to decide on the basis of majority view. The court held that duality of membership was the position agreed upon in bye laws and it could not be objected once membership is accepted on such conditions and that if the lawn members were discriminated and oppressed on any other count the court could provide remedy in appropriate cases.

In both the above cases, the courts acted upon shareholders' interests and not upon stakeholders' interests in spite of the prevalence of oppressions and discrimination against the minority. But the actions invoked by the petitioners involved voting rights and not specific allegation of oppression and mismanagement. While the judicial approach is logically correct in the circumstances of the cases, the problems arising from dissensions and groupism remained unresolved. The validity of bye-laws, in spite of their discriminating policy, was not examined from the angle of public policy. Even if it had been attempted, in light of *Zoroastrian Cooperative Society* case,[48] the consequence would not have been different as the courts have deference to the bye laws as if they are symbols of autonomy. But parochial policy involved in such bye laws would not consider stakeholder's rights, which get sacrificed at the altar of shareholders' rights. Looking from the angle of human right, welfare and democratic participation of minority group, such a position would enable creation of ghettos in the name of autonomy. In view of the fact that economic and social opportunities of members are stake irrespective of their allegiance to diverse groups, the matter needs to be looked from the basic conceptual perspectives of non-profit companies.

Thirdly, the question of conversion of NPC into commercial company or vice versa has definite implications of making the process of change methodic and conforming to the requirement of law and justice. For example the Solar Energy Corporation of India, established under section 25 in 2011 by the Union Ministry on New and Renewable Energy, was to facilitate implementation of the solar mission. In the financial year of 2014 it made a profit of Rs12 crores and in 2015 it expected to make a profit of Rs 350 crores. The Union Government took a decision in 2015 to convert the NPC into a section 3 company. The process of conversion is prescribed under Rule 21 under Chapter II of the Companies Act 2013 (Companies Incorporation Rules 2014): (a) passing of a special resolution at a general meeting for approving such conversion; (b) preparation of explanatory statement disclosing date of registration of the company, principal objects of the company as set out in Memorandum of Association, reasons for non fulfillment of the NPC objects, proposed alterations, privileges or concessions (tax exemption, approval for receiving donations or contributions including FCRA, land and moveable properties acquired at concessional rate, the extent of gain, and details of donations or bequests received subject to conditions for utilization etc.,) and details of impact of the proposed conversion on the members of the NPC; (c) getting a certified copy of the special resolution along with copy of the notice; (d) filing of application with the above details to the Regional Director. The other prominent requirements that shall

[48] *Zoroastrian Co-operative Housing Society Ltd.* v. *District Registrar, Co-operative Societies (Urban)* AIR 2005 SC 2306

be satisfied include: publication of the intended conversion in local vernacular newspaper, getting NOC from the Chief Commissioner of Income Tax of the area and from the Charity Commissioner, filing of financial statement and annual return, obtaining of certificate from the Chartered Accountant or Company Secretary, submission of new Articles/Memorandum of Association, and registration of the Company by the Registrar. Thus, the rules facilitating change stand for transparency, formal satisfaction of the disturbed expectations by withdrawal of the privileges and resolution of possible grievances.

Fourthly, the merger and acquisitions of business company/companies with NPC/s, where the latter emerges as transferee company is an issue that calls for close scrutiny and monitoring of the whole process so that the identity, commitment and purpose orientation of the NPC is kept intact. In other jurisdictions there are increasing trends of such mergers and acquisitions in view of several factors: (a) a desire to improve finances (e.g. overcoming financial collapse, improving cash flow, gaining access to another organizations' investments, etc.); (b) a desire to gain access to a larger skill set (e.g. obtaining outstanding or specialized staff, expanding geographic limits, expanding programming, etc.); (c) a desire to enhance the organization's pursuit of mission (e.g. reducing service confusion and fragmentation by creating a single entity, etc.);[49] (d) troubled economy in the 21st century after liberalization, privatization and globalization;[50] (e) avoidance of duplicacies and inefficiencies in the nonprofit marketplace.[51] Exchange of information, negotiation, care in match-making process, consultation with members and funders, due diligence compliance and formal agreements are the different steps taken for systematizing the merger process.

The Indian legal position is that, while merger of NPC into business (pro-profit) company is a situation of conversion, and all the requirements thereto are to be followed, merger of business company into NPC is under the supervision of Tribunal under sections 230 – 234 of the present Act (sections 392-4 of the Act of 1956). In *Coimbatore Cotton Mills* case,[52] the Madras High Court held that the Court in exercise of power under sections 392-4 is not acting as a rubber stamp and that it is

[49] La Piana, David. "Nonprofit Mergers: Is Your Organization Ready for the Road?" *The Nonprofit Mergers Workbook: The Leader's Guide to Considering, Negotiating, and Executing a Merger*, Amherst H. Wilder Foundation, 2000 cited in J Eric Smith, '*Understanding Non Profit Mergers and Acquisitions: A Primer*' https://jericwrites.files.wordpress.com/2011/07/understanding-nonprofit-mergers-and-acquisitions.pdfvisited on 20/1/2016

[50] Alex Cortez, William Foster, Katie Smith, '*Nonprofit Mergers and Acquisitions: more than a Tool in Tough Times*' http://www.bridgespan.org/Publications-and-Tools/Funding-Strategy/Nonprofit-Mergers-and-Acquisitions-More-Than-a-Too.aspx#.Vp7MCu_GNMs visited on 20/1/2016; also see Katie Smith Milway et al, '*Why Nonprofit mergers continue to lag*?' Stanford Social Innovation Review http://ssir.org/articles/entry/why_nonprofit_mergers_continue_to_lag visited on 20/1/2016

[51] John E Kobara, 'Facilitating Mergers and Acquisitions for Nonprofits' http://www.huffingtonpost.com/john-e-kobara/facilitating-mergers-and-_b_8065670.html?ir=India&adsSiteOverride=invisited on 20/1/2016

[52] *Coimbatore Cotton Mills Ltd and Lakshmi Mills Co Ltd, In re* (1980) 50 Comp Cas 623.

the duty of the court to see that the scheme as a whole is to be adjudged as a reasonable one having regard to the general conditions, background and object of the scheme. Thus the court has to decide whether the amalgamation is an unfair unity. In *Walvis Flour Mills*,[53] where five pro-profit companies merged with an NPC, the Bombay High Court addressed the issue with similar perspective that reasonableness of the scheme shall be satisfied by the Court, and the transferee company shall be able to perform its functions in accordance with its Memorandum of Association. The court viewed that in case the transferee company fails to perform its duty according to the Memorandum, the contravention can be dealt by the Central Government by revoking the license of the NPC. The outcome of case law development is to lay adequate focus on the continuity of the identity of the NPC with its original commitment. That actually protects the stakeholders' interest.

Fifthly, abuse of the position of NPC as a vehicle for political manipulation by use of party fund for meeting the financial crisis of the NPC has problematic dimensions. In the National Herald case, Indian National Congress granted an interest-free loan of Rs. 90.25 crore to The Associated Journals Limited (AJL), owner of National Herald newspaper, which had become NPC in 1956. It was alleged that the loan was either not repaid or repaid in cash which is in violation of Section 269T of the Income Tax Act, 1961. The Young Indian company was incorporated in November 2010 and it acquired almost all the shareholding of AJL and all its properties. The contention against the leaders of the Congress is that lending of party fund interest-free to a public limited company was breach of trust and criminal misappropriation as the expectations of donors are ignored. The defense line is refusal of the presence of conflict of interests, and lack of locus standi of the complainant. The facts of the case suggest about the possibility of abuse of NPC by political means.

Conclusions

Combining the power of corporate organization and ethics of charity is the force underlying NPC. Unlike the public trusts whose functioning depends upon creative and responsible leadership, and unlike the registered societies which depend upon inner democracy's dynamism, the NPC has great potentiality of fund raising through shares, has persuasion of strictly toeing the lines drawn by its objects, and has the convenience of amalgamating with similar entities and receiving the merger of pro-profit companies. Unlike its pro-profit counterparts, its functioning is facilitated by relaxation of rigid formalities and cumbersome procedures. Conceptually, the façade of corporate personality in the context of NPC should be brimming with stakeholders' interests in charity, human right, and welfare. The conventional ideas about legal person fail to project the NPC's social image and role. Hence, development of the law of NPC and judicial approach to the same ought to respond to the imperatives of stakeholders' interests primarily, and shareholders' interests incidentally.

[53] *Walvis Flour Mills Co Pvt Ltd, In re* (1992) 76 Comp Cas 376

From the very inception of company law, the idea of Association Not for Profit was within the perception of policy makers. There has not been big change in the conception and legal arrangement for NPC over the century. The greater focus of the law has been towards making the NPCs to enjoy relaxation from rigidities of formalism. But the constitution's impact on NPC law's regime is becoming visible especially to deal with Central Government's power of superintendence over the NPC. However, it cannot be said that the constitutional values of equality, justice and welfare necessarily percolate into the layers of bye laws and Articles and Memorandum of Association and purge the impurities of parochial discriminations and sinks of narrow mindedness therein. A more penetrating approach is required in this sphere, especially in view of the fact that the social presence of NPC is expanding be it the sphere of education, health, poverty alleviation or culture.

The law relating to amalgamation, merger and acquisition has a cardinal aim of safeguarding the NPC's identity, adherence to its basic purpose and the interests of stakeholders. There is a need for greater clarity and sharper application of these principles keeping in mind the stakeholders' claims. On the same count, political manipulation of NPC by using it as handmaid for party fund's transaction needs to be avoided.

JUVENILE WAIVE SYSTEM: A critique

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Introduction

The Juvenile Justice (Care and Protection of Children) Act, 2000[1] (JJ Act 2000) was repealed and a new Juvenile Justice (Care and Protection of Children) Act 2015[2](JJ Act 2015) has come into force with effect from 15 January, 2016. The Parliamentary Committee[3] was informed by the Ministry of Woman and Child Development, Government of India that during the implementation of the JJ Act 2000, in the last thirteen years, many issues arose constraining of its effect implementation. One of the main such issue was inadequacy of the provisions to deal with Children in Conflict with Law (CCL) in the age group of sixteen-eighteen years found involved in heinous offences entailing punishment with imprisonment of seven years or more. The back ground note on the Juvenile Justice Bill, 2014, submitted by the Ministry of Woman and Child Development to the Parliamentary Committee, stated that special provisions in the proposed law have been made to address heinous offences committed by children above the age of sixteen years, which would act as a deterrent for child offenders committing such crime. The Ministry justified their stand on the basis of the following details of the heinous offences committed by children in the age group of sixteen to eighteen years from the year 2010 to 2013 in India.

Years	*Murder*	*Rape*	*Kidnapping/Abduction*	*Dacoity*
2010	600	651	436	105
2011	781	839	596	142
2012	861	887	704	207
2013	845	1388	933	190

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1 Act No. 56 of 2000
2 Act No. 2 of 2016
3 The committee was constituted by Chairman, Rajya Sabha to examine and report on the Juvenile Justice (Care and Protection) Bill 2014, under the chairmanship of Shri Jagat Prakash Nadda, w.e.f 1 September, 2014. Dr Satya Narayan Jatia was nominated as a member and Chairman of the Committee w.e.f. 26 November, 2014. The committee submitted its Report No. 264 on 16 February, 2015.

Accordingly, a separate scheme of classification, enquiry, punishment, custody and rehabilitation of such CCL has been prescribed in the JJ Act 2015 though it has been argued on behalf of the child rights activists and several non-governmental organizations that it is not proper to classify CCL in categories based on age and prescribe separate procedures to deal with CCL involved in heinous offences. Questions are raised over the constitutional validity of such a separate scheme, understood as Juvenile Waiver System (JWS), for CCL in the age group of sixteen to eighteen years. The JWS is also stated to be violating the principles of Juvenile Justice contained in the United Nations Convention on Child Rights, 1992(CRC) and several other treaties and conventions including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption (1993) and other related international instruments. It would be timely to examine the provisions relating to JWS on the altar of constitutional provisions and our commitment to the international community. At the same time, the utility, feasibility and practical difficulties involved in the process are also to be inquired into.

Judicial Waiver System (JWS)

As per the JJ Act 2015, criminal offences are classified in three categories namely, petty offences,[4] serious offences[5] and heinous offences.[6] Petty offences include the offences for which maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years. Serious offences entail punishment of imprisonment between three to seven years. In heinous offences, the minimum punishment is imprisonment for seven years or more. The Judicial Waiver System (JWS) is the system whereby a CCL, in the age group of sixteen to eighteen years, who is found involved in a heinous offence, is classified as a separate category for the purpose of enquiry, punishment, custody and rehabilitation. Section 14(5)(f) of the JJ Act 2015 prescribes that inquiry of heinous offences

- For child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Juvenile Justice Board by following the procedure for trial in summons cases under the Code of Criminal Procedure, 1973; and
- For child above the age of sixteen years as on the date of commission of an offence shall be dealt with the manner prescribed under section 15, i.e. the Judicial Waiver System.

The JWS enshrined in section 15(1) of the JJ Act 2015 provides that in case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a Preliminary Assessment

[4] Section 2 (34) JJ Act 2015
[5] Section 2 (54) JJ Act 2015
[6] Section 2(33) JJ Act, 2015

(PA) with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence. The Board may take the assistance of experienced psychologists or psycho-social workers or other experts to arrive at a decision during the PA. Explanation to section 15(1) makes it clear that PA is a not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence. Where the Board is satisfied on PA that the CCL should be disposed of by the JJ Board, then, the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973. If the Board on PA decides that the CCL should be treated as adult, the Board shall pass an order and transfer the trial of the case to the Children's Court having jurisdiction to try such offences[7].In order to ensure that there is no undue delay for concluding the inquiry, it is provided in section 15(2) read with section 14(3) of the JJ Act, 2015 that the PA shall be completed within a period of three months from the date of first production of the child before the court. The order of the Board on PA is appealable under section 101(2) of the Act.[8] The appeal against the order of the Board during PA shall lie before the Court of Sessions. While deciding the appeal, the Sessions Court may take the assistance of experienced psychologists and medical specialists other than those whose assistance has been obtained by the Board in passing the order on PA.[9] No second appeal shall lie from any order of the Court of Sessions passed in appeal under the section. It is, therefore, made clear that order of the Court of Sessions in appeal on PA shall be final. Though, the affected party can file revision in the competent court.

After the receipt of PA from the JJ Board under section 15, the children's court consider the PA report afresh and may decide whether the CCL should be tried as an adult as per the provisions of Code of Criminal Procedure, 1973 or otherwise. In case the children's court decides that there is need for trial of the CCL as an adult, it may conduct an inquiry as a Board and pass appropriate order under section 18 i.e. an order which a JJ Board passes for a CCL.[10] If the CCL is to be tried as an adult, the children's court shall follow the provisions of the Code of Criminal, 1973 and pass appropriate order accordingly. However, it is prohibited under section 21 of the JJ Act, 2015 that no CCL shall be sentence to death or for life imprisonment without the possibility of release.

The CCL convicted as adult shall be sent for rehabilitation to the place of safety till he attains the age 21 years and thereafter the person shall be transferred to a jail. During the stay in the place of safety, the child shall be provided reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy and psychiatric support etc.[11] The progress made by the CCL during the rehabilitation period shall be evaluated periodically with the help of Probation officer or the District Child Protection Unit or

[7] Section 18(3) of JJ Act, 2015
[8] Proviso to section 15(2) of JJ Act, 2015
[9] Section 101(2) of JJ Act, 2015
[10] Section 19 of JJ Act, 2015
[11] Section 19(3) of JJ Act, 2015

a social worker. When the CCL attains the age of 21 years and is yet to complete the term of stay, the children's court shall evaluate if such child has undergone reformative changes and if the child can be a contributive member of the society.[12] As per section 20(2) of the JJ Act, 2015, after the completion of the evaluation, the children's court may

- Decide to release the child on such conditions as it deems fit which includes appointment of a monitoring authority for the remainder of the prescribed term of stay; or
- Decide that the child shall complete the remainder of his term in a jail.

Thus a CCL gets two opportunities to escape inquiry/trial as an adult and one opportunity to escape incarceration in jail after staying in a place of safety up to the age of 21 years in case he is tried as an adult. The above scheme of inquiry/trial explains the tenets of the Juvenile Waiver System.

Critique of the JWS

India is a signatory to Convention on Rights of the Child (CRC) and several other treaties and Conventions on Child Rights, which are legally enforceable in the Courts of Law in India. Moral as well as legal and international obligations require that all States parties should promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- Establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; or
- Whenever appropriate and desirable, devise measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.[13]

While enacting any provision relating Juvenile Justice, the following principles are to be adhered to by all the countries who are signatory to CRC-

(i) International law has clearly established the age of adulthood at 18.If the body of evidence in a given case shows that the accused had not yet turned 18 at the time the alleged offense was committed, then the juvenile criminal justice system must apply. Similarly, the Committee on the Rights of the Child has stated that it wishes to remind States parties that they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of Article 40 of CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice.[14]

[12] Section 20(1) of JJ Act, 2015
[13] Article 40 (3), UN Convention on Rights of children 1992
[14] Committee on the Rights of the Child, General Comment No. 10, *Children's rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, paras.36 and 37.

(ii) The Committee on the Rights of the Child acknowledges that the preservation of public safety is a legitimate aim of the justice system. However, it is of the opinion that this aim is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in CRC.

(iii) Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child's assuming a constructive role in society (art. 40 (1) of CRC). The arrest, detention or imprisonment of a child may be used only as a measure of last resort (art. 37 (b)). It is, therefore, necessary - as part of a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and supervision, counseling, probation, foster care, educational and training programmes, and other alternatives to institutional care.[15]

(iv) According to article 40 (3) of CRC, the States parties are required to seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable. Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be used in most cases.

(v) In the opinion of the Committee, the obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is certainly not limited to children who commit minor offences, such as shoplifting or other property offences with limited damage, and first-time child offenders. Statistics in many States parties indicate that a large part, and often the majority, of offences committed by children fall into these categories. It is in line with the principles set out in article 40 (1) of CRC to deal with all such cases without resorting to criminal law procedures in court. In addition to avoiding stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.

(vi) Retribution is not an appropriate element in a juvenile justice system, if the aims of reintegration and rehabilitation are to be fully utilized. Mr. Thomas Hammarberg, Commissioner for Human Rights for the Council of Europe, proposed that it is time to go beyond a debate on the arbitrary setting of a minimum age of criminal responsibility and instead to consider how best to separate the concepts of "responsibility" and "criminalization" and stop criminalizing children. [16] This is a complex matter; removing children completely from the criminal justice system must neither absolve them of

[15] Article 40(4), UN Convention on Rights of children 1992
[16] See Mr. Thomas Hammarberg, Commissioner for Human Rights for the Council of Europe views athttp://www.coe.int/t/commissioner/Viewpoints/070611_en.asp.

responsibility for their actions, nor deny them due process in the determination of whether allegations made against them are true. It is strongly urged to move progressively closer toward 18 the age at which children could be responsible under the juvenile justice system. The Committee on the Rights of the Child has expressed its concern about the practice of allowing exceptions to the minimum age of criminal responsibility which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.[17]

(vii) The best interests of the child imply, among other considerations, that in juvenile justice proceedings and processes, each case will be examined on an individual basis, as every child's needs are difference,[18] and that proper weight will be given to the child's own opinion in accordance with his or her respective age and maturity,[19] and with the opinion of the child's parents, guardians and/or representatives or closest family members.[20] This is not to say that the examination of the case on an individual basis can take place over the questions of determining the age as is suggested by the present act.

(viii) Cases where children under the minimum age of criminal responsibility engage in conduct criminalized by law, should not elicit a criminalization and punishment response but rather a socio-educational one in light of the best interests of the child, the *corpus juris* on the rights of children and due process guarantees.

(ix) Some States have two minimum ages of criminal responsibility or "minimum age ranges", which means that children who fall between the two minimum ages can be held criminally responsible if they are deemed to be sufficiently mature. The Committee on the Rights of the Child has found that the system of two minimum ages is often not only confusing, but leaves much to the discretion of the court or judge and may result in discriminatory practices.[21]

(x) To reiterate, the Committee on the Rights of the Child has also expressed its concern over the exceptions made to the minimum age principle when the crimes alleged to have been committed are serious offenses.[22]

[17] *Supra* note 14 at para. 34.

[18] See ECHR. *Case of Neulinger and Shurukv. Switzerland*, Application No. 41615/07, Judgment, Grand Chamber, 6 July 2010, para. 138. In cases in which children under the age of criminal responsibility violate criminal laws, the legal exclusion shall be generic, and no case-by-case analysis is necessary. I/A Court H.R., *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17,para. 105.

[19] See Committee on the Rights of the Child, General Comment No. No. 12, *The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, paras. 29 and 59.

[20] *Supra* note 14 at paras. 43 to 45.

[21] *Ibid* para. 30.

[22] *Ibid* para. 34.

(xi) Where there is no proof of age, or if it cannot be determined that the child is at or above the minimum age of criminal responsibility, then the child cannot be held responsible for a crime.[23]

(xii) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society (Article 40 (1)).

(xiii) It is recommended to explicitly provide by law for the maximum possible involvement of parents or legal guardians in the proceedings against the child. This involvement shall in general contribute to an effective response to the child's infringement of the penal law. To promote parental involvement, parents must be notified of the apprehension of their child as soon as possible.[24]

(xiv) No child who was under the age of 18 at the time he or she committed an offence should be sentenced to life without the possibility of release or parole. For all sentences imposed upon children the possibility of release should be realistic and regularly considered.

Concluding Remarks

The JWS, whereby a separate scheme of classification of offences, inquiry, punishment, custody and rehabilitation has been prescribed, appears to have violated some of the above mentioned guiding principles of juvenile justice. It will be an uphill task for the Ministry of Woman and Child Development to justify the provisions of the JWS before the UN Committee on the Rights of the Child. All the provisions of the international documents which India has signed at the United Nations are now enforceable in the courts of law in India. Any provision of law which is in contravention of the International documents may be struck down by the courts, being in conflict with our commitment to the International community.

[23] *Ibid* para. 35.

[24] *Ibid* para. 54.

PROBATION IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN INDIA: An Overview of the Probation of Offenders Act, 1958

Prof. Nirmal Kanti Chakrabarti[*]

Introduction

Administration of Criminal Justice is a policy which studies the means by which the volume of harmful conduct in society can be limited. Its subjects for investigation, therefore, are:

a). the appropriate measures of social organization whereby harmful activities may be prevented; and
b) the treatment to be accorded to those who have caused harm.

The last mentioned investigation involves decisions as to which appropriate sanctions can be imposed under the Criminal law, and these range from death penalty, through various degrees of imprisonment down to such measures as probation or mere admonition.[1]

Etymologically Probation means "I prove my worth" derived from the Latin word 'probates' meaning 'tested' or 'proved'. The legal concept of probation as a Criminal Justice System (CJS) is conditional suspension of sentence. Don M. Gottfredson defined probation as" a procedure by which a convicted person is released by the Court without imprisonment, subject to conditions imposed by the Court. Thus probation is part of the decision – making process of Judges at the time of Sentencing "[2] Thus , probation is a method of penal non-institutional treatment of offenders, specially in case of juvenile and youthful offenders, developed as an alternative to imprisonment out of realization that short–term imprisonment is harmful and ineffective. Probation is one step forward in the progressive realization that the sentence should fit the offender and not the offence.

History of Probation in India

Though conceptually the system of probation was developed not before 1841 when John Augustus, a Boston Cobbler, volunteered to assist offenders if Court would

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1 Kenny, *Outlines of Criminal Law* (19th Ed. 1980), Tripathi, Bombay, p.6

2 Kadish, S.H., (Ed.), *Encyclopedia of Crime and Justice*, Vol III (1983), The Free Press, p.1247.

release them to his care,[3] Yet the system of probation in its broader sense was not altogether unknown in India. Dr. P.K. Sen has rightly pointed out in his. Tagore Law lecture that the idea of releasing an offender after due admonition (the part of probation system) was not borrowed in India from U.S.A. or England. The Hindu law – givers laid down that punishment must be regulated by consideration of the motive and nature of the offence, the time and place, the strength, age, conduct, learning and economic condition of the offender, and above all by the fact whether the offence was repeated . These ideas were envisaged by the Smriti writers as early as 300 B.C. The Smriti writers were aware of the complexities of human nature and they paid due attention to individuality of an offender in criminology. Their foresight was remarkable. Though in their writings there was no direct reference of releasing offenders on probation. Yet, their views seem to support the modern concept of probation. Let us note some of these writings.

Manu said that after scientifically considering the tendencies of repeated inclination in the offender, his antecedents and capacity. The punishment should be awarded, About 2,000 years ago Brahaspati in his Dandabhda Vyavas that referred to admonition as punishment and advised that a gentle admonition should be administered to a man for light offence. Brihaspati Samhita revealed the modern idea of individualization of punishment and the caste, social status of the offender, his knowledge, education, pecuniary and other circumstances all that went to make up the mind of the offender were duly considered in awarding punishment. In Bridharit Smriti we find the punishment of admonition. Narada remarked that the nature of the offence its times and place should be carefully considered and ability and motive of the offender should be thoroughly examined before inflicting punishment. Yajnawalkya also laid down that having ascertained the guilt, the place and time, as also the capacity, the age and means of the offender, punishment should be given to those deserving it. *Kautilya* in his "Arthashastra" advised the king to award punishment which should neither be mild nor severe. Apastamba said that a spiritual teacher, a priest and a prince may protect a criminal from punishment by their intercession except in case of grave offence. In Brahmabaibarta Purana Lord Mahadev told to Brahma that if people commit offence it is the duty of pious man to forgive him.

Maurya rulers were in favour of mild punishment. One of the edicts of the Emperor Ashok contains provision for remission of punishment. He advised his officers to examine and reduce punishment awarded to prisoners and consideration of circumstances which substantially coincide with those mentioned by Smriti writers. Though during Muslim rulers the principles of correction not generally recognized in Criminal Justice administration but according to David F. Forte the object of 'tazir' (i.e. discretionary punishment) in Islamic Law was prevention of the

3 For further details history of Probation in U.S.A., England and other foreign countries see:
Carney Louis P., *Probation and Parole: legal and Social Dimension* (1977) Mcgraw – Hill, pp.75-92.
Abadinsky, Haward, *Probation and Parole : Theory and Practice* ,(1977) Prentice Hall Inc. pp.21-26.
Sills, David L. *International Encyclopedia of Social Sciences*(1968), Vol. II, P.519.

recurrence of the crime and reform of the faulty party. During Maratha and Peshwa period we get traces of principles of probation if we take the concept of probation in a very broad sense so as to include cases where an offender is not at once punished but given a chance to improve h himself. Thus, in 1775-76 one Vishwanath Bhatt Patanakar of Mouje Khed was arrested for committing thefts. As he was unable to furnish security, the district officer sent him to Huzur. Shri Janardan Bhatt Bhide stood surety for him promising that he would not again commit theft or any other offence. In 1785 -85, one Jankil Lagadin was imprisoned at Fort Visapur for adultery. Her father Shivaji Gaikwad prayed for her release. The prayer was granted on his standing as surety for her future good conduct. These can be said to be the earliest cases of probation in India.[4]

Legislative Development in India

Probation in its Anglo – American sense had found its place in Indian law in section on 562 of Criminal Procedure Code (Cr.P.C), 1898 (Act 20 of 1898) which was almost a copy of English Probation system as introduced by First Offenders Act, 1887 in England. That old section 562 of Cr. P.C. provided grant of probation to an offender for only I.P.C. offences punishable with not more than two years imprisonment. But in the Amendment Act, 1923 of Cr. P.C. S. 562 had made a revolutionary change in the Probation law in India. Under the amended section 562 Cr. P.C. a Court may grant probation to an offender not under age of 21 years in case of offences punishable with not more than seven years, and in the case of offender below 21 years or a woman the Court may exercise this power in respect of all offences, not punishable with death or imprisonment for life. The provisions of section 562 with some modification have been placed as section 360 in the new criminal Procedure Code,1973.

In 1031 the then Government of India circulated a proposed draft of Probation of Offenders Bill to the then Provincial Governments for their views for implementation throughout India. However, due to pre –occupation with other important matters the Bill could not proceed with. Thereafter in 1934the Government of India informed the Provincial Government immediate prospect of Central Legislation on the subject and there would be no objection if the provinces undertake such legislation themselves.[5] In pursuance of the said suggestion some Provinces enacted their own Probation Laws such as the C.P. and Berar Probation of Offenders Act, 1936, The Madras Probation of Offenders Act, 1937, The Bombay Probation of Offenders Act, 1938, The W.B. First Offenders Probation Act, 1936, etc. Thereafter when India became

[4] See for further Information:
Sen, P.K., *Penology Old and New*, Calcutta University Tagore Law Lecture, p.110.
Kane, P.V. *History of Dharmashastra*, pp.388 -89.
Das, Shukla, *Crime and Punishment in Ancient India*, p.57.
Bhattacharya, S.K., *Probation System in India*, p.16.
Kulkarni, A.K., *Probation of Offenders in India*, pp.2-6, 141-48.
Maxmuller, *The Sacred Book of the East*, pp.215 -97.
Khadish (Ed.) *Encyclopedia of Crime and Justice*, op. cit., pp.196, 1184.

[5] See Gazette of India, Extraordinary, Part-II, Sec.2, No.37, dt.11-11-1957.

independent our Parliament felt a need for a national law of Probation and passed the present law of probation in India by The Probation of Offenders Act,1958 (Act 20 of 1958). This PO Act is now implemented by almost throughout India except State of Sikkim and Union Territories of Arunachal Pradesh and Mizoram.[6]

Substantive Law of Probation in India

The Probation of Offenders Act, 1958 contained 19 sections only with a Preamble. Let us briefly discuss various provisions of the PO Act.

Preamble

The basic purpose of the PO Act was stipulated in the Preamble of the Act with the words: "An Act to provide for the release of Offenders on probation after due admonition and for matters connected therewith." Dr.N.L. Mitra has described the phenomenon of Probation as adopted in India in the following words, " Here the young offender, specially the first offenders charged with minor offences are released and live with their families while they are under the supervision of the Probation Officer for their upkeep and necessary correction."[7]

Extent and Commencement

Section 1 of the PO Act provides that the Act may be called the Probation of Offenders Act and it extends to the whole of India. Except the State of Jammu and Kashmir. It also provides that the Act will come into force in a State on such date as the State Government may by notification in the Official Gazette appoint different dates for different parts of the State. Therefore, the PO Act does not provide any unified date of enforcement but envisaged that proper steps be taken by the state Governments to develop infrastructural needs before the Act is brought into force.

Definitional Discourse

Section 2 of the Act though defined 'Probation Officer' but not defined probation or other related words. However, Section 2 (d) Provides that the words and expression used but not defined criminal Procedure, 1898 (now Cr.P.C., 1973) shall have the meaning respectively assigned to them in that Code.

Release of Offenders after Admonition

In Section3 of the PO Act the Court is given power to release certain offender due admonition. It provides: "When any person is found guilty of having committed an offence publishable under Section 379 or Section 380 or Section 404 of the Indian Penal Code or any offence publishable with imprisonment for not more than two years or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him and the Court by which the person is found guilty is of opinion that having regard to the circumstances of the case

[6] See, Journal of Social Defence, Vol XXIX., No.99, Jan. 1990, p.59.

[7] Mitra, N.L. *Juvenile Delinquency and Indian Justice System*, (1988) Deep and Deep., New Delhi, P.253.

including the net use of the offence and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under Section 4, release him after due admonition."

Therefore, a wide discretionary power is given to the Court to release some offenders after due admonition. It lays down certain conditions upon which that discretion is to be exercised. These conditions are as stated below:

(i) that the offender must not have been previously convicted, i.e. the accused is first offender;
(ii) that the Court while using the discretionary power of releasing an offender after due admonition should have regard to:
  (a) the circumstances of the case,
  (b) the nature of the offence, and
  (c) the character of the offender.
(iii) That the offence must be one of the following descriptions:
  (a) Theft (S.379 I.P.C);
  (b) Theft in dwelling house (S.380 I.P.C);
  (c) Theft by clerk or servant (S.381 I.P.C);
  (d) Cheating (S. 420 I.P.C.);
  (e) Dishonest misappropriation of property (S.404 I.P.C.); and
  (f) Any offence publishable with imprisonment for not more than two years, or with fine, or with both under Indian Penal Code or any other law for the time being in force.[8]

Provided that the Court shall not direct such release of an offender unless it is satisfied that the offender or hissurety, if any, has a fixed place of abode or regular occupation in the place over which the Court exercises jurisdiction or in which the offender is likely to life during the period for which he enters into the bond.

Before making any order under sub-section (1), the Court shall take into consideration the report, if any, of the probation Officer concerned in relation to the case.

Now, if we analyze Section 4 of the PO Act, the following objective criteria emerges as having been provided to Court for releasing an offender on Probation

(i) Nature of Offence;
(ii) Circumstances of the Case;
(iii) Character of the Offender; and
(iv) Age of the Offender.

[8] For further information See : Nirmal Kanti Chakrabarti, " *Admonition in Criminal Justice*", Cochin University Law Review, Dec. 1989, pp. 370 -82.

Nature of Offence

Offences are generally divided into two groups:

(i) indictable offence, and
(ii) non-indictable offence or pity offence.

However, Kenny observed that, "it is not easy to discover on what principle the separation has been made between the crimes ... It cannot depend upon the degree of dignity of the tribunal before which the offender is to be tried. Nor again, can it depend upon the amount of evil actually caused by the offence. Nor thirdly, can it depend upon the gravity of the punishment."[9] Therefore, we cannot generalized what types of offences probation can be granted rather look into various case decided by the Courts in India. In *Saradhakar Sahu* v. *State of Orissa*[10] the accused was convicted under Section 324 I.P.C. for voluntarily causing hurt by dangerous weapons which was an outcome of acting on the spur was released on probation. Similarly, where an accused girl aged 19 years was convicted for criminal trespass (S. 447I.P.C.) as she was standing on a strip of land in between a temple and residence of another person without reasonable cause the accused was released on Probation and the High court of Kerala observed that taking cognizance of the offence the Magistrate acted mechanically without applying his mind to the allegations in this petty offences.[11]

In *Ammini* v. *State of Kerala*[12] the accused was a woman convicted under S.55 (g) of Abkari Act, but she had no distillery operated by her and was only selling liquor as she was the sole bread winner of large family having a chronically sick husband at home. The court held that the accused should have been released under Section 4 of the PO Act. In this way offenders convicted for committing following offences were released by courts under Sec. 4 of the PO Act.

(i) Offences under Excise Act,[13]
(ii) Offence of hurt or grievous hurt,[14]
(iii) Offence of wrongful restraint.[15]

From the various decided cases it is revealed that though there are more than 300 I.P.C. offences where probation can be granted yet the Courts in India granted probation in about 16 types of offences only such as in cases of theft, criminal trespass, cheating, excise offences, assault, receiving stolen property etc.

Circumstances of the Case

The PO Act does not envisage the letting off of every offender committing minor offences, regardless of circumstances in which offence was committed. Therefore,

[9] Kenny, op.cit, p.127.
[10] 1985 Cri. L.J. 1891 (Orissa).
[11] 1985 Cri L/J. 1882 (Kerala).
[12] 1981 Cri. L.J. 1170 (Kerala).
[13] 1982 Cri L.J. 2246 (Delhi).
[14] 1989 Cri. L.J. 690 (Punjab).
[15] 1989 Crimes. Pt. II , DN 335.

the expression "having regard to circumstances of the case" means having regard to both aggravating and mitigating circumstances of the case and the Court should exercise its discretionary power accordingly.

In *Keshav Sitaram Sali* v. *State of Maharashtra*[16] an employee of Railway alleged to have abetted commission of theft of coal worth Rs.8 and the Supreme Court considering his antecedents directed his release on probation.

In *Ishwer Das* v. *The State of Punjab*,[17] the accused was convicted under Section 7 read with S. 16 (1) (a) (i) of the Prevention of Food Adulteration Act. The Supreme Court released the accused on probation on furnishing a Bond considering the fact that the offender was below 21 years of age and in 'repentant mood'.

In *Ved Prakash* v. *State of Haryana*,[18] the Supreme Court while releasing the offender observed that "the social background and the personal factors of the crime doer are very relevant although in practice criminal courts have hardly paid attention to the social milieu or the personal circumstances of the offender."

Again, in *Hari Kishan (Singh) and State of Haryana* v. *Sukbir Singh and others*[19] the accused was convicted under Ss.323, 325 read with Ss. 148,149 I.P.C. but the occurrence was the outcome of a sudden flare up and there was no previous enmity between parties. The Supreme Court held that the accused was entitled to benefit of probation.

However, the Supreme Court refused to grant probation in the following cases where the accused was convicted for offences under

(i) Food Adulteration Act;[20]
(ii) Smuggling of Gold;[21]
(iii) Offences under Defence of India Act, 1962;[22]
(iv) Abduction of a teenager girl;[23] and
(v) Offence relating to insult of member of lower caste, etc.[24]

Character of the Offender

In the words of Erskine "Character is the slow – spreading influence of opinion, arising from a man's department in society, and extending itself in one circle beyond another till it unites in one general opinion"[25] On the contrary, Lord Ellenborough observed that "The present conditions of busy life in crowded cities often render it impossible for a man's conduct to have been under the continuous observation of

[16] AIR 1983 SC 291.
[17] AIR 1972 SC 1295.
[18] AIR 1981 SC 643.
[19] AIR 1988 SC 2127C
[20] AIR 1974 SC228.
[21] AIR 1980 SC 539D.
[22] AIR 1969 SC 1271.
[23] AIR 1979 SC 1948.
[24] Cri L.J.1075 B (Madras).
[25] Kenny, op.cit, p.528.

many persons for so long a time as would enable any general opinion about it to come up. Even neighbours and customers of his know nothing about him beyond their personal experience."[26]

Thus, Courts in India naturally do not give much weightage to character of the offenders. Calcutta High court in *Radha Raman* v. *State of West Bengal*[27] and Gauhati High Court in *Bhadreswar Loying* v. *State of Assam*[28] considered character of the offenders for releasing them under probation. However, in *Ippili Trinacha Rao* v. *State of Andhra Pradesh*[29] the Andhra Pradesh High Court observed that "Character of the offender is not the only but one of the circumstances that can be taken into consideration. The convict was sentenced to undergo the sentence for 7 continuous working days by sitting during entire working hours in the Court of Judicial Magistrate."

Age of the Offender

In the PO Act there is no minimum or maximum age limit to grant probation to a convicted offender. But tender the age, more is the likelihood of amenability to correction. Therefore, it has been provided in Section 6 of the Act that,

> "When any person under twenty –one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied thathaving regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4, and if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so."

That the Courts in India generally give much attention about the age of the offender can be ascertained from the fact that on an average 20% of the Probationers are belonging to the age group 12-30 years.[30] The Supreme Court in *Musakhen& others* v. *State of Maharashtra*,[31] observed that the PO Act is primarily meant to reform Juvenile Offenders so as to prevent them from becoming hardened criminals. In *Daulat Ram* v. *State of Haryana*,[32] The Supreme Court held that "The Probation of Offenders Act should be liberally construed so that its operation may be effective and beneficial to the young offenders who are easier to be led astray by the influence of bad company."

[26] *Ibid.*
[27] Journal of Social Defence, Jan.1980.
[28] 1989 Cri L.J. 151.(Gauhati).
[29] 1984. Cri. L.J. 1254 (Andhra).
[30] Source : National Institute of Social Defence, New Delhi.
[31] AIR 1976 SC 2566.
[32] AIR 1972 SC 2434.

Offenders to Pay Compensation and Costs

In view of victims perspectives the PO Act provides in section 5 that the Court may direct the released probationers to pay compensation and costs to the injured person. The section runs as follows:

> "The Court directing the release of an offender under Section 3 or Section 4 may, if it thinks fit, make at the same time further order directing him to pay –(a) such compensation as the Court thinks reasonable for loss or injury caused to any person by the commission of the offence; and
> (b) such costs of the proceedings as the Court thinks reasonable."

However, from the reported cases as well as for my own field survey it is revealed that in very few cases this section was applied by the Courts in India. In *Bhagawan and another* v. *State of Haryana*[33] the High Court held that while releasing the offender on probation, Court can order him to pay compensation to the injured complainant

Removal of Disqualification Attaching to a Conviction

Considering the scope of rehabilitation of the offender the PO Act also provided in Section 12 that-

> "Notwithstanding anything contained in any other law a person found guilty of an offence and dealt with under the Provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law".

The Supreme Court in number of cases held that conviction not to affect the service of the accused. In *Rajbuir* v. *State of Haryana*[34] and in *Prafulla Bora & Others* v. *state of Assam*[35]the Supreme Court while releasing the offender on Probation observed that conviction should not affect offender's service. In *Shankar Dass* v.*Union of India,*[36]Y.V. Chandrachud, the then Chief Justice of India, observedthat "Surely the Constitution does not contemplate that a Government servant who is convicted for parking his Scooter in a 'no – parking' area should be dismissed from service." But unfortunately the Supreme Court in *Trikkha Ram* v.*V.K. Seth and another*[37] overruled its above earlier decisions and held that no Government Servant convicted of criminal offence and released on probation can be removed instead of 'dismissal' by the disciplinary authority. But to this author, the decision is against the intention of the legislature and needs review by the Court in future.

[33] 1986 Cri .L.J. 1869 (P&H).
[34] AIR 1985 SC 1278
[35] 1989Cri.L.J. 428 Assam.
[36] AIR 1985 SC 772
[37] AIR 1988 SC 285B

Other Aspects of the PO Act

The PO Act in Section 11 empowers the Appellate Courts to release offenders on Probation either on its own motion or on application of a Probation Officer. But this section is applied by the Courts on very rare occasions.

The control and supervision of the Probation Officers appointed by the Government under Section 13 of the PO Act shall be subjected to the Control of the District Magistrate of the District in which the offender for the time being resides. This provision of executive control has been criticized by many researchers in the field. The probation Officers may also be appointed by the recognized society or by District Magistrate but that is not in practice.[38]

As regards duties of the Probation Officers, Section 14 of the Act provides the basic principles and it is desired to have more details under rules framed by the State Government under section 17 (6) of the Act. Section 14 says that –

A Probation Officer shall –

a) Inquire, in accordance with any direction of a court about the particulars of any person accused of an offence and submit a report generally known as pre- Sentence Investigation Report;
b) Supervise probationers and Endeavour to find them suitable employment;
c) Advise and assist offender in the payment of compensation or costs ordered by the Court;
d) Advise and assist persons who have been released under section 4; and
e) Perform such other duties as may be prescribed.

As regards procedural aspect of the probation system the PO Act under Section 17 delegates powers to the State Governments to frame Rules necessary for implementation of the Act. But some procedural matters have also enshrined in the PO Act itself. Thus Section 17 provides that the Report of a Probation Officer as referred in Section 4(2) or 6(2) shall be treated as confidential and the court may communicate the substance of the report to the offender and may give him an opportunity to rebut any allegation by producing further evidence. Section 8 empowers the Court to vary conditions of the bond entered into by the offender in the public interest after giving him an opportunity of being heard. But if the surety or the offender refused to give consent to variation of Bond the court may sentence the offender for the offence for which he was found guilty. Again Section 9 of the PO Act provides a detailed procedure in case of offender failing to observe conditions of Bond and how the Court will sentence him for the original offence. Moreover, Section 10 of the Act says that the provisions of Criminal Procedure Code will be followed in case of Bonds and Sureties given under this Act. Section 15 of the Act declares that every Probation Officer appointed in pursuance of this Act shall be deemed to be a' public servant' as defined in the Indian Penal Code. Section 16 on the other hand protects the acts of the probation officers in respect of anything done

[38] See for more information on this aspect, N.K. Chakrabarti, "*Indian Probation system: An appraisal of the Legal Process*", Central India Law Quarterly, Vol .V. July –Sept. 1992,pp.371-78.

in "good faith". Section 18 provides a saving clause and states that nothing of this Act shall affect provisions of Reformatory Schools Act, 1897, Prevention of Corruption Act, 1947, or any law in force relation to Juvenile offenders or borstal school. Lastly, Section 19 specifically mentions that where the PO Act will be brought into force there the provisions of Cr. P.C. relating to probation (now Sec. 360 of the Code of 1973) shall cease to apply.

Conclusion

From my research study on the working of the PO Act "I have concluded that the probation system has an inherent efficiency of 'self – correction' by which the system has survived for the last 150 years and will survive for a long time to come in the Criminal Justice System."[39] The study also revealed that though the Probation system has effectiveness but the implementing agency in our country is not efficiently implementing the same. Therefore, for more effective and efficient working of the probation system in our country, it needs to be made an integral part of administration of criminal justice because it is a viable alternative to costly[40] and less effective prison system.

[39] See N.K. Chakrabarti, "*Is Rehabilitation Essential in the Probation service in West Bengal?*" International Journal of Offender Therapy and Comparative Criminology, New .York, Vol.36.No.2, Summer 1992, p.124.

[40] A comparative study in West Bengal revealed that during 1981-82 to 1985 -86per head expenditure per year per prisoner was Rs. 6,720/- whereas per head expenditure on each probationer per year during same period was Rs. 1,136 only on an average.

Human Rights and Good Governance*

*Manoj Kumar Sinha***

Introduction

The term good governance is frequently used in development literature.[1] The term governance implies the manner in which power is exercised by governments in managing a country's social and economic resources.[2] Good governance is the exercise of power by various wings of the government that is effective, honest, equitable, transparent and accountable. Human Rights and good governance are inherently linked and for the effective implementation of human rights good governance is utmost essential.[3] The concept of "good governance" emerged in the late 1980s as a response to concerns over the impact of different governance practices on economic performance in the context of development policies.[4] This concept was subsequently expanded to include other dimensions, including political, human development and the realization of human rights.[5] Human rights are universal legal guarantees protecting human beings against actions and omissions that interfere with human dignity and fundamental freedoms of individuals.[6] Human rights also include a set of performance standards, which guide public authorities, and against

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1 Gruberg, I. & Khan, S. (ed.), *Globalisation: The United Nations Development Dialogue*: *Finance, Trade, Poverty, Peace Building*, United Nations University Press, New York, 2000; Orji,E. "*Issues on Ethnicity and Governance in Nigeria: A Universal Human Rights Perspective*", Fordham International Law Journal, vol.25 (2001), pp. 430- 82; G.H. Fox & B. R. Roth (ed.) *Democratic Governance and International Law*, Cambridge University Press, Cambridge, 2000.

2 Udombana, N.J. " *Articulating the Right to Democratic Governance in Africa"*, Michigan Journal of International Law, vol. 24(2003), pp. 1209-1287.

3 Background Note, *Seminar on Good governance Practices for the Promotion of Human Rights*, Jointly organized by the Office of the United Nations High Commissioner for Human Rights and the United Nations Development Programme, HR/SEL/GG/SEM/2004/BP.2, Seoul, 15–16 September 2004, available at, http://www.ohchr.org/english/issues/development/governance/compilation/forside_02.html visited on 20 July 2006.

4 Gruberg, I & Khan, *supra* note 1.

5 Background Note, *supra* note 3.

6 Sinha, M.K. *Implementation of Basic Human Rights*, Manak Publications, New Delhi (1999).

which governments and their functionaries, as well as other relevant actors, can be assessed and held accountable. Wide ratification of the relevant international treaties by States from all regions and cultures affirms the universal nature of human rights.[7] Human rights are accorded to individuals and groups in order to enable them to realise their self–worth and dignity, and to organise society in such a way that these goals are effectuated and respected. Today, citizens of a State are well aware of the roles they should play in nation building and of the structures they should give to their societies.[8]

Indeed, it is difficult to find a single and exhaustive definition of "good governance", nor is there a delimitation of its scope, that commands universal acceptance. However, the term is being used with great flexibility.[9] The good governance has been said at various times to encompass: full respect of human rights, the rule of law, effective participation of people, political pluralism, transparent and accountable institutions, an efficient and effective public sector, legitimacy, access to information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.[10] Bad governance is largely regarded as one of the root causes of all evil within our societies.

The United Nations Development Programme (UNDP) has defined the word "governance" broadly as "the exercise of economic, political and administrative authority to manage a country's affairs at all levels.[11] It comprises the mechanisms, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences."[12] It described "good governance" as the "competent management of a country's resources and affairs in a manner that is open, transparent, accountable, equitable and responsive to people's needs."[13] The Commission on Human Rights (CHR) also adopted an important resolution on the subject of "the Role of Good Governance in the Promotion of Human Rights."[14] The CHR guided by the principles of Universal Declaration of Human Rights (UDHR) as a common standard of achievement of all peoples and all nations applying to every individual and every organ of society, and also by the Vienna Declaration and Programme of Action, which affirmed that all human rights are universal, indivisible, interdependent and

[7] Sinha, M.K., *Basic Documents on Human Rights and Refugee Laws*, Manak Publications, New Delhi (2000)

[8] Udombana, *supra* note 2.

[9] Background Note, *supra* note 3.

[10] Background Note, *Supra* note 3.

[11] United Nations Developmental Programme: Good Governance, available at, http://www.undp.org/governance/mdgs.htm, visited on 21 July 2006.

[12] *Ibid.*

[13] *Ibid.*

[14] *The Role of Good Governance in the Promotion of Human Rights*, The Commission on Human Rights, E/CN.4/RES/2004/70,57th Meeting,21 April 2004, http://www.ohchr.org/english/issues/development/docs/2004_70.doc, visited on 25 July 2006.

interrelated.[15] This resolution also recognises that transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests and that such a foundation is a *sine qua non* for the full realization of human rights, including the right to development.[16] The good governance and the building of effective democratic institutions are a continuous process for all Governments, regardless of the level of development of the countries concerned.[17]

The resolution emphasised on the universality of the Human Rights and the adoption by the United Nations Millennium Declaration of a commitment to good governance in promoting human rights is further to strengthen the commitment of the international community for good governance.[18] The international community has entered in the 21st century with the hope that worst enemy of mankind poverty will be completely eradicated from the world.[19] To achieve this goal the General Assembly of the United Nations has adopted the UN Millennium Declaration in September 2000.[20] States agreed to do their best to achieve the goals set in the UN Millennium Declaration by eradicating poverty, promote human dignity and equality and achieve peace, democracy and environmental sustainability.[21] The international community has committed, in the Millennium Development Goals, to cut extreme poverty by half by 2015 and by 2025, extreme poverty can be banished.[22] The UN Millennium Declaration, envisaged a new global partnership to reduce extreme poverty and setting out a series of time-bound targets, all with a deadline to eradicate half of the world poverty by 2015,[23] to achieve this goal they adopted 8 Goals[24] as the Millennium Development Goals (MDGs).

The CHR resolution also urged upon member states to provide governance

[15] Para 5 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June1993 General Assembly, A/CONF.157/23,12 July 1993, available at http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument, visited on 25 July 2006.

[16] The Role of Good Governance, *Supra* note 14.

[17] *Ibid.*

[18] Resolution adopted by the General Assembly, 55/2. United Nations Millennium Declaration, adopted as a V principles, Human Rights, Democracy and Good Governance, 8 September 2000, http://www.unmillenniumproject.org/index.htm, visited on 21 July 2006.

[19] Shepherd, G.W. "*The Denial of the Right to Food: Development and Intervention in Africa*," California Western Journal of International Law, vol.15, (1985), pp. 528-41.

[20] 189 States adopted the UN Millennium Declaration. Report is available on http://www.undp.org, visited on 26 April 2005.

[21] *Ibid.*

[22] *Ibid.*

[23] See home page, http://www.unmillenniumproject.org/index.htm, visited on 21 July 2006.

[24] The 8 Goals are as follows: Goal 1: Eradicate Extreme Hunger and Poverty, Goal 2: Achieve Universal Primary Education, Goal 3: Promote Gender Equality and Empower Women, Goal 4: Reduce Child Mortality, Goal 5: Improve Maternal Health, Goal 6: Combat HIV/AIDS, Malaria and other Diseases, Goal 7: Ensure Environmental Sustainability, Goal 8: Develop a Global Partnership for Development, available at http://www.unmillenniumproject.org/goals/index.htm, visited on 21 July 2006.

responsive to the needs and aspirations of the people in order to achieve the full realisation of human rights to eradicate poverty and to build international cooperation on development. [25]Governance is the process of decision-making and the process by which decisions are implemented, an analysis of governance focuses on the formal and informal actors involved in decision-making and implementing the decisions made and the formal and informal structures that have been set in place to arrive at and implement the decision.[26]

Government is one of the actors in governance. The other actors involved in governance vary depending on the level of government, in rural areas, for example, other actors may include influential land lords, associations of peasant farmers, local self government, cooperatives, NGOs, research institutes, religious leaders, finance institutions political parties, the military etc. [27] The situation in urban areas is much more complex. At the national level, in addition to the above actors, media, lobbyists, international donors, multi-national corporations, etc. may play a role in decision-making or in influencing the decision-making process.[28]

The concept of good governance has been further clarified by the work of the CHR on its earlier resolution 2000\64.[29] The CHR has identified the key attributes of good governance[30]as follows- Transparency; Responsibility; Accountability; Participation; and Responsiveness (to the needs of the people).

Essential Aspects of Good Governance

Certain essential aspects for good governance are as follows

Democracy Based on Free and Fair Election

The type of political system that a country has is closely related to the standard of human rights its citizens' enjoy.[31] It is widely assumed that human rights and democracy are firmly linked together - that is democracy is the form of government most likely to defend human rights.[32] The core idea of democracy is that all citizens' are entitled to participate in public affairs through participation in governments and

[25] The Role of Good Governance, *supra* note 14.
[26] Gruberg. I & Khan,S (ed.), *supra* note 1.
[27] UNESCAP, *What is Good Governance?*, available at http://www.unescap.org/huset/gg/governance.htm, visited on 18 July 2006.
[28] *Ibid.*
[29] Commission on Human Rights Resolution 2000/64, *66th meeting 26 April 2000,* adopted by a roll-call vote of 50 votes to none, with 2 abstentions, available at http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2000.64.En?Opendocument, visited on 18 July 2006.
[30] *Ibid.*, para.1.
[31] Background Note, *supra* note 3.
[32] Ramcharan, B "The United Nations and Human Rights in the Twenty – First Century", in G. Alfredsson , et.al. (ed.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller,* (Martinus Nijhoff, Hague, 2001), p. 7.

the associations of civil society.[33] This entitlement should be available to all on terms of equality to all. Control by the citizens over their collective affairs and, equality between the citizens in the exercise of that control are the basic democratic principles.

Free and fair election is critical for the continuance of a democracy. A nation can only truly be "of the people, by the people and for the people" when proper procedures are followed in administering the way people choose their leaders to govern them.[34] Sadly, the history is full of examples where elections were conducted under the control of dictator, who did not allow any opposition parties to contest the election.[35] Thus, it becomes more important for the world community to identify the States where dictatorial form of government is in power and convince the head of the state to adopt democratic process for the good governance. The human rights require an inclusive democracy, which moves beyond the necessary but insufficient system of periodic elections and the establishment of separate institutions for the exercise of power.[36] It also calls for innovative formal and informal processes and institutions that may help to resolve the classic dilemma: majority rule versus minority rights. [37]

The basic rationale of democracy is that elected representatives of the people and public functionaries are entrusted with power, which is a trust reposed in them by the people. That trust has to be discharged for the benefit of the nation and the people. Public functions and statutory powers are to be performed to serve public purpose and national interest, not for personal aggrandizement, nor for extraneous or ulterior considerations. Democracy must play also an instrumental role in promoting good governance, which also means realizing certain societal goals, such as the eradication of human deprivation, the realization and sustainability of fundamental and human rights, the security of life and human liberty, the democratization of, and participation in, the process of governance, and also the market.[38] Regrettably, we noticed that functioning democracies, even those of long-standing, have not been able to sustain good governance, and this has led to the degeneration of democracy and has compromised its sustainability.[39] Democratic governance and respect for human rights are the foundations for political and social stability and economic progress and they are also intrinsic to the goal of human development.

[33] Norris, P "*Stable Democracy and Good Governance in Divided Societies: Do Power Sharing Institutions Work?*" at http://ksgnotes1.harvard.edu/research/wpaper.nsf/d745629e080d1fe88525698900714934/ab69bfceef0365c985256fa8006a1102/$FILE/ISA%20Norris%20Consensus%20democracy.pdf, visited on 21 July 2006.
[34] G. A. O'Donnell, "Democracy, Law and Comparative Politics", available at, http://www.polisci.berkeley.edu/faculty/bio/permanent/Collier,D/journal-comparative/scid-odonnell.pdf, visited on 21 July 2006.
[35] Sinha, *supra* note 6.
[36] *Ibid.*
[37] *Ibid.*
[38] Background Note, *supra* note 3.
[39] UNESCAP, *supra* note 27.

The Human Rights and Democratic Government

UN charters and resolutions have been interpreted as helping to provide a common framework of international norms and values that link human rights to development and democratic governance. [40]Human rights provide a constitutional framework for all countries to pursue sustainable development because it affords universally acceptable guidelines that transcend national boundaries.[41] The appeal to human rights is to have common ground for global governance systems that ensure the means to pursue development freedoms for individuals, groups and nations. From a human rights perspective, the concept of good governance can be linked to principles and rights set out in the various international human rights instruments.[42] To begin with Article 21 of the Universal Declaration of Human Rights (UDHR), which recognizes the importance of a participatory government and Article 28 states that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized.[43] The two International Covenants on Human Rights contain language that is more specific about the duties and role of governments in securing the respect for and realization of all human rights.[44] The UN Charter, the UDHR, International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) offer a normative basis for accountability at varying levels of governance.[45] Well before the Millennium Development Summit in 2000, the Copenhagen Declaration on Social Development and Programme of Action took up the importance of human rights for development in 1995. Many of the principles and goals enunciated in the Declaration also formed the central theme in the Brussels Programme of Action (BPoA),[46] including the commitment to "a political, economic, ethical, and spiritual vision for social development that is based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and co-operation, and full respect for the various religious and cultural backgrounds of people".[47] At that time, governments agreed specifically to promote democracy.[48]

[40] Franck,T "*Legitimacy and Democratic Entitlement*" in G. H.Fox & B.R.Roth (ed.), *supra* note 2, pp. 25-48.

[41] Marcelli, F. "*The Principle of Democratic Participation: A Key to Pan European Cooperation on Environmental Issues*?" author's personal copy.

[42] Background Note, *supra* note 3.

[43] *Ibid.*

[44] Sinha, *supra* note 6.

[45] *Ibid.*

[46] Welch, Gita and Nuru, Zahra *Governance for the Future: Democracy and Development in the Least Developed Countries* (UN-OHRLSS, 2006), available at http://content.undp.org/go/newsroom/may-2006/good-governance-20060519.en, visited on 19 July 2006, p.37. The Brussels Programme of Action (BPoA) 2001-2010, adopted in June 2001 at the Third UN Conference on LDCs, articulates policies and supportive actions to promote the long-term economic growth and sustainable human development of LDCs.36 It seeks their successful integration into the global economy through partnerships that focus on developing the human and institutional resources needed to raise the quality of life for the 600 million people in the 50 LDCs.

[47] *Ibid.*

[48] *Ibid.*

They also undertook to "promote all human rights and fundamental freedoms for all, which are universal, indivisible, interdependent and interrelated, including the right to development as an integral part of fundamental human development and fundamental freedoms for all, including the right to development" commitment.[49] The BPoA therefore is seen as integral to the goals for poverty eradication articulated in the Millennium Development Declaration; in fact, Goal 8 of the MDGs, to develop a global partnership for development, has direct relevance for democratic governance. Ten years after the Copenhagen meeting, governments recommitted themselves to these same values, with a renewed focus on rule of law and democracy. The Ulaanbaatar Declaration[50] sets forth six key principles or benchmarks endorsed by the Fifth International Conference of New or Restored Democracies (ICNRD) that is, democratic societies are

(1) just and responsible,
(2) inclusive and participatory,
(3) promote and protect the rights and freedoms of all their members,
(4) open and transparent,
(5) function under agreed rules of law and accountability regardless of the challenges they may face, and
(6) show solidarity toward others.

The countries agreed to a total of fifty-two commitments falling under these six principles.

The Outcome Document of the 2005 World Millennium Summit once again reaffirmed the commitment of the international community to address the special needs of the poor from developing Countries, which continue to face persistent human development challenges. It has been realised that concerted effort should be made to achieve Millennium Development Goals (MDGs), in particular the goal of halving the proportion of people living in extreme poverty by 2015.[51]The UDHR, expressed the values of democracy in proclaiming that "the will of the people shall be the basis of the authority of government" (Article 21) and considered it essential that "human rights should be protected by the rule of law" (Preamble).[52]

Thus, it is necessary on the part of the state to establish a democratic form of government. In a democratic form of government, the people are enabled to express and discuss their opinion freely on all matters affecting them. In a democratic

[49] *Ibid.*

[50] The Fifth International Conference of New or Restored Democracies (ICNRD) was held in Ulaanbaatar on 8-12 September 2003 as a forum to share knowledge and experiences in promoting pluralistic democracy and in particular its participatory aspect as the theme of the Conference Democracy, Good Governance and Civil Society specified. The Sixth International Conference of New or Restored Democracies will be held in Doha, Qatar on 13-15 November 2006.Available at, http://www.icnrd5-mongolia.mn/, visited on 18 July 2006.

[51] Welch, Gita and Nuru,Zahra *supra* note 46.

[52] *Ibid.*

society, legislative institutions must exist to check the exercise of executive power and an independent judiciary must exist to safeguard the civil liberties of the people.

Independence of Judiciary

The justice system has been the major recourse of the human rights community in the enforcement of human rights.[53] Litigation has been identified as one of the key means of protecting and enforcing the rights of individual. The independence of judiciary is an important requirement for good governance. The establishment and functioning of an independent judiciary for the protection of human rights and other constitutional guarantees are essential for good governance.[54] The independence of judiciary is often undermined during emergency through various ways, for instance, removal of competent judges by unqualified persons and the establishment of special courts to try those who try to defy the authority. Such court functions under direct control of the State government and discharge its duty in more biased manner to legitimise all illegal practices of the State. The tendency to make judiciary a rubber stamp of government is not very uncommon practice in many developing countries.[55] Once the State authority proclaims emergency it automatically starts exercising unlimited power. The danger of this unchecked power is that the state may resort to arbitrary methods to silence the people opposing the government.[56] This particular situation may even become worst when military government overthrows democratically elected government. The suspension of the writ of *habeas corpus*, arbitrary arrest, trial conducted not by competent court is common practice during time of emergency. Thus, it is imperative to maintain the independence of judiciary for the protection of human rights. Independence of judiciary would help substantially in preventing the abusive exercise of emergency powers by the executive.

Right to Fair Trial

The right to fair trial is envisaged under both international as well as regional human rights instruments.[57] It is absolutely true that the right to fair trial is the most fundamental rights of victims of violation of human rights and this right should be protected in all times.[58] The right to a fair trial is a basic human right. It is one of the universally applicable principles recognized in the UDHR and still the cornerstone of the international human rights system. The right to fair trial has been reaffirmed and elaborated since 1948 in legally binding treaties such as the ICCPR, and in numerous

[53] Sinha, *supra* note 6.
[54] *Ibid.*
[55] *Ibid.*
[56] Sinha, M.K. "*International Human Rights Regime and States of Emergency: Need for Reform*" Indian Journal of International Law, vol. 39 (1999), pp. 677-688.
[57] Weissbrodt, D., *The Right to a Fair Trial : Articles 8, 10 and 11 of the Universal Declaration of Human Rights,* Martinus Nijhoff, Hague (2001).
[58] Sinha, *supra* note 6.

other international and regional treaties and non-treaty standards, adopted by the UN and by regional intergovernmental bodies.[59]

The right to a fair trial is one of the most important rights enshrined in the UDHR. Article 10 of the UDHR provides that, "everyone is entitled in full equality to a fair and public hearing by an independent trial in the determination of his rights and obligations and of any criminal charge against him."[60] Article 10 regulates the relationship between an individual and the tribunal and expresses the basic right to a fair trial in both civil and criminal proceedings. This right applies to the individual in all cases, whether he or she initiates the proceedings or is the defending party. The ICCPR further elaborates – particularly in its Articles 14 and 15.[61] Article 14 of the ICCPR recognises the right to "A fair trial and public hearing by a competent, independent and impartial tribunal established by law." Article 14 is the most prominent fair trial provision of the ICCPR and incorporates the content of Articles 10 and 11(1) of the UDHR. Article 14 is paralleled on the regional level by Article 6 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights and the Article 7 of the African Charter on Human and People's Rights.[62]

Every government has the duty to bring to justice those responsible for crimes. However, when people are subjected to unfair trials, justice is not served. When people are tortured or ill-treated by law enforcement officials, when innocent individuals are convicted, or when trials are manifestly unfair, the justice system itself loses credibility.[63] If human rights are not upheld in the police station, the detention centre, the court and the prison cell, then the government has failed miserably in its duties and responsibilities towards its citizens. Thus, it is important to protect and promote human rights for which each State should make right to a fair trial as fundamental right under their Constitution and if necessary, adopt required legislation to fulfil this obligation.[64]

Right to Information

Advancement of technology has made world a small village, but unfortunately this development did not reach, yet, to some developing countries because of their strong believe in respecting the official secret act. There is no transparency and accountability at the local level where it counts the most. Poor citizens cannot go to the government officials for any information related with the development and any other aspects. Though, the right to information has been recognised as a fundamental human rights in most of the Constitutions of the world. Thus, it is required to urge upon the states to bring out a necessary legislation and make all information available to citizens.

[59] Weissbrodt,D, *supra* note, 57.
[60] Sinha, *supra* note 7.
[61] *Ibid.*
[62] Weissbrodt,D, *supra* note, 57.
[63] *Ibid.*
[64] *Ibid.*

Indian Parliament enacted a very revolutionary Right to Information Act, 2005[65], which empowers the citizen to ask for any information from the government officials. Freedom of information lies at the root of the rights discourse. Failure of the State to provide access to information or State suppression of information can lead to the most egregious forms of human rights violations. The Right to Information (RTI) is fundamental to the realisation of rights as well as effective democracy, which requires informed participation by all.

Respect for Human Rights

In the past fifty years, the community of nations have produced a series of international and regional instruments both at international as well regional levels. These human rights instruments are designed to promote and protect human rights and fundamental freedoms of individual. Those States, which are parties of these instruments either at regional or universal levels, have an obligation to protect and promote the human rights of its citizens.[66] One of the important developments of the past couple of years has been the efforts of the United Nations Development Programme (UNDP) to integrate human rights at one of its activities. The UNDP and other development institutions are according more and more importance to issues of governance and capacity building in the process of development.[67] The UDHR recognises human rights as the foundation of peace, justice and democracy. Human rights are inalienable entitlements; they constitute the ground-rules for human development. The human rights framework reflects the crucial interdependence of economic, social and cultural rights, on the one hand, and civil and political rights, on the other.[68] The international community has developed a comprehensive legal framework for the protection and promotion of human rights. The ICESCR[69] and the ICCPR, and its two Optional Protocols together with the UDHR constitute the International Bill of Rights.[70] Alongside these, specific conventions were drafted to protect the rights of certain vulnerable groups, such as women and children, and to address certain specific rights, such as the elimination of racial discrimination.[71]

Under international human rights law, States Parties have specific obligations to (i) respect, (ii) protect and (iii) fulfil the rights contained in the conventions. Failure

[65] See for whole Right to Information Act 2005, available at http://www.humanrightsinitiative.org/programs/ai/rti/india/national/rti_act_2005.pdf, visited on 24 July 2006. This Act extends to whole India except the State of Jammu and Kashmir. The Act was enacted by the Parliament on 15 June 2005, and the Act came into force on 12 October 200. It includes the right to (i) inspect works, documents; records, (ii) take notes, extracts or certified copies of documents or records, (iii) take certified samples of material, (iv) obtain information in form of printouts, diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts

[66] Ramcharan,B, *supra* note, 32.

[67] *Ibid.*

[68] Sinha, *supra* note 6.

[69] Sinha, M.K., *Enforcement of Economic, Social and Cultural Rights: International and National Perspectives*, Manak Publications, New Delhi (2006).

[70] Sinha, *supra* note 6.

[71] *Ibid.*

to perform any one of these three obligations constitutes a violation of such rights.[72] The World Conference on Human Rights in 1993 also states that, "while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognised human rights".[73] It is important to distinguish inability from unwillingness. Any deliberate retrogressive measures require the most careful consideration, and need to be fully justified by reference to the totality of the rights provided for in the treaty concerned and in the context of the full use of the maximum available resources. In General Comment No. 12 of the Committee on Economic, Social and Cultural Rights, on the right to food, the Committee stated "Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all."[74]

The entire UN system – including the funds, programmes and specialised agencies – has a responsibility to support State Parties in these efforts, according to Article 2 (1) of the ICESCR, "States have to undertake steps, individually and through international assistance and cooperation, to the maximum of their available resources with a view to achieving progressively the full realisation of the rights recognised".[75] Since human development means expanding people's choices and enhancing their freedoms, empowering people goes beyond the development of human resources as means to economic growth and generation of income. [76]

Human rights and human development are two sides of the same coin. A human rights-based approach provides both a vision of what development should strive to achieve, and a set of tools and essential references.[77] It is based on the values, standards and principles captured in the UN Charter, the UDHR and subsequent legally binding human rights instruments. It attaches importance not only to development outcomes, as traditional approaches do, but also to the development process, as the latter implies the participation of all stakeholders to ensure that their interests and rights are included in the ultimate development outcomes. [78] The relationship between good governance, human rights and sustainable development has been recognised by the international community in a number of declarations and other global conference documents. For example, the Declaration on the Right to Development, which was adopted in 1986,[79] proclaims, according to Article 1, that

[72] Sinha, *supra* note 69.

[73] Vienna Declaration, *supra* note 15.

[74] General Comment 12 by Committee on Economic, Social and Cultural Rights on Article 11 (Right to Adequate Food), Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, 20th Session, Geneva, 26 April-14 May 1999, E/C.12/1999/5, 12 May 1999. Para.23, available at http://www.ohchr.org, visited on 25 July 2006.

[75] *Ibid.* Paras.14-15.

[76] Gruberg, I ,& Khan,S., *supra* note 1.

[77] Welch. Gita, and Nuru, Zahra *supra* note 46

[78] Gruberg,I , & Khan, *Supra* note 1.

[79] Declaration on the Right to Development Adopted by the General Assembly resolution 41/128 of 4 December 1986, available at http://www.unhchr.ch/html/menu3/b/74.htm, visited on 21 July 2006.

every human person and all peoples "are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development".[80] In the Millennium Declaration world leaders affirmed their commitment to promote democracy and strengthen the rule of law as well as to respect internationally recognized human rights and fundamental freedoms, including the right to development. According to the United Nations strategy document on the millennium development goals (MDGs), entitled "The United Nations and the MDGs: a Core Strategy', "the MDGs have to be situated within the broader norms and standards of the Millennium Declaration", including those on "human rights, democracy and good governance".[81] All recent international conferences, notably the Monterrey Consensus reached at the International Conference on Financing for Development[82] and the World Summit on Sustainable Development, have reaffirmed the importance of good governance and human rights to achieve the objectives of development and poverty eradication.[83]

Corruption

Corruption is a major threat to good governance. A State that is riddled with the corrupt practices has less regard for any form of democratic norms. [84]Citizens have to struggle for small things and nothing can move unless they grease the palm of concerned officials. International community is well aware of this deep-rooted evil practice of corruption in majority of the states in Africa, Asia and Latin American countries. By adopting couple of instruments at international and regional levels show the concern and earnestness of the international community in removal of this practice from the state. The human rights dimensions of the fight against corruption, one of the basic challenges to good governance. Corruption erodes the ability of a nation to reform itself, and to build more open, responsive, credible and legitimate political institutions. Corruption seriously undermines the ability of the State to respect, protect and fulfil human rights, particularly of those most dependant on the State because of their marginalized and vulnerable situation. Thus, the fight against corruption is in many countries at the core of government practices that promote human rights.

UN General Assembly in its resolution[85] recognized that there is a need to have an effective international legal instrument against corruption, decided to establish an ad hoc committee for the negotiation of such an instrument in Vienna at the headquarters of the Centre for International Crime Prevention, Office for Drug Control and Crime Prevention. The text of the United Nations Convention against Corruption was negotiated during seven sessions of the Ad Hoc Committee for the

[80] *Ibid.*
[81] Welch, Gita and Nuru, Zahra *supra* note 46.
[82] International Conference on Financing for Development, adoption of the Monterrey Consensus, A/Conf./198, 1 March 2002, available at http://www.un.org/esa/ffd/0302finalMonterreyConsensus.pdf, visited on 21 July 2006.
[83] Welch, Gita and Nuru,Zahra, *supra* note 46.
[84] Alam,A, "Crisis of Governance : Need for Political Reforms" in A.Alam (ed.) *Crisis of Governance*, Raj Publications, Delhi (2003), pp. 9-45.
[85] UNGA Res. 55/61 of 4 December 2000, available at http://www.unodc.org/pdf/crime/a_res_55/res5561e.pdf, visited on 25 July 2006.

Negotiation of the Convention against Corruption, held between 21 January 2002 and 1 October 2003. The approved United Nations Convention Against Corruption (UN Convention Against Corruption) by the Ad Hoc Committee was adopted by the General Assembly by its resolution.[86] The UN Convention on Corruption has already come into force in 2005.[87]

Corruption undermines democratic institutions, retards economic development and contributes to government instability.[88] Corruption attacks the foundation of democratic institutions by distorting electoral processes, perverting the rule of law, and creating bureaucratic quagmires whose only reason for existence is the soliciting of bribes.[89] Economic development is stunted because outside direct investment is discouraged and small businesses within the country often find it impossible to overcome the "start-up costs" required because of corruption.[90]

Gender Equality

No Society can progress where gender inequality persists. Numerous studies and the ground reality have shown that promoting equality between women and men helps a state grow faster, accelerate poverty reduction and enhances the dignity and well being of men, women and children.[91] Unfortunately, gender inequalities still prevalent in many of developing countries, as evidenced by such indicators as high maternal mortality rate, disparities in education, basic health services and scanty representation of women in the political process of a state.[92] Gender issues are highly relevant to achieving all of the Millennium Development Goals (MDGs), be it protecting the environment, achieving sustainable development or enabling universal access to health care. The third MDG is to promote gender equality and empower women addresses gender equality by targeting the elimination of gender disparities in primary and secondary education. It also targets literacy rates, the share of women in non-agricultural jobs, and the proportion of seats women hold in national parliaments. Despite increased awareness that gender equality is a critical factor in economic growth as well as poverty reduction, gender inequalities still prevail in many countries. Gender inequality is evidenced by disparities in access to education and basic health services, women's lack of independent rights to own land, manage

[86] UNGA Res. 58/4 of 31 October 2003, available at http://www.unodc.org/unodc/crime_convention_corruption.html, visited on 25 July 2006.
[87] The UN Convention came into force on 14 December 2005 after getting required 30 ratification, in accordance with article 68 (1) which reads as follows: "1. This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, available at http://www.unodc.org/unodc/en/corruption.html, visited on 24 July 2006.
[88] Corruption, available at http://www.unodc.org/unodc/en/corruption.html, visited on 24 July 2006.
[89] *Ibid.*
[90] *Ibid.*
[91] Welch, Gita, and Nuru,Zahra, *supra* note 46.
[92] Olasfsdottir, O.T., "*Equality Between Women and Men*", in B. Ramcharan, *supra* note, 32, pp. 608-615.

property, or conduct business, and women's under-representation at all government levels.[93]

Role of Civil Society

The term civil society refers broadly to organizations and associations of people, formed for social or political purposes that are not created or mandated by governments. Civil society broadly includes, non-governmental organizations, trade unions, cooperatives, churches, grassroots organizations and business associations.[94] These groups are important for their role in articulating and advocating for popular concerns. This advocacy function gives voice to a variety of interests and perspectives that governments and decision makers may otherwise not hear. It is increasingly accepted fact that real progress in tackling development deficits can only be made by building the institutions for good governance and by ensuring genuine civil society participation. In many countries, and even in those countries deemed to be "good reformers", governments are often extremely nervous of or even hostile to the development of civil society. Democratic governance requires the existence of constant and efficient linkages among governments and all members of society. Civil society is distinct from society in general since it refers to people organizing and acting together in the public sphere to attain collective goals, express shared ideas and views, exchange information, and improve the functioning of state institutions and make them more accountable, among many other functions.[95] Civil society provides a space for state institutions and members of society to consult with each other, interact, and exchange views and information on public matters. It also creates institutional spaces for the active participation of minorities and vulnerable groups in decision-making processes and for increasing political representation of the views and interests of such groups in state institutions.[96] It is important to emphasize that civil society is not a homogenous group; it encompasses a broad range of formal and informal organizations, associations and social movements. Community-based organizations, NGOs, charities, voluntary organizations and trade unions are all part of civil society. This intrinsic diversity in origin and ideas is one of civil society's main contributions to democratic governance. Contributions from civil society vary across countries depending on the development stage of the civil society organizations and individual countries' needs and openness to their involvement. Civil society in many countries has been successful in helping enhance civic participation in democratic governance. In many instances, civil society has created awareness about participating in elections, raised issues for election manifestoes, and initiated debates and discussions on issues of public concerns. It has also played a significant role in voter education programmes, particularly among minorities, young and first-time voters, women and indigenous groups.[97] In countries with weak

[93] Tomasevski, K,"*Men and Women, Sex and Gender*", in B. Ramcharan, *Supra* note, 26, pp. 429-440.
[94] Phillips, A," *The Role of International Non-Governmental Organisations in Promoting Minority Rights Monitoring*" in Ramcharan, B, *supra* note, 32, pp. 897-906.
[95] Welch, Gita and Nuru,Zahra *supra* note 46.
[96] *Ibid.*
[97] *Ibid.*

governance, civil society is frequently equated with political opposition. The United Nations, in many of its General Assembly resolutions and conventions, acknowledges the role of civil society in the promotion of human development, environmental and human rights protection, democracy and good governance. The Millennium Development Goals are very clear in this regard. Successive human development reports by the United Nations Development Programme acknowledge the critical role of civil society.[98]

One of the most important functions of civil society is to provide checks and balances to government power. In this context, civil society serves as the watchdog of democratic institutions, helping ensure that they are accountable to their constituencies. Civil society promotes state accountability in many cases by empowering and making the State's checks and balances work efficiently.[99] In other instances, where government mechanisms of accountability do not exist, civil society can exert pressure to create them in the first place. Civil society in this sense is not an adversary of the State, but instead serves to encourage it to improve and maintain its democratic nature.[100] By exposing abuses of power and government wrongdoings, increasing expectations of effective performance and creating political pressure, civil society can push state mechanisms to target corrupt, inefficient and unaccountable practices

Ethnic Conflict and Civil Wars

Ethnic conflict and civil wars are the most pervasive forms of armed conflict in the world. In the 1990s, ethnic conflict and civil wars raged in dozens of countries, killing an estimated six million people. These conflicts usually involved neighbouring states, often undermining regional stability and respect for international law and organizations. Some conflicts engaged the interest of distant international powers. For these reasons, ethnic conflict and civil wars are major international security problems. Ethnic conflict and civil wars have continued to slow down the pace of development and realization of good governance in number of countries of the world especially in Africa. The nations' wealth is most times spent in quelling one uprising or another. In this type of situation, human rights issues are not properly addressed and a lot of abuses are recorded. Those countries emerging from conflict situations face the immediate task of establishing law and order in the shortest time. These states have to adopt electoral and procedural elements that would help direct people's energies to consolidating peace.

Conclusion

The protection and promotion of Human rights need a conducive and enabling environment, in particular appropriate regulations, institutions and procedures framing the action of the State. Good governance policies should aim to empower individuals to live with dignity and freedom. Good governance and human rights are

[98] *Ibid,*
[99] Phillips, A, *supra* note, 94.
[100] *Ibid.*

mutually linked and complementary. Good governance cannot be achieved in separation from human rights. The two concepts reinforce each other and many of their core principles are common. Popular participation, accountability, transparency, and State-responsibility underline the human rights approach as well as underpin the good governance framework as defined by the Commission on Human Rights. Human rights empower people, help them to assume their roles as community members, provide the legal framework for people's participation in public affairs and in claiming their rights. Systems of governance should be expressly concerned about their ability to respect, protect and fulfil civil, economic, political and social rights. The exercise of good governance may well result in economic growth and development, as the experiences of many developing countries can attest. The rule of law is indispensable for the exercise of government in a way that promotes and protects human rights. Proper functioning of the rule of law, it is essential to have a strong legal framework, under a constitution, that upholds human rights and that provides for effective protection, implementation and redress in key areas at the domestic level, that relate to all human rights, be they civil, cultural, economic, political or social rights. The rule of law concerns itself with the substantive and the procedural, as well as with the quality, content and objectives of laws, processes, institutions and practices. States play a very important role in the promotion and protection of human rights. As the principal "duty-bearers", State is required under legally binding human rights instruments to adopt a range of measures, including legislative, economic, social and cultural measures, to respect, protect and fulfil all human rights. The interplay between good governance and human rights is marked by the value added that governance provides to human rights, and vice versa.

Philosophical and Legal Operational Two Sword Theory of B.R. Ambedkar: Some Reflections

Prof. (Dr.) S.D. Sharma[*]

> "However good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However, bad a Constitution may be, it may turn out to be good if those who are called to work it happen to be a good lot. The working of the Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of state such as legislature, the executive and the judiciary. The factors which the working of these organs of state depend upon are the people and the political parties. It is therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play- Dr. B.R. Ambedkar, Nov. 25, 1949."[1]

Introduction

Philosophy of Constitutionalism reflects and highlights special facets of Bill of Rights ensuring international and national protection, promotion and welfare of people under auspices of democratic, transparent, and responsible government. Foundation of Constitutional philosophy is based on dignity, worth, social progress and better standards of life Constitutional object and goal to fulfil legitimate expectation of the people, has been adopted and given to themselves by the people for their welfare and wellbeing.

In the light of Indian Constitution, which has been enacted and adopted by people of India, Dr. Ambedkar very aptly said that

> "The preamble clearly acknowledges, recognizes, and proclaims that the Constitution emanates from people. Unless a man is an absolute pedant, one cannot understand that a body of people 292 in number, representing this vast continent, in their representative capacity could not say that they were acting in the name of the people of this county.[2]

Ambedkar's social welfare philosophy strongly advocated for welfare of down trodden and sought to establish egalitarian society.

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1 See, M.G. Chitkara, *Dr. Ambedkar and Social Justice*, APH Publishing (2002) p.84

2 Ambedkar; Constituent Assembly Debates Vol. 10, p. 455.

Jurisprudential Notion of Dr. Ambedkar's Theory

Concept of Justice

Jurisprudential approach of Ambedkar focused on supremacy of people for accessing justice, equality and progress. Close on the heels of John Rawls he observed, "I characterize a well ordered society as one designed to advance the good of its members and one that is effectively regulated by a public conception of justice." Thus, it is a society that accepts and knows that the others accept the same principles of justice, and the basic social institutions satisfy and are known to satisfy these principles. Rawl's justice as fairness is framed to accord with this idea of society. In his scheme of justice, the persons on the original position are to assume that the principles chosen are public, and so they must assess conceptions of justice in a view of their probable effects as the generally recognized standards. Conceptions that might work out well if understood and followed by a few or even by all, so long as this fact was not widely known, are exuded by the publicity condition. We should also note that principles are consented to in the light of true general beliefs about men and their place in society, the conception of justice adopted is acceptable on the basis of their facts. There is no necessity to invoke theological or metaphysical doctrines to support its principles, nor to imagine another world that compensates for and corrects the inequalities which the two principles permit in this one. Conceptions of justice must be justified by the conditions of our life as we know it or not at all.[3]

Relationship of justice with the people as described by John Rawls was clearly manifest in the philosophy of justice propounded by Dr. Ambedkar. During constitutional assembly debate pertaining to preamble of the Constitution, Ambedkar observed,

> "Preamble clearly acknowledges, recognizes and proclaims that the constitution emanates from the people. Unless a man is an absolute pedant, one cannot understand that a body of people 292 in number, representing this vast continent, in their representative capacity could not say that they were acting in the name of people of this country.[4]

Dissent in Democracy

Indian people's authority in republican democracy reflects the Ambedkar's thoughts about the people's welfare and wellbeing, which according to him, is the supreme goal of the constitution. Such principle is endorsed by Maxwell who underlines the importance of the preamble as a legitimate aid in matters of constitutional interpretation and construction.[5] Indian constitutional democracy as emerged over the years is opposed to aristocracy, monarchy, dictatorship or totalitarianism. In such

[3] John Rawls, *A theory of Justice* 453-4 (2005); Rawls also described that Plato has followed this drive of Justice in Republic bk. III 414-5, as well as the advocacy of religion (when not believe) to buttress a social system that could not otherwise survive, as by the grand inquisitor in Dastoevsky's the Brothers Karamazov.

[4] Ambedkar- Constituent Assembly Debate- Vol. X P. 455

[5] Maxwell , *Interpretation of Statute* 6-9 (12th ed.)

system of government hereditary class distinctions are to be ignored and minority views are expected to be tolerated. Discussion, persuasion and accountability are three pillars of democracy. The decisions, though, are taken by majority, but such decision-making is always open to ideas and opinions. Equality before law and equal protection of laws thus constitutes essence of democracy.[6]

Relation of Social Democracy with Polity

Ambedkar has supported social democracy with the help of political democracy. According to him, "Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity which are not to be treated as separate items in a trinity. They form a Union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can equality and liberty be divorced from fraternity." [7] This theme of Ambedkar is similar to the jurisprudential philosophy of H.L. Menken, the latter also firmly believing in the social democracy as the common good for common people. He said "democracy is the theory that the common people know what they want, and deserve to get it good and hard". In democracy there is a scope for discussion and debate but in the interest of general people on the ground of general will of those people. It is essential to maintain discipline for achieving social Justice. In this regard, Mahatma Gandhi rightly observed that, "A born democrat is a born disciplinarian."

Corruption and Democracy

Ambedkar also had a vision as to how the social justice can be achieved in India in the face of social problem of corruption and nepotism. In the Constituent Assembly this issue was also debated, constitution makers opined that unless corruption would not be eradicated and removed from the Indian society, we cannot achieve the social justice. In this reference Dr. Radhakrishna said that, "we have to assume responsibility ourselves for what we do. A free India will be judged by the way in which it will serve the interests of common man in the matter of food, clothing, shelter and social services. Unless we destroy corruption in high places, root out every trace of nepotism, love of power, profiteering and black marketing, which have, unfortunately in recent times, spoiled the good name of this great country, we will not be able to raise the standards of efficiency in administration as well as in the production and distribution of necessary goods of life."[8] In this regard, Ambedkar famously quoted,

[6] *M. Nagaraj* v. *Union of India* AIR 2007, SC71.

[7] See, Durga Das Basu, *Introduction to the Constitution of India* 24 (11th ed.)

[8] Dr. Radhakrishna; Constituent Assembly Debate vol. V p. 4. In India for prevention of corruption, there were provisions in the Indian Penal code 1860 from sec 161 to 165 A. However, these provisions were omitted in 1988. Indian parliament has enacted a separate law known as "Prevention of Corruption Act, 1988. In this Act, Chapter II from sec 7 to 16 provisions are made for prevention of corruption. These Provisions are more or less similar as these were in the 1860 Indian Penal Code from 161 to 165 A.

> "...Who shall rule-wealth or man? Which shall lead, money or intellect? Who shall fill public stations, educated and patriotic free men or the feudal serfs of corporate capital? For the present, Indian politics, at any rate the Hindu part of it, instead of being spiritualized has become grossly commercialized, so much so that it has become a byword for corruption. Many men of culture are refusing to concern themselves in this cesspool. Politics has become a kind of sewage system intolerably unsavory and unsanitary. To become a politician is like going to work in the drain."[9]

On the Objectives of Fundamental Rights

Dr. B.R. Ambedkar, as the Chairman of Drafting Committee of the Constitution had observed, "The object of fundamental rights is twofold- First that every citizen must be in position to claim those rights. Secondly- they must be binding upon every authority. Therefore, it is quite clear that the fundamental rights must be expressed in clear terms; and they must be treated as binding on government, including on authorities established by laws as for instance, district local boards, municipalities, even village panchayats and taluka boards etc., which has got certain powers to make law, to make rules, or make by-laws.

Ambedkar further observed,

> "If that proposition is accepted and I do not see anyone who cares for fundamental rights can object to such a universal obligation being imposed upon every authority created by law then what are we to do is to make our intention clear. There are two ways of doing it. One way is to use the composite phrase such as 'the state' or to keep on repeating every time the 'Central Government', the provincial Government, the State Government, the Municipality, the Local Board, The Port Trust, or any other authority. It seems to me not only most cumbersome but stupid to keep on repeating the phraseology every time we make a reference to some authority. The wisest course is to have this comprehensive phrase and to economize in words."[10]

Dr. Ambedkar's ideology supports the duty oriented function of every organ of government in every stage for providing justice. Concept of justice depends on the form of democracy. Requirement of Indian democracy is to uplift the downtrodden for enhancing their social, educational, political and economic status. Thus, definition of 'State' by Ambedkar may be comprised with the theory of social justice of Honore. About the equality, Honore rightly said, "equality distribution among equals means that according to given criterion of discrimination, unequal cases are to be treated differently, which still leaves open the question whether it is just to select that particular criterion.[11]

[9] Valerian Rodrigues (ed.), *The Essential Writings of B.R. Ambedkar*, OUP (2002) p. 129

[10] CAD VII p. 610, Cited in *M/S Zee Tele films* v. *Union of India* AIR 2005 SC 2677,2685-2686(majority view).

[11] Honore, *Social Justice in Essays in Legal philosophy* ,61 at 68-69 (ed.) by Robert S. Summers, 1968.

Doctrine of equality always requires fulfilling all the expectations of the people by the democratic State by way of providing corrective and distributive justice. According to Aristotle distributive justice is based on the principle that there has to be equal distribution among equals. Corrective justice seeks to restore equality when, this has been disturbed. RWM Dias critically analyzed the concept of Aristotle's justice by raising the question, "the distribution of what?" Aristotle spoke of distribution of honours or money or the other things that fail to be divided among those who have a share in the Constitution.[12] Some other seminal writers like Immuanal Kant, Stammler, karl Marx and John Rawls were of the view that justice is not synonymous with equality; equality is one aspect of it, and that justice is not some 'thing' which can be captured in formula once and for all; it is a process, a complex and shifting balance between many factors, including equality. As has been further observed, 'justice is never given, it is always a task to be achieved.'[13] Relationship between equality and justice cannot be divorced from each other as justice can be achieved by way of maintaining equality among unequal. It will also be proper to express views that equality cannot be divorced from liberty and liberty cannot be divorced from freedom.

Economic Democracy

Equality, liberty and freedom can be achieved only in the democracy. In the democracy where there is a parliamentary from of government, there should be political, economic and social democracy. About the aforesaid purpose of Indian democracy, Dr. B.R. Ambedkar expressed his view that,

> "Our constitution is the peace of mechanism which lays down what is called parliamentary democracy. By parliamentary democracy we mean 'one man one vote'. We also mean that every Government shall be on anvil, both in its daily affairs and also at the end of a certain period when the voters and the electorate will be given an opportunity to assess the work done by the government. The reason why we have established in the Constitution a political democracy is because we do not want to install by any means whatsoever a perpetual dictatorship of any particular body of people. While we have established political democracy, it is also the desire that we should lay down as our ideal economic democracy. We do not want merely to lay down a mechanism to enable people to come and capture power. The Constitution also wishes to lay down an ideal before those who would be forming the government. That ideal is economic democracy whereby, so far as I am concerned, I understand to mean, 'one man one vote'. The real question is: have we got any fixed idea as to how we should bring about economic democracy? There are various ways in which people believe that economic democracy can be brought about; there are those we believes in having a socialistic state as the best form of economic democracy, there are

[12] RWM Dias, *Jurisprudence* 65 (1985) cited Aristotle; Nicomachen Ethics Vol. 2.

[13] Friedrich ; *Justice ; Just Political Act Nomos, Justice* at p.35

those who believe in the communistic idea as the most perfect from of economic democracy.[14]

Dr. Ambedkar by expressing the base of social democracy, he has stressed on the strengthening of economic democracy; his submission in the Constituent Assembly about the Indian democratic form of government was that the way in which, Indian people will get the equality, will be the social democracy and social democracy cannot be fruitful unless there is economic democracy. He had suggested ways to brought about economic democracy. In this context he said, that "various ways by which economic democracy may be brought about are enshrined in the Directive Principles, which are neither fixed nor rigid in their meanings.[15] The language of Part IV of the Constitution, if read organically, directs the State to strive positively for ensuring economic and social equality for the well being and welfare for the people. Ambedkar said, it is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and the times, keep on changing. It is therefore, no use saying that the directive principles have no value. In his judgment, the directive principles have a great value, in that they lay down that our ideal is economic democracy, and not merely a parliamentary form of government.[16]

In most of the provisions of the Constitution the word 'strive' is written as a direction to fulfil the economic object by the democratic government. In this reference, there was a debate in the Constituted Assembly that the word 'strive' should not be used in all the articles of directive principles of the Constitution. Clarifying in favour of the word 'strive', Dr. Ambedkar said,

> "It is very important, we have used it because our intention is that even when there are circumstances which prevent the government, or which stand in the way of the government giving effect to these Directive Principles, they shall, even under hard and unpropitious circumstances, always 'strive' in the fulfillment of these Directives. That is the reason as to why the word 'strive' has been allowed to used. Otherwise it would be open for any government to say that the circumstances are so bad or that the finances are so inadequate that state cannot even make any effort in the direction in which the Constitution obliges us to carefully tread. Therefore, the word 'strive' in this context is of great importance and it would be very wrong to delete it."[17]

Socio-Legal Thoughts of Ambedkar

Dr. Ambekdar's demand for the political justice for depressed class was related to social environment and circumstances of Indian society. His socio-legal approach was motivated towards ameliorating the politically and socially neglected class. His efforts culminated into what later came to be known as Poona Pact of August 14,

[14] CAD Vol VII,; 22nd November 1948 at 494-95
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*

1931. He raised his voice in favour of depressed classes that there shall be seats reserved for them out of general electorate seats in the provincial legislatures. Poona Pact provided that there shall be no disabilities attached to anyone on the ground of his being a member of the depressed classes in regard to any elections to local bodies or appointment to the public services. Every endeavour shall be made to secure fair representation of the depressed classes, subject to such educational qualifications as may be laid down for appointment to public services. In every province, out of the educational grant, an adequate sum shall be earmarked for providing educational facilities to the members of depressed classes.

Due to the impact generated by Poona Pact of 1931, relevant provisions were made under Article 330 and 332 of the Constitution setting out that reservation of seats for scheduled castes and scheduled tribes in the union parliament and state legislative assemblies. The same constitutional policy of reservation is supposed to be replicated in the local bodies, as also to government services and posts. In addition, Article 46 also prescribes the duty of state to promote educational and economic interests of schedule caste, schedule tribes and other weaker sections. In this way, complete political rights are given by the Constitution to the depressed class in India, due to Ambedkar's visionary and sustained efforts.

Concluding Remarks

Dr. Ambedkar as a human rights activist, jurist, social reformer and visionary leader fought against the social injustice and inequality. Ambedkar was always in favour of sovereignty of people, rights of depressed class, minority rights, and power of democratic people and privilege of economically weaker section of society. Being against the social injustice, his ideology protects the weaker people of every area, caste and religion. Undeniably, his stellar role in the constitution making process was truly guided by the avowed goal of creating an egalitarian social structure, with no room for discrimination for the downtrodden sections of the society.

Constitution is the mechanism for the purpose of regulating the work of the various organs of the state. What should be the policy of the state; how the society should be organized in terms of socio-economic order, must be decided by the people themselves according to the needs of time and circumstances. Not everything can be provided for in the Constitution itself. Like Dr. Ambedkar, the author believes, that people are the ultimate custodian of their rights and future. It is submitted, in line with Ambedkar's thought, that socialistic pattern of organizing country and governance system is better than the one based on capitalistic organization of society. But, it is, in the same vein, argued that thinking people must devise some other forms of social organization which might be better than the socialist organization of today or tomorrow.

Contemporary Stance of BRICS with Special Attention to Space Activities and Africa

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Introduction

BRICS is an international association of five countries: Brazil, Russia, India, China and South Africa. In 2009 and 2010 the union was called BRIC, as it united only four states (Brazil, Russia, India and China). With the accession of South Africa in 2011, the association obtained its current acronym. In this text, with a view to uniformity, we will refer to it as 'BRICS', regardless of the year, except for the names of documents which use the differentiated abbreviation(s).

Strikingly large population and size of territories and economies of the BRICS States make them different from others. They account for 40% of the world population, 25% of the earth's surface area and about 20% of the world GDP. So far, they control about 43% of global foreign exchange reserves and this share continues to grow.

At the same time, BRICS is not an international intergovernmental organization. It is not based on a constituent treaty, has no headquarters, secretariat, budget, etc. BRICS is an advanced form of institutional international cooperation and is on a par with the Group of Eight, the Group of Seventy Seven and the Arctic Council.

The fact is that in our globalized world international cooperation is taking new forms. International intergovernmental organizations are full-fledged subjects of international law that can enter into treaties and bear responsibility under international and national law. However, today there are a lot of organizations and state forums that do not have all features of an international intergovernmental organization, but make a great contribution to the development of international relations and, often, of international law. In some cases, it demonstrates unwillingness of the states to deeper integrate into and transfer significant powers to an international organization. Over time, the states may decide to grant the status

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"inter-governmental" to an international organization. Then there can be a transition period in the development of an international organization, when its international legal nature will gradually form and shape into one or another model of international organizations (e.g. ASEAN). In other cases, the states are quite satisfied with the existence of the uncertain status of an international organization and do not take action aimed at the development of the international legal status of an international forum (e.g., the Group of Eight).

International forums that do not have all the features of an international intergovernmental organization are usually referred to as informal international institutions, international quasi-organizations (from Greek "quasi" - pseudo) or so-called para-organizations (from Greek "para" - similar, alike). Examples of such organizations are the Arctic Council, the G-8 (the Group of Eight), the Group of 77, the Paris Club of public lenders, non-governmental London Club of commercial banks and etc.[1]

Quasi-organizations are characterized by constancy and regularity of work, permanent and usually clearly limited membership; often, but not necessarily, they have a particular headquarter. They are fundamentally different from international organizations by the fact that they are not legally vested with legal capacity, although they operate with a certain composition of members, but usually without the constituent instruments. They have neither a formalized organizational structure, nor the right to make legally binding decisions.

An international quasi-organization can be defined as an informal association that is similar to an international organization, but is not one, and has no corporate and law-making properties and clear institutional features. Let us consider the examples of specific organizations, proceeding then to briefing on BRICS and analyzing the latter at the two different examples of the engagement in space activities and placing Africa in its agenda.

Results

Several informal associations are taken for the comparison. 'The Group of Eight' is not an international organization, it is not based on an international treaty, has no statute and secretariat. Decisions of the Group of Eight are not binding. As a rule, they just specify the intentions of the parties to adhere to the agreed line or include recommendations to other entities of international life to apply certain approaches in solving various issues. The G-8 summit takes decisions on key issues of the global economy and due to this fact it cannot have impact on the world politics. Today, the ability of a state to influence the structure of the world economy is one of the main factors of its power.

With a formally limited membership, this quasi-organization has virtually universal jurisdiction, including review of any international global or local economic issues.

[1] M.N. Kopylov, A.M. Solntsev, "*The G8 contribution to sustainable development*" Международное право – International law, 2009. No. 3 (39). P. 108.

'The Arctic Council' was formally established in 1996 by the Ottawa Declaration as "a high-level intergovernmental forum to promote cooperation, coordination and interaction among the Arctic States, associations of indigenous peoples and other Arctic residents on such issues as sustainable development and environmental protection" (art. 1)[2]. Its founders were Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the United States of America.

The Council was established as an intergovernmental "high-level forum". It holds meetings on ministerial level every two years. About four million people, including indigenous peoples, live to the north of the Arctic Circle. Representation of indigenous peoples in all bodies of the Arctic Council is a unique feature of the Council and is important to the organization of its activities in all areas. In this regard, along with the aforementioned Arctic countries, the Inuit Circumpolar Conference, Aleut International Association, the Saami Council, the Association of Indigenous Peoples of the North, Siberia and Far East of the Russian Federation, the Arctic Athabaskan Council and the Gwich'in Council International are "permanent participants" of the Council. The category of "permanent participants" was created in order to provide "active participation and full consultation" with representatives of the indigenous peoples of the Arctic. The number of "permanent participants" can be increased, but should not in any case exceed the number of the Member States.

In 2011, the Arctic Council Ministerial Meeting in the Greenland city of Nuuk (Denmark) brought new important developments for the Arctic Council. Firstly, the Nuuk Declaration was adopted. Its provisions established a secretariat in Tromsø (Norway). Secondly, the following agreements were signed: the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic and the Agreement on Cooperation on Marine Oil Pollution Preparedness. Being developed in the framework of the Arctic Council, these agreements are a fundamentally new element to the Council, as they are the first legally binding documents developed by the Council.

'The Association of Southeast Asian Nations' (ASEAN) was established in 1967 on the basis of the Bangkok Declaration and has long been an international quasi-organization. In 1976, the ASEAN Secretariat was established, which indicated the strengthening of the institutional framework. Only 40 years after the establishment of the ASEAN, the Charter was adopted in 2007 and finally secured the ASEAN's international legal personality[3].

The Organization for Security and Co-operation in Europe' (OSCE), earlier known as the Conference on Security and Cooperation in Europe (CSCE) was established upon the initiative of the USSR and the socialist countries of Europe as a permanent international forum of representatives of 33 European states together with the United States and Canada for strengthening peace and security in Europe against military or any other confrontation.

[2] Declaration on the Establishment of the Arctic Council (Ottawa, Canada, 1996). http://www.international.gc.ca/arctic-arctique/ottdec-decott.aspx?lang=eng

[3] A.M. Solntsev, A.Y. Shirokinsky, "*Integration processes in the ASEAN: yesterday, today, tomorrow*"Международное право – International law. 2010. No. 2 (42). P.28-31.

Renaming of the CSCE to the OSCE at the Helsinki Meeting in August 1975 had a great importance. According to some lawyers, the Helsinki Final Act of 1975 is an agreement *sui generis*, i.e. of special kind, due to its political, international and historical significance, and can therefore be regarded as "legally binding". However, the status of OSCE never became legally binding. Although the Final Act has the features of an international legal act, it is not a treaty in the strict sense of the word. There is a widespread understanding that the obligations of the States Parties under the document, which was considered as a kind of a general declaration, were binding only in terms of morals and policy. To date, the OSCE has 56 Member States located in North America, Europe and Central Asia. There are permanent bodies in the structure of the OSCE. A special feature of the OSCE is the fact that the organization does not have a single document as a constituent instrument. The formation of the OSCE took a large amount of time and has not ended so far. The transformation of the OSCE into an international organization would facilitate the early adoption of the Charter. Submitting a draft Charter is an important initiative of Russia; availability of the OSCE Charter would bring its status closer with a typical international intergovernmental organization and would elevate it to a higher international legal status. This fact has repeatedly drawn the attention of the Russian side, in particular, the Minister of Foreign Affairs of the Russian Federation, Sergey Lavrov said: "Indeed, this organization needs a shake. The organizational structure of the OSCE needs another shake ... our draft Charter was prepared in cooperation with other OSCE members, it is our joint initiative, and it has been under consideration of the OSCE for a long time already. It is a really necessary step for the OSCE to become a full-fledged international organization ... the adoption of these documents is a necessary step for the OSCE to become a full-fledged international organization".[4]

It is known that the United Nations recognize the OSCE as a regional agreement, rather than a regional organization. This creates significant legal problems for the OSCE in performing its functions. Not being a subject of international law, the OSCE can act as a party only in documents of political nature, i.e. "soft law instruments". Converting of the OSCE into an international intergovernmental organization is rather a political issue than a legal one. The NATO and EU are not willing to speed up the process arguing that the mechanism of the Organization works well enough and so does not need to be improved; and the Charter may affect the flexibility of the Organization's activities as the OSCE is known for its quick response to conflict situations.

Unfortunately, the process of transformation of the OSCE into an international organization is slow and painful, because of bipolar views on a number of issues, and the prospect for the OSCE to become a full-fledged international organization is quite low. Perhaps with the growing influence of Russia in the international arena, attracting like-minded countries will contribute to coordinated adoption of the OSCE Charter.

[4] The Speech of the Minister of Foreign Affairs S. Lavrov at the OSCE Summit in Astana (December 1-2, 2000).

BRICS is not standing still as well. Today, significant steps towards institutional building of BRICS have already been taken. The Business Council of BRICS and the New Development Bank have been established. Moreover, the Ufa Declaration adopted at the VII BRICS Summit in 2015 stressed the importance of establishing a joint BRICS website, which can be regarded as a virtual secretariat of BRICS (para. 75).[5]

The above given examples lead to the conclusion that, based on its features, BRICS can be attributed to an international quasi-organization. In our opinion, it is not necessary to force the events and give BRICS the status of an international intergovernmental organization; it shall happen in an evolutionary manner, like it was with ASEAN. BRICS shall not be limited solely to the economic sphere of cooperation. The current status of BRICS already allows its Members to implement a number of international initiatives, for example, the BRICS Member States together opposed the intervention in Libya and Syria. Moreover, all the BRICS States are spacefaring nations, which also open great horizons for cooperation. Thus, BRICS has a great potential and it is for its Member States to decide how it shall be implemented.

Discussion

Let us consider cooperation in outer space activities and regarding Africa generally as the issues of a raising interest for BRICS.

Cooperation in outer space activities

The BRICS States have extensive technical and financial capacity to develop space programs, they have the necessary infrastructure, and four of the five members of the BRICS have their own space ports. At present, there are only 3 space superpowers (Russia, the USA and China) and 2 of them are BRICS Member States.

The need to develop this area of cooperation is mentioned in the documents adopted at the BRICS summits. At the 2011 BRICS Summit it was noted that "we intend to explore the cooperation in the sphere of science, technology and innovation, including the peaceful use of space".[6] A series of agreements and declarations were concluded in order to develop this area of cooperation on a bilateral basis. So, in 2013, Russian Space Agency and the South African Space Agency signed an agreement on cooperation in astrophysical research under the "RadioAstron" project. The South African Space Center will be used to retrieve data from a Russian satellite for the project "Radioastron". A quantum and optical system will be set in South

[5] The VII BRICS Summit Ufa Declaration of 2015 (Ufa, the Russian Federation, July 9, 2015) // en.brics2015.ru/load/381158

[6] The Third BRICS Summit Sanya Declaration (Sanya, China, April 14, 2011), para. 28.

Africa to increase the accuracy of the GLONASS signal reception in the southern hemisphere[7].

There are great prospects in cooperation between BRICS Member States. In the 2013 Joint Statement of these States, it was stressed that it is necessary to start negotiations on adoption of the Treaty on the Prevention of the Deployment of Weapons in Outer Space, and it was noted that concrete proposals on transparency and confidence-building measures can be an important part of this document[8].

The section "Cooperation in the sphere of science, technology and innovation" of the Concept of participation of the Russian Federation in BRICS of 2013 has a specific paragraph "cooperating in the field of space research and use of space technology" (para. 23(c))[9]. It is noted that, as a first step, the Russian side proposes to establish a working group for identifying areas of interaction in this sphere that are of interest to all participating States.

In the Ufa Declaration adopted at the VII BRICS Summit in 2015 (Ufa, the Russian Federation, July 9, 2015), it is noted that "our countries can benefit from the opportunities for cooperation in outer space in order to expand the application of appropriate technology for peaceful purposes" (para. 32).

Thus, it appears that cooperation among the BRICS Member States in the field of exploration of outer space is quite promising and it needs to be implemented both in the technical and in the legal spheres. It is suggested to unify national space laws and speak with one voice at the United Nations Committee on the Peaceful Uses of Outer Space and at the Geneva Committee on Disarmament on all key issues with a view to the early adoption of the Treaty on the Prevention of the Deployment of Weapons in Outer Space.

The place of Africa in the official positions of BRICS

During the post-war period, the African continent fighting for freedom from colonialism became, to a large extent, the scene of the struggle of the USSR and the United States for political allies. At the beginning of the XXI century, Africa's socio-economic and natural and resource potential comes to the forefront. The states that traditionally had an impact on African countries (the former mother countries and the United States) yield their place to new actors, the first of which are China, India and Turkey. Africa became a region of a keen geopolitical struggle and a place of redistribution of once stable spheres of extra-regional players' interests.

[7] Agreement between the Federal Space Agency (Roskosmos) and the South African Space Agency on cooperation in astrophysical research under the "RadioAstron" project of March 26, 2013.

[8] The Joint Statement of the Minister of Foreign Affairs of the Russian Federation and the Minister of Foreign Affairs and Worship of Argentina. Press service of the Ministry of Foreign Affairs of the Russian Federation, June 11, 2013.

[9] Concept of participation of the Russian Federation in BRICS of 2013 http://static.kremlin.ru/media/events/eng/files/41d452b13d9c2624d228.pdf

The following part of the article covers three aspects. What are the trends in addressing Africa's problems in the joint acts of BRICS? In what areas does Africa attract attention of BRICS? Whose interests are thus promoted and how?

- A brief overview of the declarations and joint statements of the BRICS leaders shows that Africa tends to appear in these documents more and more often.

The first time Africa was directly mentioned is the Joint Statement of Heads of State and Government of the Member States made at the 2010 Brasilia BRIC Summit: "We call upon the international community to make all the necessary efforts to fight poverty, social exclusion and inequality, bearing in mind the special needs of developing countries especially the least developed countries, small islands and *African Countries"* (para. 18, Fight against poverty; italics was added by the author).

In the Sanya Declaration of 2011 BRICS Summit, Africa is already mentioned four times (not taking into account thirteen references related to the accession of South Africa to BRICS and one reference to the African Union): with regard to the cooperation within the UN Security Council, particularly, on issues of peace and security in the North African and West African regions (para. 9), with regard to achieving the Millennium Development Goals (MDGs), such as eradication of extreme poverty and hunger "particularly in Least Developed Countries in Africa ..." (para. 20) and with regard to the support of "infrastructure development in Africa and its industrialization within framework of the New Partnership for Africa's Development (NEPAD)" (para. 25).[10]

The Delhi Declaration[11] adopted at the IV BRICS Summit in 2012 contains nine references of Africa (plus the same number of references of South Africa). On the one hand, the declaration reproduces the provisions of paragraphs 9, 19 and 20 of the Sanya Declaration. On the other hand, the Delhi Declaration mentions Africa in the context that BRICS has particular value and significance as a transcontinental platform for dialogue and cooperation (para. 3)[12], and in the expression of "commitment to the alleviation of the humanitarian crisis that still affects millions of people in the Horn of Africa and support international efforts to this end" (para. 37).

[10] The Third BRICS Summit Sanya Declaration (Sanya, China, April 14, 2011), [official website of the Ministry of Foreign Affairs of the Russian Federation]. http://www.mid.ru/brics.nsf/WEBdocBric/9AF718AA83D590FAC3257 8720022EB1A (as of 25.10. 2012).

[11] The IV BRICS Summit Delhi Declaration (March 29, 2012), [official website of the Ministry of Foreign Affairs of the Russian Federation]. http://www.mid.ru/brics.nsf/WEBdocBric/1DB82FF3745BA8FE442579D5004778E6 (as of 25.10. 2012).

[12] "BRICS is a platform for dialogue and cooperation amongst countries that represent 43% of the world's population, for the promotion of peace, security and development in a multi-polar, inter-dependent and increasingly complex, globalizing world. Coming, as we do, from Asia, Africa, Europe and Latin America, the transcontinental dimension of our interaction adds to its value and significance" (para. 3 of the Delhi Declaration).

The Fifth BRICS Summit (Durban, South Africa, 2013) was entitled "BRICS and Africa: Partnership for Development, Integration and Industrialization",[13] with this topic speaking for itself for the place of Africa in it.

The Fortaleza Declaration[14] adopted at the sixth BRICS summit in Fortaleza, Brazil, on July 15, 2014, mentions problem situations in certain African countries (Guinea Bissau and Madagascar (para.29), the CAR (para. 34)), mentions instability in the African region as a whole (para. 30) and establishment of capacities to address it (para. 36), provides for the confirmation of the "commitment made during the BRICS Leaders-Africa Retreat at the 5th BRICS Summit to foster and develop BRICS-Africa cooperation in support of the socioeconomic development of Africa, particularly with regard to infrastructure development and industrialization" (para. 65) and welcomes "the inclusion of these issues in discussions during the BRICS Business Council Meeting, held in Johannesburg in August 2013".

As of February 25, 2016, the latest summit document, i.e. Ufa Declaration[15], showed the joint position of the States in respect of the most important events in the political life of the world and followed, generally, the approach of the Fortaleza Declaration in a number of other issues. The former can be illustrated by para. 44, in which States expressed "serious concern about the escalation of the armed conflict in Libya, highlighting its extremely negative consequences for the Middle East, North Africa and the Sahel region", para. 51 where we see "concern about the scourge of terrorism and violent extremism and condemn[ing] the terrorist acts perpetrated by Al-Shabaab, Boko Haram and other groups, which pose a serious threat to peace and stability in Africa", para. 61, which speaks about deep concern with "the impact of the Ebola virus disease (EVD) in Guinea, Liberia and Sierra Leone, including its grave humanitarian, social and economic consequences for these countries and the potential spread of the disease". The latter follows from paras. 45 (on South Sudan), 46 (on Somalia), 47 (on Mali), etc.

There is an obvious gradual increase of attention to the region, which, however, does not claim to have the first place in the agenda of the BRICS common positions, despite the growing struggle of the world powers, mainly, over control of mining and sales markets for their manufactured goods on the African continent. After the apparent culmination of the 2013 South African Summit, Africa resumed its far from the central position on the BRICS agenda.

[13] The V BRICS Summit eThekwini Declaration and Action Plan of March 27, 2013 // [official website of the Ministry of Foreign Affairs of the Russian Federation]. http://www.brics.mid.ru/brics.nsf/WEBsamBric/EBB2830BE1D5F49D44257B410038C4 A5.

[14] The VI BRICS Summit Fortaleza Declaration adopted in Fortaleza, Brazil, July 15, 2014 // [official website of the Ministry of Foreign Affairs of the Russian Federation]. http://www.brics.mid.ru/brics.nsf/WEBsamBric/C9903DE836DEDC0244257D17002A78 9F.

[15] The VII BRICS Summit Ufa Declaration (Ufa, the Russian Federation, July 9, 2015) // [official website of the Ministry of Foreign Affairs of the Russian Federation]. http://www.brics.mid.ru/bdomp/brics.nsf/Ufa_Declaration_rus.pdf.

- To characterize the general perspective in which Africa attracts the collective attention of the BRICS countries, it should be noted that Africa is mentioned in the documents both directly and amongst other developing countries or, separately, poor (the poorest) countries.

For the first time, the issues of the world's poorest countries in the framework of achieving the MDGs, were mentioned in the Joint Statement of the BRIC leaders after the meeting in Yekaterinburg in 2009 (although Africa was not mentioned directly): "The poorest countries have been hit hardest by the financial crisis. The international community needs to step up efforts to provide liquid financial resources for these countries. The international community should also strive to minimize the impact of the crisis on development and ensure the achievement of the Millennium Development Goals. Developed countries should fulfill their commitment of 0.7% of Gross National Income for the Official Development Assistance and make further efforts in increasing assistance, debt relief, market access and technology transfer for developing countries" (para. 6).[16]

The issue of development and achievement of the MDGs has been getting more and more important during the years of cooperation within BRICS17. Following this trend, accession of South Africa enabled support of NEPAD (para. 25 of the Sanya Declaration and para. 36 of the 2012 Delhi Declaration), and, partly, the transition to practical steps aimed at creation of a new Development Bank (para. 13 of the Delhi Declaration). In the Ufa Declaration BRICS reaffirmed the States' commitments «to the ambitious post-2015 development agenda (para. 65).

The issue of reforming the financial and economic architecture of the world, which is a leitmotif of all four BRICS summits, is definitely related to Africa. However, it deserves separate consideration which goes beyond the scope of this article.

Another significant aspect of Africa's importance for BRICS is associated with the principles, instruments and mechanisms of achievement and maintenance of international peace and security. We shall recall that the "Arab Spring" began in Africa, Tunisia, and affected such African countries as Libya, Egypt, Algeria, Morocco and Mauritania, Western Sahara, Sudan, Djibouti. In the final acts of the BRICS summits, the issue of peace and security can be traced through several sub-issues. Firstly, through the emphasis on commitment to the rule of international law in international relations where there is no alternative to the multipolar world order[18]. Secondly, through the expression of strong commitment to multilateral diplomacy

[16] The Joint Statement of the BRIC Countries Leaders (Yekaterinburg, Russia, June 16, 2009), [official website of the Ministry of Foreign Affairs of the Russian Federation]. http://www.mid.ru/brics.nsf/WEBdocBric/F204322D9ED6118EC3257853003F4BD2 (as of 25.10. 2012).

[17] *See,* paras. 15-16 of the Brasilia Joint Statement of the BRICS Countries Leaders, paras. 17, 20 of the Sanya Declaration, paras. 11, 13, 28, 35, 36 of the Delhi Declaration.

[18] *See,* para. 12 of the Yekaterinburg Joint Statement of the BRICS Countries Leaders, para. 2 of the Brasilia Joint Statement of the BRICS Countries Leaders, paras. 3, 5, 7of the Sanya Declaration, para. 3 of the Delhi Declaration.

with the United Nations playing the central role in dealing with global challenges and threats.[19] Thirdly, through the solidarity to the role and importance of the UN Security Council, strengthening its fair involvement and effectiveness in the resolution of conflicts in the world.[20]

- To answer the question whose interests are promoted through BRICS and how it is being done, it seems useful to apply the words of Sergey Lavrov, the Minister of Foreign Affairs of the Russian Federation, to the African continent: when he talked about influence of BRICS in the international arena: "BRICS' influence in the international arena is a result of its members' growing economic power and their important contribution to global demography and the supply of natural resources. ... In terms of political influence, Russia and China are permanent members of the United Nations Security Council (UNSC), and all BRICS members play a prominent role in leading international organizations ... and regional organizations ..."[21] Thus, greater awareness of economic and political aspects of the issue is spreading.

Therefore, we turn to the data of two kinds, i.e. actual involvement of the BRICS countries in projects on the African continent and the strategies of our country's foreign policy.

According to T.L. Deych and E.N. Korendyasov,[22] two-thirds of the total volume of the BRICS countries' trade with Africa accounts for China, 20% - for India, 11% - for Brazil and only 4% - for Russia. China's total investment is estimated at 30-40 billion dollars, India's at 14-20, Brazil's at 8-12, and Russia's at 5 billion dollars. There are about 2,000 Chinese and 20 Russian companies on the continent, etc.

The disproportion in the economic involvement of Russia and China (the latter being the undisputed leader) is obvious. One could argue that China is now involved in the activities in Africa to the same extent as the Soviet Union was at the height of its activities in the African region[23].

[19] *See,* para. 14 of the Yekaterinburg Joint Statement of the BRICS Countries Leaders, para. 4 of the Brasilia Joint Statement of the BRICS Countries Leaders, para. 8 of the Sanya Declaration, para. 26 of the Delhi Declaration.

[20] *See,* para. 8 of the Sanya Declaration, para. 26 of the Delhi Declaration, paras. 27, 36 of the Ufa Declaration.

[21] S. Lavrov. BRICS is a new generation forum of a global reach. The article was prepared for an international collection of articles "BRICS – India – 2012" edited by prof. M.V. Larionova (Higher School of Economics, Russia), prof. J. Kirton. (Toronto University, Canada), Y. Alagh (Institute of Rural Management, Anand, India). http://www.mid.ru/brics.nsf/WEBforumBric/ F8C251DB09032059442579C000531B68 (as of 24.10.2012).

[22] T.L. Deych, E.N. Korendyasov, "*BRICS – A New Actor on the African Continent*" Asia and Africa today. 2012. No. 4, P. 24-28 (beginning), No. 6. P. 18-23 (ending).

[23] On the activities of the Soviet Union in Africa, see: L.V. Ponomarenko, E.G. Zueva. PFUR and Africa. M.: PFUR, 2010. P. 9-19.

Assessment of political involvement in African affairs requires an analysis of Russian foreign policy concept as a strategy for developing country's international relations. What place does Africa have in the Concept of the Foreign Policy of the Russian Federation adopted in 2013?[24] It takes one of the two last places. About Africa, there is a whole paragraph in the regional priorities at the very end of the section (para. 94), two references in the context of stabilization of the situation in the Middle East and North Africa (para. 88), and one reference in the context of interaction with the Muslim world (para. 90).

Analytical material prepared by A.M. Makarenko, the then-director of the African Department of the Ministry of Foreign Affairs of Russia[25], leads to the conclusion that, at present, Russia is primarily involved in peacekeeping activities on the continent (although, of the BRICS Member States, China still keeps the first place[26]), in staff training (China provides about 4,000 scholarships for African students in China, Russia – about 750[27]), as well as in preferential treatment for traditionally exported African goods, humanitarian assistance programs[28] and health care. All in all, Russia looks more than modest in comparison with China, the leader of influence.

To do justice, it should be noted that from the point of view of resources, Russia is not as interested in Africa as China is. There can also be seen some progress, however, slight progress in Russia's activities in African countries[29]; and the significance of BRICS for Russia as a "new model of global relations, built on top of the old barriers of East-West or North-South", "the experience of coordination of a number of major international political issues, in the first place in the Security Council"[30] seems to be even higher than the interest in the reform of the world financial and economic architecture.

[24] The document was not officially published, but it is available both in legal reference systems (Consultant Plus, Garant) and on the official websites of the state authorities of the Russian Federation.

[25] *See,* A. Makarenko, *Problems of Africa.*, http://civilg8.ru/g8russia/ publication/659.php (as of 08.10.2012).

[26] See: Africa and BRICS: new perspective and opportunities. No author // Bridges. Issue 5. August 2011.

[27] *Supra* note 23 at P. 20, 22.

[28] *See,* Russia slashes the debt of African countries – over 20 billion US dollars. The UN News Center. October 17, 2012. http://www.un.org/russian/news/fullstory news.asp?newsID=18470 (as of 24.10.2012).

[29] *See, e.g.,* the Concept of foreign policy of the Russian Federation of 2008 and 2000.

[30] S. Lavrov. BRICS is a new generation forum of a global reach. The article was prepared for an international collection of articles "BRICS – India – 2012" edited by prof. M.V. Larionova (Higher School of Economics, Russia), prof. J. Kirton. (Toronto University, Canada), Y. Alagh (Institute of Rural Management, Anand, India). http://www.mid.ru/brics.nsf/WEBforumBric/ F8C251DB09032059442579C000531B68 (as of 24.10.2012).

Conclusion

Today BRICS can be characterized as a quasi-organization with institutional structures still taking a concrete shape. BRICS has capacity to influence political and economic relations in the world, reflecting joint view of member States on the major contemporary problems facing the world. The fact that all the BRICS States are spacefaring-nations opens great horizons for further cooperation.

Thus, it appears that cooperation among the BRICS Member States in the field of exploration of outer space is a promising area and needs to be implemented both in the technical and in the legal spheres. It is suggested to unify national space laws and speak with one voice at the United Nations Committee on the Peaceful Uses of Outer Space and at the Geneva Committee on Disarmament on all key issues with a view to the early adoption of the Treaty on the Prevention of the Deployment of Weapons in Outer Space.

The growing importance of Africa in the foreign policy agenda of both individual BRICS Member States and the organization itself is an undeniable fact of our time. However, only those countries can benefit from these relatively new areas of cooperation that make considerable efforts in providing aid to African partner countries, on the one hand, and use public financing mechanisms to engage national companies to work on the African continent, on the other hand. Position of Russia, however, is weak in these two areas that prevent it from standing in a row with the BRICS partners in the area of "using" the investment potential of Africa.

Disaster Law and Community Resilience: NGT Initiatives

Prof. Amita Singh[*]

Introduction

The World Conference on Disaster Reduction which was held in January 2005 in Kobe, Hyogo, Japan adopted the present Framework for Action 2005-2015. Its main aim was to build the 'Resilience of Nations and Communities to Disasters.' This aim became the so called 'Framework for Action"(HFA) . Now that the deadline of 2015 is over and the Sendai targets have started moving national policies, it appears that 'resilience' is once again erroneously being misunderstood for a top down approach. Its interesting how the National Green Tribunal has been an unstoppable force to enlighten, straighten and push action into institutions which continue to work within outdated pedagogy of disaster policies.

Three questions remain perplexing in DRR initiatives; Are institutions prepared to face disasters? Are administrators moving ahead to achieve Hyogo framework for its national policies? Is India well equipped to move further in the direction of targets set forth in Sendai Declaration? Any form of governance reform to address the above three concerns ends up in a basic structural-legal reform, which we can safely call a Weberian framework of institutions, but this ironically also becomes the undoing of the Hyogo conscience. Its time that the disaster management policies get introduced to the critical pedagogy introduced in the Hyogo philosophy for formulating implementable and sustainable disaster management policies. The changed framework directing DRR policies towards critical pedagogy brings to surface many hidden realities which have never been treated in the mainstream understanding of disasters but which have the capacity and the inclination to bring down castles of the best structured models of public policies. NGT has not only introduced the role of law in resilience building but also addressed administrative accountability as a measure of community empowerment against disasters. This article highlights the critical pedagogy of disaster management policies as enshrined in the Hyogo Declaration and the role of NGT in facilitating this process.

Hyogo's Pedagogy of Disaster Management

Hyogo framework is a break from the earlier disaster management policies in converting a neutral and isolated science and technology based learning to the one

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embedded in political, social and cultural categories or what one may like to address as 'critical pedagogy.' It reaffirmed the connection of DRR policies to a process of accompanying learners (administrators, scientists and communities) to discover ways to care for rather than impose drill learning in human lives. DRR is not just about knowing but also about changing ourselves and the world we live in. Hyogo changed the whole perception of looking at disasters from the erstwhile 'knowledge banks of science' which treated people as objects to be acted upon during crisis but as a relationship which generates compassion, peace, togetherness and sustainability. Ironically, this has neither been able to influence nor change the manner in which disaster management institutions have been functioning even though we are standing over the Hyogo deadline of 2015. Even though some individuals have become better, institutions follow the old bureaucratic paradigm.

Introduction of 'resilience' in disaster management indicated a need for institutional transformation, a refreshing institutional pedagogy of understanding the factors through which human capabilities return to normalcy after absorbing the trauma and shocks or surviving through devastating infrastructural, physical and emotional trauma striking them down and pushing them several years behind or even leaving them standing all alone in a rubble of human settlements. The whole new meaning brings the state in a new garb of decentralized constellation of community institutions being coordinated by enlightened and knowledge based professional district level bodies. Knowledge sharing would entail that governance opens up a concern about preexisting community vulnerabilities such as disability, gender, age and poverty which prevents them from deciphering warnings and even if they did their inability to be rescued the way those who could shout, run and find their way to safety. What is institutional preparedness for the trafficking and poaching of young girls, women and children during disasters? Several thousand women and children were trafficked through June 2013 Uttarakhand disaster alone but policies are still not open to anything beyond property and cash loot which are dealt with under IPC and CrPC sections through a fairly outdated set of dismissive police personnel. National Disaster Management Authority (NDMA) has to explore its new proactive leadership role in the midst of clueless and untrained local governance institutions.

Countries are working hard to identify catalysts that engender progress in disaster risk reduction. Law has been one such real time catalyst lately being discovered by institutions for disaster risk reduction. Since 2005, for example, 121 countries have enacted legislation to establish policy and legal frameworks for disaster risk reduction, 191 countries have established HFA Focal Points and 85 countries have established National Platforms for disaster risk reduction. It is ironical that lack of critical legal research in this area has inhibited its true flowering in the field of disaster management. India's political response to the catastrophic disaster in Nepal is commendable. This had been was treated as a fundamental priority of governments under the Hyogo Framework for Action (2005-2015) which was brought out in the wake of the devastating Tsunami. The design of this framework is known to have changed the pedagogies of disaster policies from a neutral and isolated science and technology based learning to the one embedded in political, social and cultural categories or what one may like to address as 'critical pedagogy.' It reaffirmed the connection of DRR policies to a process of accompanying learners

(administrators, scientists and communities) to discover ways to care for rather than impose drill learning in their lives. DRR is not just about knowing but also about changing ourselves and the world we live in. Hyogo changed the whole perception of looking at disasters from the erstwhile 'knowledge banks of science' which treated people as objects to be acted upon during crisis but as a relationship which generates compassion, peace and sustainability. Ironically, this has neither been able to influence nor change the manner in which disaster management institutions have been functioning as we reach the Hyogo deadline of 2015.

Countries are systematizing national data, assessment and systematically monitoring progress towards Hyogo Framework of Action (HFA) .UNISDR has been collecting comparable data from governments and reviewing progress through the HFA. A multi-dimensional approach is now being increasingly adopted by nation states which are focusing upon the following;

1. Gender has been recognized as a decisive factor yet it is an area which has seen the poorest performance.
2. Strategies of capacity development is now at the core of disaster management policies and it has combined with social equity and vulnerability of communities and individuals.
3. The geographically isolated communities and their environmentally linked socio-economic vulnerabilities have become a major concern and a driver of progress.
4. An increasing need for community engagement has been emphasized. This entails partnerships and coping mechanism which are community based and are rooted in indigenous wisdom and local skills.

Disaster mitigation and risk reduction policies require more than inclusive representation from diverse sectors. In a large number of cases such as the one reported[1] from Indonesia in 2011 that despite the available multi-sectoral disaster reduction platform, its work has not even been minimally possible as it does not have a work plan or a budget which could mobilize public-private members into the fray. At this juncture the role of National green Tribunal became crucially important firstly for integrating disaster risk considerations more effectively with sustainable development policies, planning and programming at all levels, Secondly, strengthening institutions and communities and lastly, incorporating risk reduction approaches systematically in designing and implementing programmes for emergency preparedness, response and recovery, including programmes for rebuilding affected communities.

These changed pedagogy of HFA has indicated objectives reflect the need to make disaster risk reduction an integral part of existing policies and infrastructure rather than addressing it as a separate activity. By responding to this need, countries can take advantage of investments already made and policies currently in place to achieve the goal of diminishing the impact of disasters on affected populations. Instead of reacting to disasters and trying to recover only after the event, countries

[1] See http://www.preventionweb.net/english/hyogo/progress/ reports/?pid:223&pil:1

can emphasize reducing the risk of disasters before they occur, focusing on planned resilience rather than on crisis management. The Sendai Framework is a non-binding agreement which recognizes that the State has the primary role to reduce disaster risk. It however admits that the only possible manner to achieve this is the state should draw partners to facilitate this undertaking.

Interrogating Resilience

The critical pedagogy of disaster management suggests that whenever a state bypasses community cultural norms prevailing within a given space it generates a form of anxiety (Giddens's 'existentialist anxiety' 1991,pp.187-201) which may more appropriately be addressed as termed by Lefebvre (1995,p.281) and Giles(2006) as 'spaces created by violence'[2] which 'subordinates and totalizes the various aspects of social practices – legislation, culture, knowledge education-within a determinate space; namely the space of the ruling class's hegemony over its people and over the nationhood that it has arrogated.'(Lefebvre 1995, p. 281) The community spaces are likely to get traversed by what the state believes to be 'resilience building' which in reality may be working against it. Lefebvre indicates that it is the mass culture of disaster management which would also define resilience consequently turning community effort on resilience building as more interfering and authoritarian. He writes, 'It (violence) manifests itself from the moment any action introduces the rational into the real from outside by means of tools which strike, slice and cut and keep doing so until the purpose of their aggression is achieved.'(p.289). The disaster law is expected to demand and make sure that it is not just the nuts and bolts understanding of resilience building but the cultural, anthropological and ecological understanding of resilience which can bring some meaning to disaster management.

Situations, perceptions and inclinations have changed since the UN declared 1990s as International Decade for Natural Disaster Reduction(IDNDR). The decade emphasized the need for investments into science and technology purchases and research. Many studies from the Intergovernmental Panel on Climate Change (IPCC) and mid term reviews of IDNDR suggested a need for connecting DRR policies to sustainable development as the frequency of the rise in extreme weather conditions had doubled hydro meteorological disasters resulting into glacier melting, floods, sea level rise, hurricanes, tsunami, landslides and earthquakes. The International Organization for Migration warns of an ever increasing number of ecological refugees which could be more than 200m by 2050. Most Asian cities which are currently glamorizing growth models of swank buildings and luxury hangouts due to the rise of their GDPs are also encountering increased population density, clustering of settlements and vulnerability to urban resources of water, transport, energy and fresh air. Any disaster in the midst of this unprepared and clueless playboy city system may spell a doom for the life and progress of any nation. It was in this context that global policy makers realized that disaster resistance be replaced by 'resilience'

[2] Henri/Lefebvre, 1991, links the desire to create a space with the violence of excluding others through a powerful control.

and to carry forward the Hyogo Framework 'to build a culture of prevention' with institutions which could build their capacity continuously through multi-stakeholder partnerships and a shared vision for prioritized implementation. The publication of World Bank document on 'Climate Resilient Cities…' (2008) attracted attention of policy makers on a megacity resilience framework. Introduction of 'resilience' in DRR indicated a need for institutional transformation, a refreshing institutional pedagogy of understanding the factors through which human capabilities return to normalcy after absorbing the trauma and shocks or surviving through devastating infrastructural, physical and emotional trauma striking them down and pushing them several years behind or even leaving them standing all alone in a rubble of human settlements. It further opens up a concern about their preexisting vulnerabilities such as disability which prevents them from deciphering warnings and even if they did their inability to be rescued the way those who could shout, run and find their way through safe passages could. What is institutional preparedness for the trafficking and poaching of young girls, women and children during disasters. Several thousand women and children were trafficked through June 2013 Uttarakhand disaster alone but policies are still not open to anything beyond property and cash loot which are dealt with under IPC and CrPC sections by regular police people as the framework for emergency governance to deal with human security is not even an idea so far with the disaster management agencies of India.

DRR has been littered with many deeply relevant terms like prevention, preparedness, resistance, mitigation, reduction and adaptation. The ball is now with the centres of social sciences to generate an appropriate understanding of 'resilience' which should ideally construct the commandments of disaster management institutions as a prelude to streamlining DRR policies. The Stokholm Resilience Centre brought various precincts of ecologists and social scientists together to define resilience as the capacity to deal with change and to continue to develop. While this is relevant for the overall framework of sustainable development it nevertheless occupies a core agenda of DRR policies. On a minimal scale it can be understood as (a) Carrying capacity of human and infrastructural systems to withstand shocks (b) Ability for re-organizing and self-management after the shock (c) ability to generate a never ending relationship for learning and adaptation. Resilience brings down the DRR framework from top down jerky, adhoc and philanthropic institutional drills to a well prepared local institutional capacity building in partnership with communities. Who would deny that local institutions and communities are our first defence to disasters and they do better when they have their funds, their freedom and their independent multi-stakeholder partnership with relevant agencies for training, capacity building and emergency governance. It is well known that in the absence of ideas and commitment state disaster management authorities have unused and unallocated funds resting with departments unattended.

NGT Initiatives

The Indian Constitution has ample provisions through which courts can legitimately impart justice to the victims. These are part of the discretionary jurisdiction of the courts and are more often invoked to protect the rights and entitlements of suffering individuals or communities. Articles 32, 136, 142 and 226 allow Courts to take *sou*

motu cognizance of a situation and deliver justice to the victims. Article 142 has been a much contested section of the powers of the Supreme Court. While in *E.K.Chandrasenan* v. *State of Kerala*[3] this Article was held to empower the Supreme Court to deliver complete justice and initiate *suo motu* proceedings it was also considered to be used with caution yet should not be controlled by any statutory provisions or enactments in delivering justice.[4] Article 226 vests the High Court with suo motu jurisdiction for the protection of rights as enshrined in Chapter III and for imparting justice to the affected party. There have been a large number of suo motu decisions taken by the Supreme Court as well as the High Court in case of CRZ violations and against the construction of apartments and hotels within the prohibited zone in Kochi, Ernakulum and Vembanad. One could link the development of law which in this case is about the CRZ laws in relationship to fishing communities, which could have high potential of enhancing resilience levels of local communities to coastal disasters.[5]

An added environmental focus into the above powers of courts Following the World Commission of Environment and Development directives the National Green Tribunal was constituted through a Parliamentary Act 2010. The Tribunal functions in many ways to build community resilience and ensure human security against environmental hazards and disasters. It works to protect and promote (1) 'sustainable development', (2) 'polluter pay principle' and the (3) 'precautionary doctrine'. The tribunal has been given wide powers to look into and watch the functioning of various acts for ground water, water bodies, air, rivers, sea and coastal regions, mountains etc. Under its Chapter III, Section 19, (1-3) the tribunal has been given wide powers and not being bound by the procedure laid down by the Code of Civil Procedure but shall be guided by the principles of natural justice. It has been given the power to regulate its own procedure and this is understood as an unwritten right to try cases *suo motu* to prevent harm to environment and human life. The Tribunal has also not been bound by the Indian Evidence Act 1872 despite the fact that for the purpose of discharging its functions, it would be vested with the same powers as are vested in a civil court under the Code of Civil Procedure 1908.The NGT is expected to implement the decisions taken at various UN Conferences on environment protection. In the last one year the *suo motu* proceedings of the National Green Tribunal have been recognized as a valuable contribution to environmental protection following which the government has increased its budgetary grant by four times from a meager Rs. 8 crores in the past to Rs. 32 crores.

The National Green Tribunal is currently the strongest protector against environmental hazards turning into disasters has attempted to steer through despite

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[3] AIR 1995 SC 1066

[4] *Laxmidas Morarji* v. *Behrose Darab Madan*, (2009) 10 SCC 425

[5] see Rodrigues,S., Balasubramaniam,G., Peter, S.M.,Duraiswamy, M & Jaiprakash P. (2008) *Community perceptions of Resources, Policy and Development, Post-Tsunami interventions and community institutions in Tamil Nadu*, India,UNDP/UNTRS Chennai & ATREE Bangalore, India.

the criticism. The NGT has taken action against Mandla district mining[6] in the state of Madhya Pradesh on the plea that its activities lie in the midst of two prominent national parks ie; Kanha National Park and Bandhavgarh National Park and so would do irreparable harm to the wildlife habitat. The tribunal also highlighted the 'irresponsible attitude' of miners in bypassing the approved production capacity by the competent administrative authority. Close to Delhi the capital city, NGT has initiated proceedings against the Delhi government for constructing roads in Asola Wildlife Sanctuary. In a major battle to protect the Mangar Bani forests in the Aravallis ranges over which the Delhi, Haryana and parts of Uttar Pradesh and Rajasthan are dependent upon as the only remaining rechargeshed for water and green corridor for wild life in the midst of Seismic Zone IV, it has also been classified as a natural conservation zone in the draft regional plan 2021. The massive media coverage led by the Hindustan Times reporter Snehil Sinha and the environmental group led by Chetan Agarwal and Jamia Millia Islamia university's Media department strengthened the movement to 'Save Mangar Bani Forest'. Because there has been a preexisting 'law' that communities could get together to save Mangar Bani from the real estate developers.

The task of bringing resilience is fraught with political contestations as well as acrimonious legal battles not just between communities, private players and the government but also amongst government organizations. NGT[7] faced the ire of the Kerala government when it was addressing concerns in an appeal by two Thiruvananthapuram-based environmental activists, Wilfred J. and V. Marydasan, seeking the tribunal's intervention to direct that coastal areas throughout the country to be protected under the 1991 CRZ Notification and specifically to save the Vizhinjam coast of "outstanding natural beauty" and those around which were "likely to be inundated due to rise in sea level consequent upon global warming." Jogy Scaria,the counsel for the Kerala government questioned the *suo motu* powers of NGT to intervene in the CRZ notifications and environmental clearances already given to the Rs.5000 crore Vizhinjam Sea Project in Kerala by the MOEFCC in January 2014. The NGT took cognizance of the fisher folk communities as well as the fragility of ecosystems which were both to be protected.

The Green Tribunal was again questioned when its Southern Zone headed by Justice M. Chockalingam and the expert member Prof. Dr.R. Nagendran issued notices *suo motu*[8] to the Commissioner, Chennai Corporation for the closure of 869

[6] Judgment of the *National Green Tribunal (Central Zonal Bench, Bhopal) Suo Motu* v. *Ministry of Environment &Others* dated 04/04/2014 regarding Dolomite mines in Mandla District of Madhya Pradesh and being a threat to Tiger corridor in Kanha. Original Source: http://www.greentribunal.gov.in/judgment/16_2013(App)(CZ)_4Apr2014_final_order.pdf

[7] Wilfred J., *Marydasan* v.*Ministry of Environment and Forest, State of Kerala, Vizhingjan International Seaport Ltd.*(a State government undertaking) Original Jurisdiction appl. no.(74), Appeal no.(14) of 2014. Justice Swatantra Kumar took note of fisherfolk communities and the ecosystem losses in the judgment.

[8] In Application No.40 of 2013 *SZ, Suo motu* v. *The Commissioner, Corporation of Chennai and others*, Application No. 181 of 2013 SZ, *Suo motu v. Union of India and others*, and Application No. 299 of 2013 *SZ, Suo motu* v. *Additional Chief Secretary to Government, contd...*

companies of Packaged Drinking Water Manufacturer's Association in Chennai. This action was followed after a newspaper report on concerns regarding ground water and pollution control measures in the Chennai city. The reaction to prevent a proactive NGT position came in the form of questioning[9] the very grounds of its *suo motu* jurisdictional powers under the NGT Act of 2010. A few months later we see the blatant exposure of this government organization in its helplessness in preventing floods by blaming the incessant rains. Floods only exposed the environmental neglect emerging out of lethargic, corrupt and irresponsible governance alliances which these public organizations develop to give a scintillating modern look to a city. The expose was on many fronts (ground water dip, loss of water bodies, blocked drainage, illegal constructions, concretization of green spaces etc) and the Chennai corporation did pushed the whole city to a kind of disaster, death and displacement never experienced before by its inhabitants.NGT could play a powerful role in resilience building in urban and rural terrains. Disaster law is well positioned to fix accountability of disasters as it is a record keeper of performance and decision making despite the long gestation period within which a disaster gradually builds up to surface. Therefore it is also a tool to interrogate mega structures of globalization which are built within the neo-liberal rhizome[10] state structures.

The Ministry of Environment, Forest and Climate Change (MOEFCC) accused NGT for causing major embarrassment to the government. However, NGT quickly snapped back to clarify that the MOEFCC is merely an administrative body to sanction funds for the NGT to function and beyond that it cannot have any controls. It also explained that the language of the provisions of the NGT Act is such that notwithstanding the power of judicial review under Article 226 and Article 32 for the High Courts and the Supreme Court respectively, it is by necessary implication given the power of judicial review under Section 19(1-3) as well. To deny this would be a 'Travesty of Justice'. The government later withdrew its affidavit.

The trajectory of NGT itself suggests that mitigation and risk reduction would not occur without the justice dispensation institutions are not strengthened and made autonomous of governmental controls.

Environment and Forest Department and Application No. 294 of 2013 *SZ, Suo motu* v. *Union of India and others*.

[9] CJ Sanjay Kishan Kaul and Justice T.S.Sivagnanamp on hearing the writ petition of *Sundararajan* v. *The Deputy Registrar NGT Southern Zone*,(No.35098,2013) prevented the NGT (SZ) from using *suo motu* powers in this case.

[10] 'Rhizome' state structures is a philosophical concept developed by Deleuze and Guattari in their book *Capitalisme et Schizophrénie* (1972) which came up in English translation by Brian Massumi in 1987 as *A Thousand Plateaus.* Rhizome as an underground subterranean plant has root like stem and leafy apex which defies organizational structure and planning. It is unplanned, can connect to anything, non-hierarchical and can ceaselessly establish connections between semiotic chains, organizations of power and circumstances related to arts, science, and social struggles. This model of culture is being used in this paper to describe a neo-liberal opportunistic connections which defy a regular planning mechanism and chronological order of decision making.

Conclusion

One can assert that a clearer framework of disaster law is required to deter a disaster provoking action, environmental damage and institutional apathy, corruption, oversight or negligence in attending to it. It should adapt to the international humanitarian response laws to help a timely transportation of international relief material and aid to affected people. In many earlier occasions tons of food items and clothes were spoiled due to inability to get custom clearances. Disaster law should be located at the meeting points of accountability and autonomy and this is impossible without the use of scientific information delivered by GIS data (on aquifers, land and its carrying capacity), wild life experts (on critical animal zones), geo-chronologists (on geological processes, mineral lives and tectono-metamorphic histories) and life sciences (food, distress ecology and ecosystems) and many other areas. Lastly, an integrated framework of emergency governance and the role of regular police and district agencies be redesigned to attend to disasters. It is here that the role of ICT innovations, practices and relevant people friendly software support be made available to people affected by disasters. This would also mean that a certain section of regular but.better trained district administrative personnel, Police, CISF, Fire department and Home Guards should constitute a local chapter of NDRF and should spring into action when required. On the other hand this could also ensure safety to key papers of birth, death, property, land and wealth through safety areas so that compensation claims become state responsibility rather than noise and lobby.

DRR is currently a victim of pedagogisation which is reinforcing identities and subjectivities to people who have become its objects of rote learning. It is leading the nation to a cultural production of policies for preparedness per se on relief and rehabilitation. It is high time that institutions of justice dispensation such as the NGT should rework the boundaries of DRR framework according to the true meaning of resilience.

Securing Equality through Positive Measures*

*Prof. M.P. Singh***

Introduction

Among the basic rights of all human beings, if not of other species, the right to equality is ranked foremost along with the rights to life and liberty. The preamble to the United States Declaration of Independence 1776 placed equality of men in the forefront among the self-evident truths even though it took over one hundred years to guarantee the right to "equal protection of the laws" in the Constitution in 1868 in the States and much longer in its application against the United States by reading it in the due process clause of the V Amendment. Contemporarily the French Declaration of the rights of Man and of the Citizen of 1789 ranked equality along with liberty in the forefront of those rights. Dworkin, who closely engaged himself with equality and sincerely believed that an equal society is better than an unequal society, titled one of his major works *Equality as Sovereign Virtue*. Many other scholars and reformers in the West and the East including the Buddha engaged themselves with the issue of equality. But even after it was recognized as a constitutionally protected basic right, the right to was for long was generally conceptualized as a negative right not to be discriminated against. It did not acquire a positive content ensuring equality of results or equality in fact. Consequently in spite of the recognition of equality as a basic right the society continued to be starkly unequal. Even polities based on Marxist or communist ideology could not make much difference in this regard. In the light of this background and widespread inequality of all colours and kinds existing in Indian society since time immemorial, the makers of the Constitution of India not only placed the right to equality in the forefront among the Fundamental Rights (FRs) but they also gave it a positive content by empowering and in turn obliging the state to take positive steps to eliminate existing inequalities in order to bring equality in the society so as to create equality of opportunity to all to move forward and live a satisfactory life.

Accordingly soon after the commencement of the Constitution and in some parts of the country even before the commencement of the Constitution positive steps were

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* This paper is a revised version of my paper titled *Ashoka Thakur* v. *Union of India*: A Divided Verdict on an Undivided Social Justice Measure published in 1 NUJS Law Review, 193 (2008), being republished for wider circulation.

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taken to move forward those sections of the society whom the social or religious traditions or other reasons always kept behind. These positive steps were prominently taken in the form of reservation in the educational institutions and public services besides the political reservation for which the Constitution made separate provisions. These reservations or the so called quotas have, however, been a bone of contention from the very inception of the Constitution giving rise to legal battles requiring several amendments in the Constitution as well as resulting in violent reactions resulting in loss of lives and property. In spite of serious engagement of the state organs including the judiciary, social, legal, political and other thinkers and publicists the constitutional goal of equality continues to elude. The same issue has also engaged me since long. In the same sequence I try to make one more attempt to lay down the roadmap for achieving that ideal of equality which the Constitution makers strongly held and incorporated in the Constitution not only in the negative but also in the positive terms. I start with an issue that arose a few years back but continues to hound us as much even today.

The Thakur Case

Ashoka Kumar Thakur v. *Union of India*[1] is about the validity of the Central Educational Institutions (Reservation in Admission) Act, 2006 and the Constitution (Ninety-third) Amendment Act, 2005 which introduced clause (5) in Article 15.[2] The multi-party Parliament with no political party having absolute majority in it passed the Amendment as well as the Act unanimously. The Act provides for the reservation of 15, 7 1/2 and 27 per cent seats in Central educational institutions for the Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs) respectively. Certain educational institutions such as those in tribal areas covered by the VI Schedule to the Constitution, the institutions of national and strategic importance, minority educational institutions and programmes or courses at high level of specialization are excluded from the operation of the Act. The Act also provides for increase in the number of seats in institutions in which reservation is made so that the unreserved seats are not less than the seats available in the immediately preceding year. It also provides that if for academic reasons it is not possible to make the entire reservation for OBCs in one year it could be done in up to three years. While reservation for SCs and STs was not questioned, serious questions were raised with respect to the reservation for OBCs which the Act defines as "the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government." The Statement of Objects and Reasons appended to the Act states that in the light of Article 46 reservation under the Act

[1] Writ Petition (civil) No. 265 of 2006 decided on 10 April 2008. Hereafter, Thakur. References are to paragraphs of the judgments of different judges and not to page numbers.

[2] Cl. (5) of Art. 15 reads: Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the state from making any special provision, by law, for the advancement of any socially or educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to the educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

was based on Article 15(4) but for excluding minority institutions from its scope reliance was also placed on Clause (5) of Article 15.

Thakur filed the initial petition in March 2007 against the decision of the Central Government to implement the Act from the academic session starting that year. A two judge bench of the Court stayed the Government's move to the extent it applied to OBCs but not in respect of SCs and STs.[3] In view of important questions concerning the interpretation of the Constitution involved in the petition it was later referred to a constitution bench of five judges. The main grounds for the challenge to the Act and the Amendment before the constitution bench included: that (i) the principle of equality contained among others in Articles 14, 15(1) and 29(2) required that all admissions to educational institutions must be made on merit; (ii) any reservation is suspect and must be subject to strict scrutiny based on compelling state necessity; (iii) the Amendment was against the basic structure of the Constitution as it violated the principle of secularism by giving special favour to the minorities and also disturbed the balance between various Fundamental Rights (FRs) and between the FRs and the Directive Principles of State Policy (DPs); (iv) that the determination of OBCs or socially and educationally backward classes (SEBCs) was not consistent with the Constitution and the "creamy layer" must be excluded from amongst them; (v) clauses (4) and (5) of article 15 overlapped and conflicted with each other and could not stand together; (vi) the Act violated the principle of non-delegation of legislative power to the executive by authorizing the latter to determine the OBCs; (vii) the Act should have provided for a time limit for the operation of reservation; (viii) 27 per cent reservation for OBCs is too high; (ix) no reservation beyond 10 + 12 stage is valid; and (x) the Amendment and the Act were passed by the self-seeking politicians to please the voters even though they were against the national interest.

On April 10, 2007 the five judges announced their four separate opinions expressing concurring and conflicting views on several issues. But all of them upheld the Act in its entirety and rejected all the grounds of challenge stated above subject to the clarification that in the enumeration of OBCs the "creamy layer" from amongst them must be excluded from the provision for reservation. Exclusion of creamy layer, according to the Court, is an essential constituent of OBCs if OBCs are determined on caste lines. A group of persons based on caste is not OBC unless the creamy layer, if any, is removed from it. Exclusion of creamy layer is an essential requirement of reservation for OBCs. The Court implied this requirement in the Act and therefore upheld it as such. It also clarified that the creamy layer concept does not apply to SCs and STs.[4] All the judges also upheld the Amendment as it applied to the issues in hand. The Amendment applies both to public and private, whether aided or unaided, educational institutions but the Act applies only to Central Government institutions. No private aided or unaided educational institution is covered by the Act and no such institution or any one on their behalf approached the Court to question the Amendment as it applies to them. Four of the judges, including the Chief Justice,

[3] *Ashoka Kumar Thakur* v. *UOI*, Writ Petition (civil) 265 of 2006 decided on 29.03.2007.

[4] Thus the existing doubts on this point raised after *M Nagaraj* v. *Union of India*, (2006) 8 SCC 212 have stand removed.

confined their judgments to the issue in hand and left the determination of the validity of the Amendment with regard to the private unaided educational institutions for the future to be decided in an appropriate case, i.e. in which that matter directly arises. One of the judges, Bhandari J, however, went into the entirety of the Amendment and invalidated that part of it which applied to private unaided educational institutions. He does not take the issue of private aided institutions which implies that he upholds the Amendment in regard to them.

Background of the Case

For analyzing the core issues which arose in *Thakur* I need not go into the history of reservation in this country, which is well recorded at least since the later part of the nineteenth century, nor need I examine many battles that have been fought in different courts on this issue ever since the commencement of the Constitution. The unprecedented violence that broke out on the implementation of the Mandal Commission recommendations in 1990 the major constitutional issues concerning reservation had been settled in *Indra Sawhney* v. *Union of India*[5] which appeared to have put a moratorium on future controversies. However, that did not happen. At least the denial of reservation in promotions to higher positions in state services decided in that case required immediate clarification that it did not apply to SCs and STs. That led to an amendment of Article 16.[6] Later partly because of that case and a few other cases decided after it Article 16 had to be amended twice and a proviso had to be added to Article 335 by another amendment.[7] The validity of those amendments was also contested, which the Court unanimously upheld.[8]

As *Sawhney* was about reservation in state services under Article 16(4), doubts were expressed[9], which I did not share, if the propositions laid down in it applied to special provisions in educational institutions under Article 15(4).[10] Because of or irrespective of it, issues concerning reservation in admissions to educational institutions continued to crop up in the courts. They included issues such as the basis of reservation, level up to which reservation could be made, quality and quantity of concessions, quantum of reservation, etc. In the meantime under the spell of economic liberalization and globalization the Court gave two important decisions which had far-reaching implications for the education policy of the country. Differing from the monumental decision in *Unni Krishnan* v. *State of AP*,[11] which recognized the FR of every citizen to free and compulsory education up to elementary level but left open if running of educational institutions was occupation or vocation under Article 19(1) (*g*), the Court in *TMA Pai Foundation* v. *State of*

[5] AIR 1992 SC 477.
[6] See, the Constitution 77th amendment inserting cl. (4-A) in Art. 16.
[7] See, the Constitution amendments 81st (2000), 82nd (2000) and 85th (2001).
[8] See, M. Nagaraj v. Union of India, (2006) 8 SCC, 212.
[9] See, eg, DD Basu, Commentary on the Constitution of India, vol. 2, 2047-48, 8th ed. (2007) by Chandrachud et al. and MP Jain, Indian Constitutional Law, 1128, 5th ed. (2003).
[10] See, MP Singh, VN Shukla Constitution of India, 78 ff, 10th ed. (2001).
[11] (1993) 1 SCC 645.

Karnataka[12] held that running of educational institutions was an occupation entitled to protection under that article as well as under Article 26. Going further in *PA Inamdar* v. *State of Maharashtra*[13] the Court also held that the occupation of running educational institutions in private hands without aid from the state, protected under Article 19(1) (*g*), was not subject to the requirement of reservation and such reservation could not be justified under Article 19(6). These decisions, especially the latter, necessitated the Amendment.

Amendment did not cause any violent reaction though in intellectual circles it was seen as a blow to economic liberalization and free flow and progress of education. The former Chief Justice of India, who wrote the unanimous opinion for the Court in *Inamdar*, publicly expressed his doubts on its validity and wished its invalidation by the Court.[14] But soon after the passing of the Act and the government notification for its implementation, wide spread demonstrations and violence, as stated above, followed. Thus a concerted design to rewrite the Constitution appears in the background. To begin with, the policy of economic liberalization announced in 1991 blunted the impact of implementation of Mandal Commission recommendations subsequently upheld in *Sawhney* in public employment by reducing the scope for public employment. Later in *Pai* education in private hands was made a FR and several regulations of it which were approved in *Unni* were set aside. Initially *Pai* was about the FRs of minority educational institutions but for unclear reason it was later extended to education in private hands in general. Finally, in the name of clarifications to situation created by *Pai* and its interpretation in *Islamic Academy of Education v. State of Karnataka*[15], in *Inamdar* the Court brought the private educational institutions at the level of unaided minority schools which were exempted from the requirement of reservation. In the process the Court rewrote, rather subverted, the Constitution both in respect of reservation as well as minority rights. The Amendment was, therefore, necessary for the restoration of the Constitution. It has not restored the Constitution completely but at least reminds us that in matters of education minorities and majority stand at different footing.

Courts as Mediators

The foregoing observations must not, however, be taken to undermine the immense contribution of the courts in defending the Constitution and making it acceptable to those who see it an obstacle in their way. *Thakur* is one of the several major examples of the role that the courts have played in sustaining and strengthening our constitutional democracy ever since the commencement of our Constitution. Courts may be and are often projected as anti-democratic institution and any number of examples may be pressed into service to prove that point. Even on the issue of reservation several examples may be given to prove that the courts could have done

[12] (2002) 8 SCC 481.
[13] (2005) 6 SCC 537.
[14] I could not have the time to trace the copy of the *Times of India*, New Delhi edition in which the statement of the Chief justice RC Lahoti along with his photograph appeared on the cover page and which I had preserved for my records.
[15] (2003) 6 SCC 697.

better by not entering into the controversy. But if all controversies could have been sorted out by vote, the courts would have been unnecessary. The mere fact that courts have always existed in organized societies and that ever since the process of binding written constitutions was led by the Constitution of the United States all democratic countries in the world have assigned the job of resolving constitutional controversies to the courts, is enough to prove their inevitability for sustaining a constitutional democracy.

Take *Thakur*. Even though the Amendment and the Act were passed unanimously by Parliament, as soon as the decision to implement the Act was announced widespread violence, as already noted, broke out in Delhi and several other parts of the country. It subsided as soon as the Court gave interim relief and completely silenced after the matter was referred to the constitution bench. The final decision was hailed by both sides and the media reports in the evening and on the following day gave clear indication that with minor reservations all parties were satisfied with the outcome.[16] But while the government and all political parties gave up their reservations on creamy layer issue and decided to implement the Act as interpreted by the Court, a few days later the anti-reservationists comprising mainly medicos surreptitiously entered the Supreme Court compound and protested against the decision. Again, after a gap of a few days a bigger protest was organised close to Parliament causing traffic blockage and breakdown of law and order.[17] Interestingly, again most of the protestors were medicos and, therefore, on being taken into custody they threatened to paralyze all hospitals in Delhi by giving a strike call unless released immediately without bail. The government conceded and let them go without bail. Later some one filed a petition in the Delhi High Court against reservation at post-graduate level[18] while in another petition the Calcutta High Court stayed implementation of OBC reservation in IIM Calcutta on the same plea that no reservation is permissible in post-graduate courses.[19] On appeal against the Calcutta High Court decision and application to transfer all petitions in different High Courts to the Supreme Court, the Supreme Court has allowed the implementation of the Act subject to the exclusion of creamy layer.[20]

A far graver situation resulting in several suicides, self-immolation, deaths and large scale destruction of property was caused by anti-reservation violence in 1990 on Central Government's decision to implement Mandal Commission recommendations in Central services providing for 27 percent reservation for OBCs. At that time also the Court proved to be a great healer. But after the Court had upheld the Government decision subject to some clarifications, one of them being the exclusion of creamy layer, it could be expected that the controversy on 27 percent reservation for OBCs had died for ever. Perhaps knowing the difference between services and education the Government took the risk of not excluding the creamy layer in the implementation of the Act. But after the Court has decided on the

[16] See, the news reports in any daily news paper of 11 April 2008.
[17] See, The Times of India, (Delhi Ed.) 7 May 2008, p. 7.
[18] *Id.*, at p. 19.
[19] The Times of India (Kolkata Ed.), 15 May 2008.
[20] The Times of India (Kolkata ed.), 17 May 2008, p. 3.

exclusion of creamy layer and the Government has agreed to do so the controversy must have died. But as we look back at the history of reservation under the Constitution, which started soon after its commencement, every effort to resolve controversies arising from or surrounding it has been defeated for one reason or the other. Let us, however, not give up our faith in our constitutional system which will in due course amicably settle our all controversies.

Sharing of Experience

From my limited experience of university life I know how decision to reserve seats even for SCs and STs, not to talk of OBCs, in admissions is opposed on all sorts of grounds from fall in academic standards to division of society on caste lines. Even if the decision is ultimately taken under the force of law the admission bodies try to trace out all possible loopholes to deny admission to these categories. In matters of employment it is even worse. To begin with, the universities do not take the decision to implement reservation and even if, again under the pressure of law they take, they adopt every possible tactics to defeat its implementation for not letting anyone be appointed to the reserved positions. Out of several academic posts to which appointments had to be made a university went to the extent of designating every post as specialty to defeat reservation on the Court created justification that single post cannot be reserved. Our dismal progress in this respect is self-evident from the statistics about the presence of reserved categories especially the SCs and STs for whom we have provided reservation in Central and State services from almost the very beginning of the Constitution. If every other effort to block reservation fails resort is taken to the courts which have not been sympathetic to reservation except on and off since the emergency of 1975-77. The major break trough, if any, came in *Sawhney* which was also defeated by all sorts of technical interpretations requiring more than one amendment in the Constitution to overrule the Court and restore the beleaguered original position.[21] Even if the Court supports the constitutional position a fresh round of blockages starts as we have just noticed after *Thakur*. Remarkably, this time the Court has not given any interim relief against the operation of the Act.

I am fully conscious and assume similar experiences on the other side of manipulations and maneuvers in the implementation of the constitutional provisions on reservation. From my limited experience I also know that reserved category candidates may not be as good as the non-reserved category candidates. But they are not always worse than the non-reserved category candidates in their achievements and performance. Reservation, however, assumes that they are not as good yet they must be inducted. It is precisely for this reason that the provisions for reservation were incorporated in the Constitution. Therefore, I fail to appreciate the immeasurable gap between the thinking of those who fought for and brought us our freedom from foreign rule in order to bring revolutionary changes in our social order which they documented in the Constitution and our elite including the lawyers and the judges who were expected to lead and facilitate those changes. It is, however, very encouraging and faith restoring that whatever allegations against the power of

[21] See, the amendments in Articles 16 and 335.

vote in our democracy our political elite ever since the commencement of the Constitution has unitedly stood behind the Constitution and the ideals that inspired its making despite having adopted the policy of economic liberalization.

What the Anti-Reservationists are Asking for?

As a student of law I have examined the reservation issue only from the legal point of view. When any issue arises I ask myself: what is the constitutional or legal issue that is being contested?[22] More I look into the judicial decisions more I get convinced that the court battles have not been about the FRs or any other constitutional right. They have revolved around the application of the constitutional provisions on reservation. Thus unlike the United States where petitioners challenged the quotas or reservation on the ground of violation of their rights under the equal protection clause no petitioner in India seems to have ever claimed that reservation violates any of his/her FRs. Even if in any case, which I cannot recall, the petitioner might have claimed violation of any of his/her FRs such claim did not become the basis for the disposal of the case. Therefore, the fight about reservation in the courts and outside has not been about the right to equality or any other right; it is basically against the policy of reservation as such. When the opponents of the policy fail in stalling it at the political level either at the Centre or in the States they approach the courts to stall it. As the courts are not expected to go into the policy issues they have upheld or invalidated reservation with reference to the relevant constitutional provisions in this regard examining if those provisions have or have not been complied with. As the judges are also not free from policy bias, often the outcome in the courts has depended upon the constitution of the bench. If one carefully examines from the earliest to the latest decisions on reservation one could discern a line with minor variations between the judges for and against reservation. It is apparent from their opinions. As reservation is expressly provided in the Constitution, opposition to it has been based on vague suppositions about the Constitution or its scheme or non-observance of some technicality. My analysis is that while in big battles like the one in 1990 on the implementation of Mandal Commission recommendations the Court has played a great shock absorber and mediator between the fighting groups on the streets and in others has helped in tailoring the reservation policy as satisfactory and acceptable to the warring groups as possible, in many instances it has not let it have its expected impact as envisaged in the Constitution. It has stalled it not because it violated any provision of the Constitution or of the law relating to its implementation but because the judges or the majority of them on the bench had their own reservations on the policy of reservation.

In principle courts are not expected to take up policy matters but even if they do they do it in a very narrowly tailored exceptional situation where the policy is clearly

[22] As a student of LLM part II I wrote my dissertation on constitutional position of minorities including the weaker or vulnerable sections such as SCs and STs. Later I returned to this topic in some of my writings including MP Singh, *Jurisprudential Foundations of Affirmative Action: Some Aspects of Equality and Social Justice*, 10 & 11 Delhi Law Review, 39 (1983-84), *Are Articles 15(4) and 16(4) Fundamental Rights*? 33 (1994) 3 SCC (J) and Shukla's *Constitution of India* (8th to 12th eds.).

against the Constitution or its core values such as the FRs or human dignity. The policy of reservation cannot be brought in that category because the Constitution expressly provides for reservation at more than one place. Any doubts ever entertained in this regard have been successively removed by constitutional amendments and additional provisions for reservation. Therefore, no constitutional basis or justification for interference with the policy of reservation visibly exists.

As I take the view that in a constitutional democracy like ours decisions taken by the representatives of the people either in the legislature or in the executive must be honoured so long as they are not against any provision of the Constitution or any law that binds the executive, I would like to briefly examine if ever sufficient justification has existed for the courts to intervene in matters of reservation. Starting from the beginning, perhaps *State of Madras* v. *Champakam Dorairajan*,[23] the very first case on reservation, is the only one that comes closest to the determination of the issue on the ground of violation of FRs of the petitioner. There too the matter was decided not on the ground that the petitioners had any right to be admitted to the educational institutions they were asking for but on the ground that they were denied admission on grounds prohibited by Article 29(2). It does not establish that the petitioners had a fundamental right to take the kind of education they were asking for. The state could have very well denied them that education if it had taken any other criteria than the ones prohibited under Article 29(2). The state pleaded that the criteria was Article 46 and not the grounds prohibited in Article 29(2). Following the principle of harmonious construction and presumption of constitutionality of state action, the Court could have very well held that the basis of reservation was Article 46 and not any of the grounds prohibited by Article 29. It could have also held that it was a measure to attain proportional equality.[24] But instead the Court chose a rather flawed course of reading a conflict between Articles 29 and 46 and holding that as the former was included among the FRs and latter among the DPs the latter must give way to the former. The Court's reasoning was convincingly criticized in academic writings and was soon abandoned in favour of reconciliation and harmonization between FRs and DPs, which has now become an aspect of the basic structure of the Constitution.[25] *Champakam* was soon overruled by the First Amendment to the Constitution introduced, notably, by the same members of interim Parliament who gave us the Constitution.

Over a decade later in the first landmark case on reservation, namely, *M.R. Balaji* v. *State of Mysore*[26] the Court decided the whole issue under Article 15(4) which according to it was not a FR but an exception to FRs in Article 15(1). The

[23] AIR 1951 SC 226.

[24] See, A Acharya, Affirmative Action for Disadvantaged Groups A Cross-constitutional Study of India and the US, in R Bhargava (ed), *Politics and Ethics of the Indian Constitution*, 267, 282 (2008).

[25] See, PK Tripathi, *Directive principles of State Policy: The Lawyer's Approach to them Hitherto, Parochial, Injurious and Unconstitutional*, 17 Supreme Court Journal 7 (1954); In *re Kerala Education Bill*, 1957, AIR 1958 SC 956 and *Minerva Mills Ltd.* v. *Union of India*, AIR 1980 SC 1789.

[26] AIR 1963 SC 649.

reservation in that case was found bad because, according to the Court, it did not satisfy the requirements of Article 15(4). The Court did not decide or discuss if it violated any of the FRs available to the petitioners or of any other individual. The judgment may have set an example of great craftsmanship and judicial creativity but it did not have any basis in FRs or any other right. On the contrary in *Devadasan* v. *Union of India*[27] the Court clearly said that there was no violation of Article 14. It said:

> Where, therefore, the State makes a rule providing for the reservation of appointments and posts for such backward classes it cannot be said to have violated Art. 14 merely because members of the more advanced classes will not be considered for appointment to these posts even though they may be equally or even more meritorious than the members of the backward classes, or merely because such reservation is not made in every kind of service under the State.[28]

Following *Balaji*, the Court in *Devadasan* decided exclusively on the basis of excessiveness of reservation under Article 16(4). Dissenting, Subba Rao J. emphasized that Article 16(4) was not an exception but "preserved a power untrammeled by the other provisions of the Article."[29] Justice Subba Rao's opinion was adopted by the majority of the Court in *State of Kerala* v. *N.M. Thomas*[30] who, besides holding that Article 16(4) was not an exception to Article 16(1), also emphasized upon the principle of proportional equality in terms of equality in fact. Thus Article 16(4) was converted into an important aspect of equality from being treated as an exception to it. The same position was reiterated in *ABSK Sangh* v. *Union of India*[31] and was finally accepted in *Sawhney*.[32] Ever since *Thomas* I have taken the stand that *Balaji* interpretation of Article 15(4) that it was an exception to Article 15(1) was overruled though many others went by technicality that as Thomas, Sangh and Sawhney related to Article 16(4) they did not affect Balaji.[33] *Thakur* has vindicated my stand.

I am of the view that effective implementation of Articles 15(4) and 16(4) enforces and realizes equality rather than curtails or denies it to anyone in any manner. I am also of the view that by not taking any action under Articles 15(4) and 16(4) not only inequality is perpetuated but it is also denied to those for whom those provisions have been made.[34] Underlying the fact that no petitioner has ever claimed and definitely the Court has never recognized the claim that the implementation of Articles 15(4) or 16(4) violates anybody's right to equality is the presumption that

[27] AIR 1964 SC 179.
[28] *Id.* at 185.
[29] *Id.* at 190.
[30] AIR 1976 SC 490.
[31] AIR 1981 SC 298.
[32] AIR 1993 SC 477.
[33] See, MP Singh, *Jurisprudential Foundations of Affirmative Action: Some Aspects of Equality and Social Justice*, 5 & 6 Delhi Law Review, 39 (1983-84); Are *Articles 15(4) and 16(4) Fundamental Rights*?, 33 (1994) 3 SCC 33 (J); and *Shukla's Constitution of India*, 75 ff, 10th ed. (2001).
[34] *Id*, the article in SCC.

these provisions promote rather than curtail the right to equality. Therefore, if provisions are made under Articles 15(4) and 16(4) the presumption is and must be that they are constitutionally valid and the burden to prove otherwise must lie upon those who challenge their validity. *Thakur* confirms that position by rejecting the US suspect classification and consequent strict scrutiny and compelling state interest principles. In view of this position the courts should also deny interim stays against the actions taken under Articles 15(4) and 16(4) unless such stay is necessary for preventing irreparable harm or such a situation as arose in 1990 on the implementation of Mandal Commission recommendations.

By now the people who approach the courts against the implementation of Articles 15(4) and 16(4) must also realize that they have no case for the courts and must democratically build a case for themselves in Parliament and State legislatures. If anybody has a FR under the Constitution then subject to the provisions of the Constitution he must be protected by the courts even against the claims of the entire nation but if he has no such right the courts must decline to interfere against the lawful actions of the state. If the courts continue to entertain challenges to reservation on such specious or vague grounds as the reservation is against national interest or that it must be only in primary schools or up to graduation level or before making reservation arrangements must be made for primary and secondary education for everyone or that Article 21-A must be realized before reservation is made for anyone at any stage or that funds must be diverted to one kind of education rather than the other or that reservation policy must be reviewed every five years or ten years and so on and so forth then there will never be an end to litigation and the constitutional goal of achieving equality through reservation will never be realized. The only apparent requirement for reservation in Article 15(4) and (5) is that it must be for OBCs or SEBCs. To that apparent requirement the Court has added that if OBCs or SEBCs are determined on the basis of caste the creamy layer amongst them must be excluded and that reservation must be of less than 50% places. If these requirements are met no ground for challenge in the courts survives. As *Thakur* has made it amply clear that if the government has done everything required by Article 15(4) nobody has the right to question the government decision and its implementation in the courts, it may be hoped that no more the reservation policy or its implementation will be held up in the courts.

The Argument of Merit

The most forceful and apparently convincing argument taken against the policy of reservation is of merit, i.e. merit is and must be the foundation of any society which the Constitution of India also envisages and establishes. Reservation of any kind is the negation of merit and, therefore, even though expressly provided in the Constitution it must be kept within the narrowest possible limits only as a temporary measure. I have dealt with this argument earlier at more than one place and, therefore, need not return to all its details.[35] Briefly, merit is not a fixed or static

[35] See, MP Singh, *Jurisprudential foundations of Affirmative Action: Some Aspects of Equality and Social Justice*, 10 & 11 Delhi Law Review, 39 (1981-82) and *Merit in the*

contd...

concept. It varies with the needs and objects of a society. Merit, therefore, is not and end but is only a means to the ends of a society. What ends a society sets for itself will determine the means that are most suitable to achieve those ends. What the ends of the Indian society are may not be free from controversy. But as our present society is organized under the Constitution with which we are dealing, I draw them from its Preamble as securing of justice, liberty, and equality to all the citizens and promotion of fraternity among them all assuring the dignity of the individual and the unity and integrity of the nation. Of course they are very broad ends capable of various and varying and occasionally conflicting contents and interpretations but by all means they are our ends. Means that are most appropriate for achieving those ends are our merit. Within the broad framework of democracy based on adult franchise which must constantly work out those means the Constitution lays down guidelines for working out such means. Among those guidelines reservation is provided at more than one place. Merit is not mentioned even once anywhere in the body of the Constitution. Often reliance is placed on Article 335 to derive the notion of merit form the expression "maintenance of efficiency of administration" as if it is the foundational doctrine of our Constitution. But besides the limited application of Article 335 confined to state services, efficiency and merit is not one and the same thing. Efficiency is an end while merit is only a means to achieve that end. The Constitution envisages that by taking into consideration the claims of SCs and STs in the matter of state services maintenance of efficiency of administration will be assured and, therefore, they must always be taken into consideration. Limitations on the consideration of that claim the Court placed were removed by the Constitution through appropriate amendments.

Any attempt to subvert or defeat the reservation on the plea of merit amounts to subversion of the Constitution. No constitution ever provides for its own subversion. Our Constitution does not permit even the change in its basic structure through the process of amendment provided in it. The limitation of basic structure also applies to judicial interpretation of the Constitution.[36] Therefore, the courts should not get persuaded by the argument of unstated merit to defeat the stated means of achieving the constitutional goals as mentioned above. In the argument of merit to defeat the democratically taken decisions I smack an attempt to replace democracy through some sort of oligarchy. I am not imagining something unimaginable. It was very much argued and the Court noted it in the petition of Ashoka Kumar Thakur that "a time has come to replace the 'vote bank' scenario with 'talent bank'."[37] *Inamdar* is clearly based on that argument. Therefore, I earnestly plead that as guardians and defenders of the Constitution the courts should not entertain the flat argument of merit taken by a small group of privileged sections of society only to preserve and perpetuate their privileges and to defeat reservation for the underprivileged and excluded. Let me end up with a quote from the monumental decision on the power of

Appointment of Judges, 1 (1999) 8 SCC (J). The later article has also been cited by Justice Lokur in *Assn. of Advocates on Record* v. *Union of India* decided on 16.10.2015.

[36] See, *M Nagaraj* v. *Union of India*, (2006) 8 SCC 212.

[37] See, *Ashoka Kumar Thakur* v. *Union of India*, WP (Civil) 265 0f 2006 decided on 29 March 2007, paragraph 2

amendment on the issue of reservation in public employment, namely, *M Nagarj* v. *Union of India*.[38]

> Merit is not a fixed absolute concept ... The basic presumption.. remains that it is the State who is in the best position to define and measure merit in whatever ways it considers it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit.

Amendment and Unaided Private Educational Institutions

While four judges, including the Chief justice, did not decide the issue of the validity of the amendment vis-à-vis the unaided institutions because no such institution had approached the Court, Bhandari J decided that issue because it had been argued before the Court and required to be settled to avoid uncertainty and delay when the government targeted these institutions in future. Relying upon *Minerva Mills Ltd.* v. *Union of India*,[39] in which the determination of the dispute was not dependent upon the determination of the disputed amendment, he felt that since amendments are often enabling provisions and if they "clear the way for future legislation that would in fact violate the basic structure, the Court need not wait for a potential violation to become an actual one."[40] Laying down the test that "an amendment alters the basic structure if its actual or potential effect would be to damage a facet of the basic structure to such an extent that the facet's original identity is compromised" Bhandari J mixes up 'legislation" and "amendment" and says that to determine if "legislation" violates constitutional limitations two-step effect test is to be applied. "Step one requires us to first ask if legislation affects a facet of the basic structure" and "at step two we ask if the effect on the facet of the structure is to such an extent that the facet's original identity has been altered."[41] Clarifying the test he said that "the form of an amendment is irrelevant; it is the consequence thereof which matters." Further, differentiating between "abridge" and "abrogate" he says that while abridgement is valid "the legislation must be struck down" if it abrogates.[42] Applying the twin tests laid down by him to Article 15(5) the judge finds that it excludes 19(1) (*g*), "a facet of the basic structure of the Constitution" and a part of the golden triangle recognized in *Minerva* even though it was much milder than the amendment in Article 31-C decided in *Minerva*.[43] To bring home his point on Article 15(5) vis-à-vis Article 19(1) (*g*) the judge relies upon and quotes extensively from *Pai* and *Inamdar*, which the Amendment was meant to overrule, that according to those decisions the government could not take any measure of reservation in admissions to private unaided educational institutions except the regulation for ensuring admissions on merit. But he admits that Parliament could subject Article 19(1) (*g*) to Article 15(5) even if the Court had "held that reservation in unaided institutions was an

[38] *Id* at 249.

[39] AIR 1980 SC 1789.

[40] *Thakur*, p 134.

[41] *Id*, p 137.

[42] *Id*, p 139.

[43] *Id*, p 149.

unreasonable restriction that could not be saved by Article 19(6)"[44] and that subjecting Article 19(1) (g) to 15(5) does not per se violate the basic structure.[45]

Taking up his second step Bhandari J asks if the amendment merely abridges or it abrogates a fundamental right even of small section of educators or even of one person and answers that in case of abridgment it does not but in case of abrogation it does violate the basic structure.[46] After enumerating the adverse effects of the amendment on unaided educational institutions, he concludes:

The 93rd Amendment's imposition of reservation on unaided institutions has abrogated Article 19(1) (g), a basic feature of the Constitution, in violation of our Constitution's basic structure. Therefore, I sever the 93rd Amendment's reference to 'unaided' institutions as ultra vires of the Constitution.[47]

As academic exercises are free from the procedural constraints of the courts, I could very well examine the validity of the Amendment without any concrete case or controversy having arisen. Although unlike the Constitution of the United States our courts are not expressly required to deal with actual cases and controversies as a matter of prudence, they decline to decide moot or hypothetical questions and confine to the actual issue in dispute. Only in exceptional cases where the parties can satisfy the courts of the imminent urgency of the matter, which is affecting or is likely to affect immediately vital issues concerning life or liberty of the people but may not culminate into a concrete live issue before the courts, the courts agree to hear and decide moot questions. This is what happened in *Minerva*.[48] In *Minerva* the respondents raised a preliminary objection against the petition being heard on the validity of the Forty-second Amendment which after full arguments the Court rejected. Only after the disposal of the preliminary issue the Court proceeded to hear the petition on merits.[49] Even then the propriety of hearing in *Minerva* and the binding authority of the decision were questioned in a later case which remains undecided but seems to have lost its relevance with lapse of time.[50] *Thakur* provides no clue of any such issue having been raised and decided. All the judges agreed that no private unaided institution or anyone on behalf of such an institution filed a petition or appeared before the Court. Therefore, no other judge except Bhandari J expressed any opinion on the validity of the Amendment about the private aided or unaided institutions. As neither the issue was urgent, nor was its determination necessary for the disposal of the petitions before the Court, nor was the procedure required for deciding moot questions was followed, Bhandari J could have also left

[44] *Id*, pp 163-164.
[45] *Id*, pp 164 & 166
[46] *Id*, p 167.
[47] *Id*, p 177.
[48] *Minerva Mills Ltd* v. *Union of India*, AIR 1980 SC 1789
[49] *Id*. at 1802-03. In coming to that conclusion the Court stated: "We are dealing with a constitutional amendment which has been brought into operation and which, of its own force, permits the violation of certain freedoms through laws passed for certain purposes."
[50] *Sanjeev Coke Mfg Co* v. *Bharat Coking Coal ltd*, AIR 1983 SC 239. At p 248 the Court observed that a petition to review Minerva was pending in the Court.

this issue for the future to be decided in an appropriate case. But as he has decided it as summed up above, let us examine some of the issues related to it.[51]

Ever since the Court has drawn the basic structure limit on the power of amendment in *Kesavananda Bharati* v. *State of Kerala*,[52] it has been trying to formulate a precise test that could guide the amending body as well as the courts whether an amendment is consistent with or crosses that limit. Of course that process is not yet over and in view of the nature of the issue it may never be concluded, after having enumerated several basic features of the Constitution laid down in earlier cases, in *Nagaraj*,[53] the Court has tried to formulate a general test for determining if an amendment is against the basic structure of the Constitution. "In the matter of application of the principle of basic structure", the court held that "twin tests have to be satisfied, namely, the 'width test' and the test of 'identity'."[54] Upholding the validity of three amendments in Article 16 inserting clauses (4-A) and (4-B) and making an amendment in the former and a fourth one in Article 335 inserting a proviso, a five judge bench of the Court unanimously held that "Applying the 'width test', we do not find obliteration of any of the constitutional limitations. Applying the test of 'identity' we do not find any alteration in the existing structure of the equality code."[55] Relying upon the earlier cases, especially *Kesavananda*, it clarified that not an amendment of a particular article but an amendment that adversely affects or destroys the wider principles of the Constitution such as democracy, secularism, equality or republicanism or the one that changes the identity of the Constitution is impermissible. "To destroy its identity is to abrogate the basic structure of the Constitution", concluded the Court.[56] A little later in *I.R. Coelho* v. *State of T.N.*,[57] a nine judge bench unanimously re-emphasising the identity test, varied it in respect of FRs. While, according to *Coelho*, *Nagaraj* held that in respect of the amendments of FRs not the change in a particular article but the change in the essence of the right must be the test for the change in identity, in *Coelho* the Court held that if the "triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the 'essence of right' test but the 'rights test' has to apply."[58] Pointing out the difference between the "rights test" and the "essence of right test," the Court observed that both form part of application of the basic structure doctrine, but, When in a controlled Constitution conferring limited power of amendment, an entire chapter is made inapplicable, 'the essence of right' test as applied in *M. Nagaraj*

[51] Even though *Minerva* was decided after the disposal of the preliminary issue, in *Sanjeev Coke Mfg. Co. Bharat Coking Coal Ltd.*, AIR 1983 SC 239 Chinappa Reddy J. raised serious doubts about *Minerva* as binding precedent on the determination of the issue of basic structure.
[52] AIR 1973 SC 1461.
[53] (2006) 8 SCC 212.
[54] *Id*, 268.
[55] *Id*, 269.
[56] *Id*, 268.
[57] (2007) 2 SCC 1
[58] *Id*, 108. With due respect to the Court, I could not find the expression "essence of right" in *Nagaraj*.

Case will have no applicability. In such a situation, to judge the validity of the law, it is the 'right test' which is more appropriate.[59]

In the context of amendments to the IX Schedule the Court concluded that the validity of each new amendment must be judged on its own merits. "The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge."[60]

Long before these cases, including *Kesavananda*, perhaps also *IC Golak Nath* v. *State of Punjab*,[61] Dieter Conrad – one of the main architects of the basic structure doctrine in India – while dealing with this issue in several writings, in one of them observed, "From the fact that the constitutional provision does not mention limitations it must be concluded that the amending power is intended to be very wide. Only clearest cases of transgression would justify judicial intervention, as a remedy of last resort. Regularly, such cases will be discernible by an element of abuse of power, of some collateral purpose appearing behind the purported scope of the amendment. In the absence of such elements a general presumption of constitutionality must operate even more than in the case of ordinary legislation."[62]

He noted an abuse of power in several provisions of Forty-second Amendment made during emergency when all political freedoms were suspended and leading political opponents in Parliament and otherwise were behind the bars. *Minerva* invalidated some of these provisions, most importantly clauses (4) and (5) introduced in Article 368. Conrad also saw virtue in the vagueness of the doctrine of basic structure.[63]

In the light of the principles arising from these precedents and academic exercises, which by their very nature are and will remain if not totally vague at least capable of different interpretations and applications, it is clear that the basic structure of the Constitution is founded within the Constitution and cannot be drawn or construed from somewhere else; that it primarily consists of the broad general features of the Constitution; that these features may not generally be represented in one particular provision of the Constitution but a change in any particular provision may change the basic structure as, for example, in the case of elimination of "triangle of Article 21 read with Article 14 and Article 19"; and that in case of FRs the actual effect and impact on the rights will be taken into account for determining if the amendment destroys the basic structure. But above all, as Conrad has suggested, the amendment must have an element of abuse of power or of some collateral purpose

[59] *Ibid.*
[60] *Id*, 111.
[61] AIR 1967 SC 1643. Conrad told me that he first delivered his lecture on the limitation of amending power sometime in early 1965 in Madras (Chennai) which was later used in arguments in *Golak Nath*.
[62] D Conrad, *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration*, 6 & 7 Delhi L. Rev. 18 (1977 & 1978). Reprinted in D. Conrad, *Zwischen den Traditionen*, J Luett & MP Singh eds. (1999) printed at p 87 quote at p 102.
[63] *Id*, at p 102.

appearing behind the purported scope of the amendment. So long as it is made in the normal conditions after due deliberations in Parliament and, wherever required, also in the Legislative Assemblies of the States and is not against the interests of any vulnerable or politically insulated section of the society such as the minorities or SCs or STs, it must be presumed to be valid.

Applying these principles and tests, I do not find anything destructive of the basic structure in the Ninty-third Amendment even in respect of the unaided private educational institutions. It is true, as it has been admitted as much by the other judges as by Bhandari J that the amendment overrules some of the propositions laid down by the Court in *TMA Pai* and *Inamdar*. But it is nobody's case that it could not be done by an amendment of the Constitution. The Amendment also does not abrogate the right to occupation or any other right in Article 19(1) (*g*). Nor does it remove or narrow down the newly recognized right to run educational institutions as occupation. It does not even amend the provision for restrictions that may be imposed on the right to occupation under Article 19(6). It simply clarifies or at the most removes a not essentially required interpretation given to the newly recognized right to occupation to run educational institutions under Article 19(1) (*g*). The clarification is in no way anything more than overruling Court's interpretation in the foregoing two cases so as to bring it in harmony with the rest of the Constitution and its clearly stated provisions. Article 15(4) clearly provides that the State may make "any special provision for the advancement of any socially or educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes" including definitely provision for reservation in admissions to educational institutions. Nobody can doubt or has ever doubted that under this provision state could make special provisions for the stated classes in private educational or other institutions. If there were any possibilities of restricting the application of Article 15(4) only to public or state aided educational institutions or other bodies until that article was being treated as an exception to Article 15 or Article 29, that has also been removed after it has been accepted that Article 15(4) like Article 16(4) is not an exception to but an integral part of the equality provisions. If in a matter such as *Pai* or *Inamdar* where special provisions for the classes covered in Article 15(4) were not in issue the Court announces that the state cannot make such provisions in private educational institutions because of the interpretation it gave to Article 19(1)(*g*), it does something which goes clearly against the express provisions and very foundations of the Constitution which, as adopted by the Constituent Assembly, made special provisions including reservation for such classes.[64] Even inclusion of Article 15(4), besides being beyond challenge technically because of approval to all existing amendments in *Kesavanada*, was required because the Court had damaged the basic structure as envisaged by the Constitution makers. We have already noted that the First Amendment was inserted by the same members of interim Parliament who gave us the Constitution.

[64] See, Part XVI of the Constitution which has been there from the very beginning and Parts IX and IX-A inserted by 73rd and 74th Amendments.

The above argument is taken in view of *Waman Rao* v. *UOI*[65] in which rejecting the challenge to Articles 31-A and 31-B also inserted by the First Amendment, the Court observed that the Amendment instead of weakening strengthened the basic structure of the Constitution because it "made the constitutional ideal of equal justice a living truth."[66] Articles 31-A and 31-B, like Article 15(4), were also introduced to overrule the interpretation of the Court of some of the FRs, especially Articles 14, 19 and 31. The Court has repeated the same proposition recently in *Nagaraj* in which amendments to Articles 16 and 335 overruling certain interpretation of those Articles by the Court were challenged. Defending the amendments the respondents argued that "the power under Article 368 has to keep the Constitution in repair as and when it becomes necessary and thereby protect and preserve the basic structure".[67] Rejecting the petitions the Court admitted that the challenged amendments were "curative by nature".[68] Thus earlier *Waman Rao* and now *Nagaraj* establish that by their interpretation of the Constitution the courts can also damage the basic structure and Parliament or the amending body owes a duty to the Constitution to repair that damage. If Parliament fails to repair the damage it shall be deemed to be conniving in damaging the basic structure of the Constitution. No doubt the courts should have much less chance for causing such damage but our experience of several amendments having become necessary because of courts' interpretation disproves that only Parliament damages the basic structure and the courts always defend it. The same may be said of the Ninety-third Amendment introducing Article 15(5) that by its interpretation in *Pai* and *Inamdar* in the matter of education the Court by equalizing the FRs of majorities and the minorities and by excluding the unaided private institutions from the purview of positive action by the state had damaged the basic structure of the Constitution which provides respectively for special protection to the minorities and for positive action as part of the equality code. The Amendment has only repaired that damage to the basic structure of the Constitution. Therefore, no basis exists to doubt the validity of the Amendment even in respect of private unaided educational institutions. I have some satisfaction that a few years after the above arguments the Supreme Court has unanimously upheld the Amendment.[69]

It may also be remembered that while in *Minerva* the Court spoke of Articles 14, 19 and 21 triangle in *Waman Rao* it upheld Article 31-A and in *Kesavananda* and also in *Minerva* Article 31-C as introduced by the Twenty-fourth Amendment, which excluded both Articles 14 and 19 in certain areas. Therefore, mere exclusion of Article 19 in any area is not enough to come to the conclusion that the basic structure has been tempered. We have to go further and see if such exclusion abrogates something that is part of the basic structure. In matters of certain aspects of property

[65] AIR 1981 SC 271.
[66] *Id*, at 285.
[67] (2006) 8 SCC 212, at 238.
[68] *Id*, at 270.
[69] *Pramati Educational and Cultural Trust* v. *Union of India*, (2014) 8 SCC 1. See also on the same issue *Indian Medical Assn.* v. *Union of India*, (2011) 7 SCC 179, 278: AIR 2011 SC 2365 in which the court also cited me as the revising editor of *VN Shukla's Constitution of India* at p. 260, fn. 37.

rights the Court did not think that exclusion of Articles 14 and 19 was against the basic structure of the Constitution.

In *Coelho* at several places the Court has mentioned Article 15 among the FRs that are part of he basic structure, which implies that only abrogation of Article 15 will destroy basic structure but not any expansion of it. Article 15(5) only adds something to Article 15 and does not curtail anything from it. The Court specifically stated, "The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Article 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution."[70]

The Court repeated, "Thus, validity of such laws [i.e. laws included in the Ninth Schedule] can be challenged on the touchstone of basic structure such as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles underlying these Articles."[71]

Remember that *Coelho* is a unanimous verdict of nine judges and that clause (5) had already been inserted in Article 15 by the Amendment. How could a single judge in a divided five judge bench question or even doubt the validity of the Amendment? Even on the question of abrogation of FRs, which Bhandari J considers conclusive test for determination if an amendment violates the basic structure, *Coelho* held, "A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not."[72]

True, the Court has held Article 19 along with Articles 14 and 21 as part of the golden triangle which stands between the haven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power, but it does not mean that every part or aspect of Article 19 is equally important or essential for that triangle. We have noted that in specified areas Article 31-A introduced by the First Amendment which excluded Articles 14 and 19, not to say of 31-B which excluded application of all FRs in unspecified areas, and Article 31-C which excludes the application of Articles 14 and 19 in respect of laws made under Article 39(*b*) and (*c*) have been, apart from *Kesavandnda*, specifically upheld in *Waman Rao* and in *Minerva*. Similarly, Forty-fourth Amendment has deleted Article 19 (1) (*f*) along with Article 31 but its validity has never been questioned. From the contents of Articles 19 it is apparent that all rights under that Article do not stand on the same footing. Its clauses (2) to (6) draw a clear distinction between the respective rights in several sub-clauses of clause (1). While the rights in sub-clauses (*a*) to (*c*) are subject to reasonable restrictions only on specified grounds, rights in sub-clauses (*d*) and (*e*) are subject to reasonable restrictions "in the interests of the general public" as well as "for the protection of the interests of any Scheduled Tribe". Finally, the rights in sub-clause (*g*) are not only subject to reasonable restrictions "in the interest of the general public" but they are also subject to any law that may provide for (i) the professional

[70] (2007) 2 SCC 1, at 108.
[71] *Id*, at 110. I have quoted from the copy printed from the web. I find slight immaterial variation in the language in SCC.
[72] *Id*, at ...

or technical qualifications necessary for the exercise of these rights and (ii) complete or partial monopoly in favour of the state in respect of any of the activities covered by that clause. Thus not only reasonable restrictions can be imposed on any of the rights in Article 19(1) (*g*) on the spacious ground of general public interest but their exercise in private hands can also be completely denied by creating monopoly in favour of the state or any corporation owned or controlled by the state. A reasonable restriction under Article 19(6) also includes total prohibition of any activity guaranteed in Article 19(1) (*g*).[73] Further, in several cases the Court has also held that rights in respect of economic activities such as business or property do not stand on the same footing as for example the right to life or freedom of speech.[74] In *Minerva*, on which reliance is placed, Palkhivala spoke primarily for Article 19(1) (*a*) and not for Article 19(1) (*g*).[75] In view of this position of rights in Article 19 (1) (*g*) in our Constitution it is impossible to assert that mere possibility of making special provisions in unaided private educational institutions clarified by Article 15(5) to remove the doubt caused by the Court amounts to the abrogation of that right and, therefore, to the destruction of basic structure. Provision for education is even otherwise considered primarily a responsibility of the state and even in many Western liberal states it is still provided almost exclusively by the state. It is beyond comprehension that in a "Socialist Secular Democratic Republic" education in private hands must be part of the basic structure of the Constitution which can be subjected only to limited regulation.

In *Pai* and *Inamdar* the Court equated the rights of citizens under Article 19(1) (*g*) with that of the minorities under Article 30(1) "to establish and administer educational institutions of their choice" and read within the former the same rights of admission as guaranteed to the minorities under the latter. An unspecified right of every citizen, which was not even known or recognized until *Pai*, could not have the same scope and content as the specified right of the minorities alone. As a matter of fact in the process of equalizing the rights of every citizen with the rights of the minorities the Court has destroyed a basic feature of the Constitution which grants the minorities special protection vis-à-vis the other citizens in matters of education. It has also diluted the special rights of the minorities to "national interest" in the same way as the rights of other citizens are under Article 19(6). Neither the rights of citizens under Article 19(1) (*g*) are the same as the rights of minorities in Article 30(1) nor can they have the claim to basic structure as the rights of the minorities are. This position is clearly implied in Article 15(5) which excludes minority institutions from its scope. Justice Bhandari's interpretation of the right to education in Article 19(1)(*g*), which brings that interpretation at par with the rights of unaided minority institutions under Article 30(1) is not, therefore, substantiated either by the provisions of the Constitution or their judicial interpretation.

[73] *Narendra Kumar* v. *Union of India*, AIR 1960 SC 430; *Municipal Corporation* v. *Jan Mohmad Usmanbhai*; *Om Prakash* v. *State of UP*, (2004) 3 SCC 402 and *Hinsa Virodhi Sangh* v. Mirzapur Moti Kuresh Jamat, (2008) 2 SCC 1.

[74] See, eg, *State of Gujarat* v.*Shri Ambica Mills*, AIR 1974 SC 1300 and *RK Garg* v. *UOI*, AIR 1981 SC 2138.

[75] See, MV Kamath, Nani A Palkhivala A Life, 214 (2007).

In this connection I need not pursue the further argument that Article 19 is available only to citizens who do not include juristic persons such as companies and other incorporated bodies which run the educational institutions.

In view of the foregoing discussion no doubt whatsoever be entertained about the validity of the Amendment even in its application to private unaided educational institutions. The Amendment is at least partly if not wholly the restoration of the basic structure of the Constitution which had been damaged by *Pai* and *Inamdar*. My views on the point have been substantially and suitably recognized by the Supreme Court in upholding the validity of clause (5) of Article 15.[76]

A new Phenomenon

Besides the opposition to reservation through legal or sometimes even by violent means, in the last few years a new phenomenon of sometimes initially resorting to strikes, *dharnas*, road and railway blockings and finally to violence by some communities of the society such as Gujjars in Rajasthan or Patels in Gujarat or Jats in Haryana is also fast emerging leading to additional challenges to reservation policy under the Constitution. Though of course the backward class commissions at the Centre and the States keep ensuring exclusion of undeserving classes or creamy layer from the socially and educationally backward classes as well as suggesting inclusion of deserving classes among them for the purpose of reservations or other measures under the Constitution, the above phenomenon is becoming frequent and stronger. For example, in 1914 against the recommendation of the commission the Centre included the Jats in the northern States of the country among the socially and educationally backward classes. It was challenged in the Supreme Court which declared it unconstitutional because it could not find enough justification for including the community among these classes.[77] In spite of the reasoned decision of the Court, the Jats resorted initially to *dharna* and road and railway blockades and finally to violence throughout the State resulting in large scale destruction of property and also human casualties. The Patels also seem to be planning the same in Gujarat and even beyond.

Such a phenomenon is contrary to the letter and spirit of the Constitution because the Constitution prescribes such arrangements for socially and educationally backward classes and not for socially *or* educationally or for economically backward classes without falling in the category of socially and educationally backward classes.[78] Let us hope that this message will reach those who do not fall within the socially and educationally backward classes as determined by the appropriate backward class commission and the work towards the realization of equality as envisaged in the Constitution shall be realized sooner than later.

[76] See fn 69 above.

[77] *Ram Singh* v. *Union of India*, (2014) 4 SCC 697.

[78] Observations in the above case that economic criteria must also be taken into consideration are valid only to the extent that among the socially and educationally backward classes economically well offs must be excluded as the backward class commissions keep doing by excluding the creamy layer from the socially and educationally backward classes.

Some Related Issues

Casteless society

Judges, lawyers, scholars, political thinkers and others, who detest reservation, strongly argue that the Constitution envisages a casteless and classless society while reservation is made on caste lines. Reservation, especially for OBCs who are determined on the caste lines, is therefore against the spirit and very foundations of the Constitution. It divides society and goes against the "unity and integrity of the Nation" which the Preamble promises to secure to all of us. It also goes against clauses (1) and (2) of Article 15 and clause (2) of Article 16 which prohibit discrimination on the ground of caste. Without going into the argument that OBCs are not determined exclusively on the basis of caste, let me clarify that the unity of the nation is not secured and ensured, but rather it is endangered, by not recognizing the existing historical inequalities and injustices in our society. It is against such inequalities that existed in our society on caste lines that discrimination on grounds of caste was prohibited in the above clauses. The clauses prohibit discrimination; they do not derecognize castes just as they prohibit discrimination on the basis of religion or sex or place of birth but they do not abolish or derecognize them. Prohibition of discrimination in its nature, content and objectives is different from de-recognition of differences. While prohibition of discrimination prohibits or eliminates contempt or disrespect or prejudices on the stated grounds de-recognition of them ignores and perpetuates such contempt, disrespect and prejudices. The Constitution makers knew this difference between prohibition of discrimination and de-recognition of differences very well and, therefore, they prohibited the former but did not do the latter. This difference they made obvious in clause (3) of Article 15 by providing for special provision for women, in clause (4) of Article 16 by providing for reservation for backward classes, in Article 30 for religious and linguistic minorities, in several DPs, in the entire Part XVI and V and VI Schedules. They made themselves further clear in this regard by adding clause (4) to Article15 by the First Amendment. No two human beings are without differences and so too no society without differences can and should be conceived of. People live in families and groups. The Constitution does not and can never be expected to dissolve them. Definitely it prohibits prejudices in public life that arise from or are associated with such groups. To that extent the Constitution definitely prohibits prejudices arising from caste just as it prohibits such prejudices arising from religion or sex but no more.

Quantum of Reservation

The Court in *Balaji* arrived at less than fifty per cent reservation not on the basis of any specification in the Constitution but in the national interest. The Central Government has respected that limitation, though the States have occasionally exceeded it. In view of the fact that regional variations apart the fifty percent limitation appears to have been well accepted, I need not raise that issue. Nor do I want to dispute that. But in view of the fact that reservation in excess of that limit was the subject matter in *Nagaraj* and *Coelho* I touch this point only to emphasise that the limit is a sort of gentlemen's agreement and not a constitutional prescription. The logic on which the Court arrived at that limit does not have any basis in

constitutional interpretation. National or public interest is a defence for and not a weapon against the state action. If Balaji was a case relating to FRs, the petitioner was expected to claim that reservation of sixty-eight percent seats in that case was against his FRs and the respondent State was expected to defend its action on the ground that it is required in the national or public interest. But no such claim seems to have been made or defended in that case. The Court of its own became the defender and decision maker of national interest without a contest between the parties on that issue. Therefore, that limit was fixed in vacuum contrary to the recognized principles of constitutional interpretation. After upholding deviation from that limit in the case of SCs and STs in *Thomas* and *Sangh*, in *Sawhney* the Court held that barring any extra-ordinary situations reservation should not exceed fifty percent. The Eighty-first Amendment by inserting clause (4-B) in Article 16 has removed the fifty percent limit in state services. The Court unanimously upheld the amendment in *Nagaraj* and observed that "the concept of 'extent of reservation' is not an absolute concept and like merit it is context-specific."[79] The supporters of fifty percent limit will argue that Article 16(4-B) and *Nagaraj* are about employment and not education; *Balaji* still controls reservation in educational institutions. I do not find it a sound argument. At the same time I have no quarrel with the agreeable limit of fifty percent. But that limit should not prevent the state from exceeding it if the situation so demands. The Tamil Nadu legislation, which provides for sixty-nine percent reservation and was initially the subject matter of dispute in *Coelho*, applies to education as well as employment. But to avoid a challenge it has been included in the Ninth Schedule that we discuss next.

Reservation and the Ninth Schedule

Kesavananda decided that laws included in the Ninth Schedule until the pronouncement of that judgment, i.e. until 24 April 1973 were protected by Article 31-B and were, therefore, beyond challenge on the ground of violation of FRs. But any laws that are included in that Schedule after that date will be subject to the requirement of basic structure and could be tested on that ground. This position was reiterated and clarified in *Waman Rao*. The same position has been reiterated in the unanimous nine judge bench decision in *Coelho*. With this abstract statement the Court has left the validity of the laws included in the Ninth Schedule after 24 April 1973 to be determined under the basic structure limitation. In this regard two things must be noted. Firstly, the Court in *Nagaraj* found no violation of the basic structure doctrine in upholding unlimited reservation provided in Article 16(4-B). Secondly, though the Court has repeatedly held that the laws included in the Ninth Schedule after 24 April 1973 are subject to the basic structure requirement, since *Indira Gandhi* in which the validity of Representation of People Act included in the Ninth Schedule after 24 April 1973 was questioned on ground of basic structure the Court has always rejected the plea of application of basic structure doctrine to judge the validity of legislation whether included in the Ninth Schedule or not. Recently in *Kuldip Nayar* v. Union of India[80] and again in Thakur[81] the Court has declined to test

[79] (2006) 8 SCC 212, 249.
[80] (2006) 7 SCC 1, 67.

the validity of legislation on the touch stone of basic structure.[82] If this is the established constitutional position that legislation of any kind cannot be tested on the ground of violation of basic structure, it becomes enigmatic as to how can legislation included in the Ninth Schedule be examined if its contents violate the basic structure of the Constitution. In my view the threat or assurance that laws included in the Ninth Schedule after 24 April 1973 can be examined on grounds of basic structure is empty and has no substance. The laws included in the Ninth Schedule can only be deleted by an amendment as the Forty-fourth Amendment did in deleting several entries introduced in the Ninth Schedule by the Thirty-ninth and Fortieth Amendments.

Conclusion

To conclude the discussion, which could and is likely to be continued *ad infinitim* in one form or the other, I may say that despite divided verdict *Thakur* has done well. It would have certainly done better if all the judges had joined in a single verdict. Maybe the divided verdict is part of a strategy not to let the controversy be buried conclusively so that the opponents of reservation have the satisfaction that they have not yet lost their case and its supporters realize that it is a slippery path on which they must move very carefully at every step. No decision on the application of the Amendment to private unaided educational institutions could also be seen as part of that strategy. It divides what could be a united front against reservation in educational institutions and makes the government stand on its toes that a hasty action on its part may divert it from the constitutional goal. Even Justice Bhandari's dissent may be justified as a strategic move to console the opponents of reservation that they have enough scope to establish and run educational institutions free from the threat of reservation and they could continue their drive and initiative with full vigour to meet the pressing educational needs of our society.

Thakur has also clarified several lingering doubts on the reservation issue. It has decided that in essence the same principles of law apply to Aricle 15(4) and (5) as to Article 16(4) as determined in *Sawhney*. That SEBCs and OBCs in the two are essentially the same and the government could draw a common list for both. That so long as OBCs are determined with reference to caste the creamy layer from them

[81] See, Blakrishna CJI, para 93.

[82] Contrary to these established precedents and without taking note of them, speaking for the majority in the Court Justice Khehar seems to be drawing an exception in this regard when in *Madras Bar Assn.* v. *Union of India*, (2014) 10 SCC 1, 218 in the following words: "[t]he 'basic structure' of the constitution shall stand violated if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted."and again in *Supreme Court Advocates on Record* v. *Union of India* decided on 16.10.2015 at p. 514.
"We would therefore reiterate that "the basic structure" of the Constitution is inviolable, and as such, the Constitution cannot be amended so as to negate any "basic features" thereof, and so also, if a challenge is raised to an ordinary legislation based on the "basic features" of the Constitution, it would be valid to do so."

must be removed to bring them within the definition of OBCs. Exclusion of creamy layer is an inbuilt requirement of being OBCs on caste lines. That the concept of creamy layer does not apply to SCs and STs. And that the principles of suspect classification, strict scrutiny and compelling state necessity evolved and applied by the US courts in determining the validity of affirmative action or in interpreting the concept of equality are not relevant for us in interpreting the equality provisions, especially Articles 15(4) and (5) and 16(4) (4-A) and (4-B). It has also endorsed the clarification enacted in the Amendment that in the matter of establishing and administering educational institutions minorities stand on a different footing than the majorities.

We could, therefore, very well expect in future a slow, if not immediate, demise of many controversies associated with the issue of reservation. It has always been a curious enigma to me that while without a provision in the Constitution reservation for almost innumerous categories of persons such as government nominees, children of government employees, persons involved in family planning, residents of certain territories, children of political sufferers, war widows, etc are either not noticed or have been upheld by the courts as part of equality scheme, reservation for SCs, STs and OBCs continues to be hotly contested subject despite express provisions for it in the Constitution. Of course the answer would be that while the former are casteless the later are caste based. As caste system is a perennial evil existing from time immemorial it should be eliminated through its non-recognition. As a student of law I ask whether the Constitution makers were ignorant of such an obvious fact when they provided for reservation for OBCs, SCs, STs and even Anglo-Indians or made special provisions for minorities. Are our representatives in Parliament and State legislatures have also been ignorant of this fact who have been ever since the commencement of the Constitution supporting and strengthening these provisions? I am sure that it is not the case. On my own analysis I find that the privileged few who retain vast resources of the society are not open to share them with the large number of our masses who have been consistently denied of them since time immemorial. They come up with all sorts of argument to retain their privileged position. The latest among them is economic liberalization as part of globalization. While economists are equally divided on the gains of liberalization and globalization, facts have proved beyond doubt that increase in total wealth of the society does not ensure its equitable distribution. For equitable distribution of gains extra measures are required. Apart from DPs, provisions like Articles 15(4) and (5) and 16 (4), (4-A) and (4-B) and 335 in our Constitution are part of that requirement. They also serve a larger purpose of narrowing down the gap that has been created and perpetuated in our society on caste lines between those who have and those who do not have any say in the society. They ensure that those who did not have a say so far will slowly be brought into the fold of those who have and in course of time, hopefully, the gap will vanish and an inclusive society, at least in public affairs, will be created. There should be no doubt that an inclusive society will better serve our constitutional goal of fraternity, human dignity and national unity than a divided society.

For that reason I earnestly urge that in the larger interest of our society and of each one of us we must give up our narrow vision and get united in the realization of our constitutional goals. We must not get confused with what the other societies are

doing for themselves. *Thakur* and the decisions following it have shown the way by rightly rejecting the principles of constitutional interpretation applied in the United States. We must also not be influenced by what the United States or any other country does with affirmative programmes.[83] We are different, our problems are different, and our Constitution is different and has the unique distinction of being the first to expressly provide for affirmative action including reservation in key areas. We should not let this opportunity of reconstructing our society slip once again from our hands as we have been doing since pre-Buddha era. Let us not let down our Constitution makers as we have done before to many reformers. Let us now create an ideal society on earth where all people live in harmony, free from want and fear and pursue their goals towards high reaches of mankind without hurdles and hindrance. The goal so set out in the Constitution and acted upon from time to time should also not be scuttled or diluted by unexpected and sometimes violent demands by those who do not fall within the category of those for whom the positive action was envisaged and is imminently required. I hope we will all respect our Constitution and the wishes of those who bequeathed it to us.

[83] See, Acharya, above n. 24 at 288.

Uniform Civil Code – Half Way around Blueprint for the Other Half Way

Dr P.B. Pankaja[*]

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Introduction

"Indian laws must have diversity wherever it is possible and uniformity wherever it is required but in all cases there must be certainty." This was the golden guideline laid down by Lord Macaulay when he was appointed as the Chairman of the First Law Commission of British India in 1833.This important message carries much relevancy even today in the context of ongoing debate on Uniform Civil Code, shortly called UCC.

The debate on Uniform Civil Code[1], which started in the Constituent Assembly on 23 November, 1948[2], has not stopped till today and it speaks volumes on the sensitivity and complexity glossed around the subject. The 'Clarian call of 1948-49' for Uniform Civil Code was substantially different from the present day call for the same.[3]Despite differences, no other phenomenon has attracted the attention of all religious communities in India, then and now, and the fundamental question – 'What is Uniform Civil Code?' is left unresolved till today.

Uniform Civil Code, from its very inception, has been a distorted concept. It is left undefined by the founding fathers and 'how to achieve it?' is left to one's own prescription. It does not lay down the blue print in clear terms. The provisions of the code are neither spelt officially nor placed in public domain. What is visible is mere a form without the contents. The factors contributing for uncertainty engulfing the concept are many and the word 'Uniform' in the title adds to it. 'Uniformity' is perceived differently by different segments of the society and hence the entire debate on UCC is founded on ones' own proposition accompanied by myth and apprehensions about UCC. This situation can be equated to the irony of touching the body parts of elephant by four visually challenged persons and equating them to things of their own imagination. Whenever it is seen through communal lens, it is devoid of rationality and objectivity. Nevertheless, in the context of new developments, intended or unintended, a new meaning for UCC is coming to the

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[1] Article 44 of the Constitution spells 'State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'.

[2] Constituent Assembly Debates, Vol. VII, PP. 540-552

[3] For details please see infra part I

forefront. The abstract phenomenon calls for a pragmatic approach. Along with it, Indian Secularism is also going through the process of being reinvented.

India is a Sovereign Socialist Secular Democratic Republic. In the constitutional set up, Freedom of religion is engraved as a fundamental right[4] and Uniform Civil Code is declared as a Directive Principle of State Policy[5]and both are allianced with preambular promise of Secularism. This holy nexus makes Indian Secularism unique from Western and European varieties of Secularism. It is unique in the sense that 'Secularism' should address the fundamental right to freedom of religion and the directive principle of UCC impartially. It should ensure religious freedom to coexist with unified religious personal laws. State does not have religion of its own but shall not interfere with religion of people. All religions are given equal protection[6] and no one religion is privileged to have more protection.

The religious freedom guaranteed under the Constitution is neither absolute nor unbridled but it is subject to public order, morality and health[7]. The State shall not discriminate anybody on the ground of religion[8] but nothing shall prevent the State from making a law in religious matters to bring about social reform[9]. The protection under Articles 25-28 is available to religious practices which form an essential and integral part of religion. But social evils cannot be practiced in the name of religion. A practice may be religious but not an essential or integral part of religion.[10] Such Secularism is one of the basic features of the Indian Constitution.[11]

Religious pluralism in India permits Hindus, Muslims, Christians, Parsees and other religious people to follow their own laws in personal matters like marriage and matrimonial remedies, inheritance and succession, adoption and maintenance, guardianship and minority. Some aspects of personal law of some communities are codified by the State to bring in uniformity and reformation and others are left untouched, to be guided by customary practices. Experience shows that we never get satisfactory answer to the basic question 'why it is so?' The selection of subject and the community depend on various factors such as political will, people's co-operation and level of resistance and each one factor, on the other hand, depends on various other factors. Codified law is generally presumed to be a just law but the presumption is always rebuttable. Conversely, un-codified laws are always open to challenge because they have not gone through legislative scanner. Most of the problems of discrimination, inequity and arbitrariness are found in un-codified laws,

[4] Articles 25 to 28 give concrete shape to religious freedom.
[5] Article 44 provides that 'State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'.
[6] Article 14 declares 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.
[7] Article 25 (1) states Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to possess, practice and propagate religion.
[8] Articles 15 &16 of the Constitution of India
[9] Clause (2)(b) of Article 25.
[10] *Gulam Khade Ahmadbhai Menon* v. *Surat Municipal Corporation*, AIR 1998 Guj 234.
[11] *S.R. Bommai* v.*UOI*, (1994) SCC 1.

calling for State action in the form of legislation to protect the victims of such discrimination and oppression.

In this context we find that personal laws, though claimed to be structured on divine revelations, have many un-divine practices derogatory to the dignity of women and human values enshrined in our Constitution. Man made customary practices are often misinterpreted as divine law immutable and beyond human intervention and no one personal law is a total exception to it. They would not stand the test of reasonableness and wholesomeness, if measured in terms of Human rights and gender justice, albeit, they vary in their unreasonableness. Family relationships are interpreted in religious terms and patriarchal notions of womanhood justify subjugate practices in terms of protective measures. Women are viewed as symbols of honour and men as protectors. Chastity is a premium for her entitlements and chauvinism is a social reward for his domination. Women are discriminated against men and women equally. Men seek to take advantage of loopholes existing in laws leading to 'conflict of laws' situation. Thus personal laws, significantly un-codified ones, stand as a witness to 'great divide' between men and women and between Hindus, Muslims, Christians and Parsees posing a threat to gender and communal harmony.

On the question whether personal laws do not fall within the regulatory framework of the State, it is judicially settled that they stand outside the ambit of Article 13 enjoying legislative immunity.[12] Part III does not touch upon the personal laws of parties.[13] Though the term 'Law' in Article 13 includes all laws in force, personal laws of Hindus, Muslims and Christians are excluded from the definition of law for the purpose of application of this Article.[14]But of late, grey areas in codified laws are either taken cognizance by the legislature or brought to judicial notice and get remedied. But it was never a smooth sail.

In this context, UCC is seen by some as a panacea for gender justice and national solidarity and by others as a threat to religious identity. In a pluralistic secular democracy like India, balancing the need for uniformity in personal law matters and the need to respect community laws has come to be realised as an uphill task. Religious diversity, existing at the cost of gender injustice, is no more a virtue to be admired and has unconsciously given a smooth way for uniformity to set in, even at the cost of India losing the charm of being called as a mosaic of multi- religious culture.

The main aim of this article is to bring home the point that there are many roads to reach UCC. The hurdles and resistance on the way to overcome are varied in nature depending on the path we choose. The author is of the opinion that the journey has already been started in a particular path and instead of coming back and taking an alternative path, efforts should be made to clear the way in the path already taken off. In this process, the author wishes to take the readers to have a cursory look into the

[12] *State of Bombay* v. *Narasu Appa Malli*, AIR 1952 Bombay 84
[13] *Krishna Singh* v. *Mathur Ahir*, AIR 1980 SC 707
[14] *Bhan Ram* v. *Baijnath*, AIR 1962 SC 1476

contemporary developments relating to UCC in the country to have a better understanding of the alternatives and to select a better alternative among them.

UCC of 1948-49 and UCC of 21st century – Debate makes a lot of difference

The political, legal and social background in which UCC was advocated and debated in 1948-49 was different from the debate in present atmosphere. Politically, the wound of partition of India was fresh in the minds of all Indians and the Congress was the single party having thumping majority, seen as nation builder; on the legal front, the Hindu enactments and Special Marriage Act were not then codified and personal laws were conveniently followed unhindered, in the name of religious personal laws (RPLs); on social front, the movements for social reformation were unorganised; women's organisations, led by educated women, demanded UCC as a panacea for discriminatory treatment; human rights conscience was still at a nascent level; social adherence to norms prescribed by priests, mullahs and bishops were received with sanctity; the fear of community ostracism gripped the women, preventing them from raising their voices against patriarchal forces, but willing to succumb to loyalty pressures; the print media was not engaged in social debates; electronic media was at its nascent stage; social media was almost nil; and above all political will was not to have confrontation with minorities who had opted to continue to live in India despite political disturbances.

In this background the need for Uniform Civil Code was mooted in the Constitution Assembly as Article 35 and it was one of the most contentious issues which had divided the floor into two.

One channel of arguments for bringing Uniform Civil Code for all Indians in personal law matters stemmed from members like Pandit Nehru, Dr. Ambedkar, K.M. Munshi, A.K. Aiyar and others. The main arguments put forth before the Assembly were: religion should be divorced from Personal law as it was not a part of religion; discriminatory Personal law was not permitted by the Constitution; in European countries uniform codes were applied even to minorities; the Muslims did not have legitimacy to question Uniform Civil Code as 'Sharia' was forcibly imposed on converted Muslims against their wishes.[15]

The second stream of arguments was put forth by Mohammad Ismail, Nazir Ahmad, Mahbood Ali Beg, Pocker Sahib and others. Their dissenting voices were founded on the premises that uniform civil code would not be possible and desirable for a vast country like India. It would infringe the fundamental right to freedom of religion, guaranteed under the Constitution and it would amount to tyranny to minority by majority. A proviso to the article was to be inserted providing that people shall not be obliged to give up their personal law because it is part and parcel of religion and any reform should be initiated only with the prior approval of the community.

[15] Constituent Assembly Debates, Vol. VII, Pp. 540-552

After a lot of deliberations, the debate was concluded by Dr. Ambedkar clarifying that

> "Existence of many number of enactments like Transfer of Property Act, Negotiable Instruments Act, Law of Contracts and Civil procedure code would prove that this country has practically a uniform civil code operative throughout the country. The only province of civil code that has not been able to invade is marriage and succession ... Therefore the argument whether we should attempt such a thing (UCC) seems to me somewhat misplaced for the simple reason that we have, as a matter of fact, covered the whole lot of the field which is covered by a uniform civil code in this country. It is therefore too late now to ask the question whether we could have it. We have already have it ... There is also no use of making a categorical statement that the Muslim law has been an immutable law. If necessary it should be applied to all ... I am quite certain that it would not be open for any Muslim to say that the framers of the civil code had done great violence to the sentiments of the Muslim community".

He also persuaded the Muslim members 'not to read too much into the Article 36' and said that 'it would be possible for future parliament to make a Code which would be implemented only to those who would consent to it.'[16] After this, the motion "provided that the personal law of any community which is guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such a manner as the Union Legislature may determine by law" was negatived. The motion "That Article 35, stand part of the Constitution" was adopted. Till date, the clarion call for UCC remains un-responded. Neither it is voluntarily sought nor optionally codified. Despite lack of inertia from community and the State, the call comes from various quarters time and again reminding the nation that UCC cannot be forgotten totally and should be brought into the legislative network of the country.

The present day debate is diversified with more vociferous players taking an active participation. It is to be viewed in the context of present political, social and legal developments. UCC is intertwined with minority rights, women's rights and human rights. It is a pedigree for politics and media. Whenever an event threatening secular spirit comes to public domain, it is hotly debated for debate sake and gets faded away as the memory fades. Whenever *Fatwas* are issued and they are declared by the judiciary as not legally binding, the question of UCC surfaces to be debated. The role of media, in this regard, is not up to mark. The time-constrained debates and discussions, being sectoral and sectarian in nature, give a distorted picture that UCC is all about practices of *Talaq*. The debates should go beyond it and be educative.

UCC as a major legal instrument towards social transformation cannot be viewed, without its political colour. The judicial holding in *Shah Bano*[17] entitling post-divorce maintenance to Muslim women, and the aftermath legislation of the Muslim Women (Protection of Rights on Divorce) Act, 1986, to nullify the *Shah*

[16] *Id.*

[17] *Mohammad Ahmed Khan* v. *Shah Bano Begum*, AIR 1985 SC 945

Bano verdict and to reassert non-obligation of divorced husbands to maintain their divorced wives, triggered the Hindu organisations like VHP and RSS to advocate UCC for all – primarily as a means of eradicating the 'privilege of Minority' assured by Parliament. The political will is unclear about the contents and the means of UCC. The Congress led government, claiming themselves as secularists, dared not to touch it as it would uproot their vote-bank politics. The possibility of UCC being only a repackaged Hindu Law was ruled out by then Prime Minister Vajpayee when he said that there will be a new code on Gender Equality comprising the best elements in all the personal laws. The BJP led government opened up the Pandora's Box for public debate by including it in their election manifesto. Emboldened by the Supreme Court's stand on UCC[18] from *Shah Bano* to *Vallamattom*, the GOI has given a positive signal to bring a common code but reserved that a code could not be finalised overnight but can be done only after detailed consultations with stake holders and voices in the government. The Government has called for a national debate on UCC and wanted the Law Commission of India to identify 'fair and equitable ingredients' from the personal laws of the Hindus, Muslims, Christians and Parsees and formulate a common code for the purpose.

The role of Uniform Civil Code in the context of gender justice cannot be ignored. Women's response to UCC is not uniform. The equation is constantly changing in supporting and distancing away from UCC. Initially, the All India Women's congress demanded UCC as a measure of emancipation of women in family relationship. Later, there has been a shift in their approach. UCC is looked upon as a 'women's rights issue' and called for reforms within personal laws through codifications and amendments. Their efforts succeeded in bringing in Domestic violence Act, 2005 and an amendment in Indian Divorce Act, 1925. A group of women associations call for egalitarian or just family law instead of uniform civil code as it would restore patriarchy. Muslim Women Personal Law Board has emerged and came up with model *Nikhanama* containing fair negotiation in the contract of marriage. Bharatiya Muslim Mahila Andolan, a national coalition of Muslim women with over 70000 members from different states drafted a Muslim Family Code and urged the government to take into consideration the constitutional rights of Muslim women. Certain feminist groups call for 'just' family laws broadening the concept of family to include non-marital and homosexual relationships too.

Progressive thinkers within Muslim community like Dr. Tahir Mahmood, Sir Syed Ahmed Khan, Amir Ali and Tyabjeehave started giving enlightened and rationalised interpretations of Quran in the light of 'gender justice',[19] even at the cost of receiving brick bat from the Muslim Personal Law Board which interprets personal law for Muslims and oppose UCC tooth and nail. They made a powerful plea for reformation within Muslim personal law and argued that many Muslim countries have outlawed polygamy and triple *talaq*. Even some *Ulemas*, belonging to

[18] Please see the following paragraphs where judicial notes are mentioned.

[19] Tahir Mahmood and Saif Mahmood, "*Muslim law in India and Abroad*", Universal Law Publishing, Delhi (2012)

certain schools of thought, and Islamic forum for Promotion of Moderate Thought consider the derogatory practices un-Islamic and invalid and wanted to forbid them.[20]

The role of judiciary, in this respect has been a whistle blower, reminding the executive and the legislature of their forgotten constitutional obligation of bringing in UCC. The journey of judicial reminder witnessed many landmark decisions from *Shah Bano*[21] to *John Vallamattom*[22], covering the entire range of personal law matters such as marriage, divorce, maintenance, guardianship, adoption and succession. *Fatwas* issued by Mullahs validating the arbitrary pronouncement of *talaq* through phone, e-mail and fax, directly to the wife or through proxy and forcing the woman to accept her father-in-law as her husband subsequent to the former raping the later and to treat her husband as her son, mandating *halala* for the *talaqued* woman to marry her divorced husband, denying maintenance and ruthless driving of wives to destitution on *talaq* were seriously taken note of by the Indian judiciary which felt UCC as the need of the hour to stop gender insensitivity to take a toll on women's physical, moral and emotional health.

In the case of *Mohammad Ahmed Khan* v. *Shah Bano Begum,*[23](1985) popularly known as the *Shah Bano* case, the court, while allowing maintenance to a Muslim woman under Section 125 Cr.P.C., who had been divorced by her husband and was in the verge of destitution, expressed its concern that 'Article 44 of the Constitution has remained a dead letter' and directed the Parliament to look towards framing a Uniform Civil Code. The then Chief Justice of India Y.V. Chandrachud observed that,

> "The Present case is yet another event which focuses on the immediate and compulsory need for UCC..... A common civil code will help the cause of national integration by removing disparate disloyalties to law which have conflicting ideologies".[24]

In *Sarla Mudgal* v. *Union of India*[25], (1995) the Supreme Court bench consisting of Kuldip Singh and Sahai JJ, has issued a directive to the Union of India to endeavour framing a Uniform Civil Code and report to it within three months the steps taken. The Supreme Court opined that "Those who preferred to remain in India after the partition fully knew that the Indian leaders did not believe in two- nation or three nation theory and that in the Indian Republic there was to be only one nation- and no community could claim to remain a separate entity on the basis of religion."

The court through J. Kuldip Singh opined that "Article 44 has to be retrieved from the cold storage where it is lying since 1949". Referring to the codification of the Hindu personal law he said, "Where more than 80 % of the citizens have already

[20] V.P. Bhartia, "*Syed Khalid Rashid's Muslim Law*", Eastern Book Company, Lucknow (2009) p.113

[21] *Mohammad Ahmed Khan* v. *Shah Bano Begum*, 1985 AIR SC 945

[22] *John Vallamattom* v. *UOI*, [(2003) 6 SCC 611

[23] AIR 1985 SC 945

[24] *Id*

[25] AIR 1995 SC 1531

been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of the 'uniform civil code' for all the citizens in the territory of India." J. Sahai expressed that "UCC is imperative, both for the protection of the oppressed and promotion of national unity and solidarity. A UCC modelled on Hindu law would resolve the treatment of Bigamy in different communities." The strong observations made in this case has created wide spread outrage from Islamic community.

Later in *Lily Thomas v.UOI*[26], (2000) the Court clarified that the remarks made by the judges in *Sarala Mudgal* were only their views on UCC constituting *obiter dicta*. While hearing a batch of writ review petitions filed by various persons and the *Jamiat-Ulemi Hind* and Muslim Personal Law Board challenging its earlier decision in *Sarla Mudgal* to be quashed, the court remarked that,

> "The government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the issue of UCC and bring about a comprehensive legislation in keeping with modern day concept of human rights for women."

The Supreme Court's another reminder to the government, of its Constitutional obligation to enact a UCC, came in July 2003 in the form of *John Vallamattom* v. *UOI*[27], (2003) when a Christian priest knocked the doors of the Court challenging the Constitutional validity of Section 118 of the Indian Succession Act.. The bench comprising of then Chief justice of India V.N. Khare, Justice S.B. Sinha and Justice A.R. Lakshamanan struck down the Section declaring it to be unconstitutional. The court observed, "It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country." J. Khare observed, "A common civil code will help the cause of national integration by removing the contradiction based on ideologies."

Post *Vallamattom*, the judiciary came under public scanner for it's over activism in pulling the legs of the government with regard to UCC. Calling for judicial restraint, a Muslim scholar observed, "It is surprising that such statements should emanate from the highest court of the country when it is well known that the prerogative of deciding what laws are good for the country vests with the executive."[28]On the other hand, the judicial approach to UCC is different in the following cases. It followed the well settled principle of judicial restraint. In *Pannalal Bansilal & Ors* v. *St of AP & Anr*[29], (1990) validity of Sections 15, 16 and 144 of the AP Charitable Hindu Religions and Endowments Act, 1987 were challenged. The court took the occasion to deal with the desirability of UCC in the light of existing religious pluralism.

> "The first question is whether India needs a UCC? ... Though it is highly desirable, enactment thereof in one go perhaps may be counter-productive to the unity and integrity of the nation. In a democracy, governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages."[30]

[26] AIR 2000 SC 1650.
[27] (2003) 6 SCC 611
[28] Faizur Rahman, '*UCC and National Integration*', The Hindu, online edition, Aug 19, 2003
[29] 1990 (2) SCC 498

In*Maharshi Avadesh* v. *UOI.*[31] (1994) the apex court had specifically declined to issue a writ directing the respondents to consider the question of enacting a common civil code for all citizens of India holding that "the issue raised being a matter of policy, it was for the legislature to take effective steps as the court cannot legislate."In *Shabnam Hashmi* v. *UOI &Ors,*[32]the Supreme Court, while disposing a writ filed as a PIL, to recognise the right to adopt and to be adopted as a fundamental right, made an observation on UCC,

> "In our considered view, we will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature, which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue, has expressed its views, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting viewpoints prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and to be adopted can be raised to the status of a Fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution."

Year 2015 has seen many more cases[33] wherein the judiciary is keen in reminding the government on UCC. Very recently, in a case[34] (2015) Christian couple challenged Section 10A(1) of Indian Divorce Act under which they have to wait for at least two years for divorce, whereas this period of separation is one year for other religions. Justices Vikramjitsen and Shivakeerthi Singh, comprising the Bench, questioned the Government about its mandate on framing UCC so that all religions are regulated by the same yardsticks in matters of personal laws. It asked the government whether it is willing to bring UCC and gave the government three weeks to take a quick decision on a UCC to end the confusion over personal laws. It

[30] *Ibid* p.510. Para12.
[31] 1994 Supp(1) SCC 713
[32] (2014) 4 SCC 1
[33] These cases are not fully decided and reported. The observations made by the court and the judges, as reported in print media are taken note of by the author in this segment.
[34] Utkarsh Anand, '*UCC: There is total confusion, why can't it be done? SC asks Government*', The Indian Express, 13 October, 2015.

observed, "If you want to do it then you should do it". "Why is India dragging its feet on the UCC?"[35]

Similarly, in a *suo motto* PIL filed in the Supreme court to have a relook at the issue of 'gender discrimination' suffered by Muslim women in the country, the bench comprising Justices A.R. Dave and A.K. Goel remarked, "arbitrary divorces and second marriages denied Muslim women dignity and security....why they should be subjected to gender discrimination despite the constitutional guarantee of equality? ... The issue had not been addressed by way of state policy despite earlier court rulings urging the government to rationalise personal laws of different communities and bring in the UCC..." Further the court insisted that "The issue cannot be left to state policy as it involved the fundamental rights of particular section of women."[36]

Reacting negatively to a very recent writ filed by a petitioner as PIL[37], the apex court through Chief Justice Thakur declined to entertain the petition saying "We cannot ask the parliament to bring the common civil code. It is for the parliament to take a call on the issue and it was not in the realm of the apex court to issue a direction on this." However the court held out hope for the minority women by saying 'if the women who find themselves at the wrong end of triple talaq, comes to the court and questions the validity of the divorce procedure, we can surely examine the legality in the light of her fundamental rights.... The goal of the Constitution for the UCC is 'one thing', asking the apex court in a PIL to issue a mandamus to the parliament to enact the common code is 'another'... we cannot ask them (Parliament) to do it". The bench said"21 years ago the apex court had declined to go into the issue of civil common code and the position has not changed."Similar views are aired by scholars and members of judiciary on various occasions. Justice Ajith Prakash Sahai, while expressing his views on UCC, said, "UCC is not a magic wand for uniformity; nor will uniformity achieve a national integration"[38]

A brief account of diversified debate on UCC in India from 1948 to 2016, brings to light the paradox of UCC. In the name of secularism Dr. Ambedkar insisted for UCC; in the name of secularism Pandit Nehru deferred it for Muslims but preferred it for Hindus; in the name of secularism Apex judiciary acts as a whistle blower for state engineering towards UCC; in the name of secularism Imams and Clergies give tough resistance to UCC. To put it the other way - we need UCC because India is a secular State; we do not need UCC because India is a secular State; we desire discriminatory personal laws to continue without State intervention because India is a secular State; we demand State to reform and refine personal laws because secularism preaches equal protection of all laws. In the light of voices of the nation,

[35] Mohan Guruswamy, The Quint, October 15, 2015.
[36] Samanwaya Rautray, '*Supreme court Prods Centre on Uniform Civil Code*', The Economic Times, 28 October, 2015
[37] Krishna Das Rajagopal, "*Cannot direct Parliament to enact Uniform Civil Code: SC*" The Hindu, 7th December 2015.
[38] Ajit Prakash Sahai, "*Towards a Modern Code*", Indian Express, October 28, 2015.

the next part of this Article is devoted to give a cursory look on the codification status of personal laws.

Codification Status of Personal Laws

Despite the constitutional limitations on State power to intervene in religious matters, the personal laws of Hindus have been in constant process of reformation and refinement. The process initiated by colonial government since 1830's did not stop till today.[39]In independent India major areas of personal laws of Hindus on marriage, matrimonial remedies, guardianship, adoption, maintenance and succession are codified[40] to bring all Hindus belonging to different schools, communities and castes within the fold of single uniform law. In the process of codification, many unfair practices forming part of personal law, claiming to be deriving their legitimacy from religious scripts were scrapped and pruned. Despite protests from fundamentalists and traditionalists, Nehru was determined to do so and he did it. The preliminary codifications are continued with amendments to the Acts to fine tune them according to changing social needs and to make them in consonance with the spirit of the Constitution. In this process the consent of the Hindus were taken as granted. Law of divorce is rationalised;[41] the religious aspect of adoption is weeded out;[42]daughters are given equal rights to succeed to their parents;[43]daughters are included in the hitherto male-cantered-coparcenaries;[44] testamentary disposition of undivided share is legalised;[45] mother's status is equalised with that of father in the process of adoption;[46] customary practice of polygamy is derecognised and monogamy is legally mandated[47]and many more. The only area of personal law, left un-codified 'directly', is Hindu joint family system despite the fact that legislative inroads are made 'indirectly' resulting in a few significant structural changes through Hindu Succession (Amendment) Act, 2005.

But the State could not and did not adopt the same approach towards minority religious groups, specifically the Muslims, mainly for the reason that they were given assurances at the time of partition that their rights would be safeguarded and State would not reform their personal laws until the community voluntarily comes forward and asks for it. Hence the personal laws of Muslims continue to discriminate women

[39] Hindu widows Remarriage validity Act1856, Hindu Wills Act, 1870, Hindu Transfers and Bequests Act, 1914, Hindu Disposition of Property act, 1916, Gains of learning Act, 1930, Hindu Women's right to property Act, 1937 and so on.
[40] Hindu marriage Act 1955, Hindu Minority and Guardianship Act, 1956, Hindu Adoptions and Maintenance Act, 1956 and Hindu Succession Act, 1956.
[41] Sections 13, 13 (1), 13(1A), 13 (2), 13-B, 13-C of Hindu Marriage Act, 1956
[42] Proviso to Section 11 of Hindu Adoptions and Maintenance Act, 1956 *"provided that the performance of Datta Homam shall not be essential to the validity of adoption"*
[43] Sections 8 and 15 of Hindu Succession Act, 1956
[44] Section 6 of Hindu Succession Act, 1956 as amended by Hindu Succession Act (Amendment) Act, 2005
[45] Section 30 of Hindu Succession Act, 1956
[46] Section 8 of Hindu Adoptions and Maintenance Act, 1956
[47] Section 5 of Hindu Marriage Act, 1955

to their disadvantage. The husband's arbitrary power of unilateral *talaq*, power to triple *talaq*, derogatory practice of *Halala*, *Muta* marriage, denial of guardianship to mother, stoppage of maintenance to wife on divorce, husband's right to have four wives and illusory amount of dower, purchase of husband's consent for divorce in lieu of dower and puberty age for marriage speak a lot about the vulnerability of women in marriage under Muslim law, quite often shaking the conscience of Judiciary. The apex court, on many occasions[48] expressed its disapproval and disagreement with the faulty understanding of Muslim law by many Muslim men. All derogatory practices are justified by Muslim fundamentalists in the garb of *Quran* mixing family relationship with religion.

Unconditional permission to follow un-codified personal laws reinforces community's religious loyalty and women are caught in between desire to be treated as an equal partner by dismantling the customary law and self imposed restriction not to cross the *Lakshman Rekha* for considerations of community support and family peace. This dilemma is more visible among Muslim women because of scarce codification of Muslim personal Law. The *Sharia*' Act, 1937 was codified eight decades ago to extend Muslim law to converted Muslims who were till then allowed to practice their pre-conversion law. Dissolution of Muslim Marriage Act, 1939 was made to settle the point that conversion by Muslim women does not automatically dissolve the marriage unlike the husband's conversion. The Protection of Muslim Women on dissolution of marriage Act, 1986 was a negative reaction of Muslim fundamentalists to the significant *Shah Bano* judgment[49] which declared a divorced Muslim woman's right to maintenance under section 125 CrPC, the secular law of the country, as legally enforceable. The Act reinstated the pre-Shah Bano position of maintenance obligation of husband limited to *Iddat* and not beyond it. Beyond these few legislations, any proposal for reform of Muslim law was resisted by the fundamentalists as violation of their fundamental right to religious freedom, guaranteed under the Constitution.

The personal laws of all religious communities are founded on patriarchal notions of womanhood and Christian's and Parsee's laws are no exception to it. They give their women lesser right to succession and are heavily tilted in favour of men. But codification of Christian Marriage Act 1872, Indian Divorce Act 1869, Indian Succession Act 1925, and Parsee Marriage and Divorce Act 1936 have brought in significant changes in elevating the legal status of women in the areas of family though not on par with Hindu law.

Alternate Roads 'Towards' UCC

A bird's eye-view on the voices of nation and the codification status of personal laws are appraised to clarify the 'what' and 'why' of UCC. This section of the Article is

[48] *A. Yousuf Rawther* v. *Sowramma* (AIR 1971 Ker. 261), *Rukhia Khatoon* v. *Abdul Khalique Laskar*, (1981) 1 Gauhati Law Reports 358; *ShamimAra* v. *St. of UP*, AIR 2002 SC 3551; *Masroor Ahmed* v. *State (NCT of Delhi)* 2008 (103) DRJ 137 (Del) and many more judgments.

[49] *Mohammad Ahmed Khan* v. *Shah Bano Begum*, 1985 AIR SC 945

devoted to discuss the 'how' of UCC. The author, with her limited knowledge, finds four possible roads 'towards' UCC. The word 'towards' and not 'to' is used here to signify that no road can 'exactly' take us to the spot of undefined destination of UCC. Opting any one path may land us somewhere near to UCC.

UCC as a Replacing Code

In this option the State shall frame UCC by replacing existing personal laws. In this sense, it is a replacing code invasive in nature. It amounts to drastically replacing the personal law in one go. If it is to be opted, number of guidelines should be put into place in order to make it more easily acceptable for all the citizens of the country. Being a *de nova* code, it is a '*Herculean*' task. Taking into consideration the time and skill involved in drafting the Code, it appears to the author as next to impossibility. For example, granting maintenance to an indigent husband is totally a new concept accepted by Hindu jurisprudence and it is a special feature nowhere else found. Concept of 'bequeathable 1/3' is a distinct characteristic of Muslim law. Tinkering with it is to be resorted to with utmost care.

In the midst of public resentment and religious pluralism this option appears to be a fallacy. It has the remote possibility to be adopted because it is neither possible nor practicable to formulate a UCC acceptable to all communities. *Mehr* can neither be taken away from Muslim women nor be made equally applicable to all women. Joint family system can neither be taken away from Hindus nor forcibly imposed on other communities. If implemented in letter and spirit, it has the potential of dividing the country politically, socially and religiously.

No democratic country will venture such an aggressive step, as this option will destroy the basic structure of the Constitution namely secularism and social democracy. It has the risk of resentment and communal disharmony leading Indian secularism to become vulnerable to communal pressures. As rightly said "UCC can emerge only through an evolutionary process which preserves India's legal heritage, of which all the personal laws are equal constituents."[50]

Above all, modernisation of personal law may not necessarily happen through UCC. Codification may put an end to diversity but is not a guarantee for equity. Many examples are at hand to substantiate this assumption. Not only un-codified, even codified personal laws discriminate women. So neither society nor the legislature wishes to treat women on equal footing with men. There may not be a full guarantee for an egalitarian UCC. The legislators who codified personal laws are going to codify UCC if it is endeavoured. Bad drafting of legislations are highlighted in recently passed Hindu Succession (Amendment) Act, 2015 and Prohibition of Child Marriage Act, 2006.[51]

[50] Justice Ajit Prakash Sahai, "*Towards a Modern Code*" Indian Express, October 28, 2015.

[51] Please see a detailed write up of the present author, "*Unique status of Child marriage in India and proposed amendments – A legal Maze*" JOLTI, Vol.4 (2013), Pp 133-144

UCC as an Optional Code

In this option, the State shall frame UCC as an optional code and allow personal laws to exist parallel. This option does not negate the possibility of citizens availing themselves of personal laws if they so wish. Those who want to move ahead of their religion may do so. The merit of this option is that community's acceptance to UCC may be gradual instead of being imposed. Despite the merits, it has certain limitations. As in the case of first option, it should be properly drafted with utmost care without communal bias, so as to satisfy legitimate expectations of all people in India because there is evidence that even secular laws have some religious content. Secondly, UCC may not make any difference in the beginning. Thirdly, women may be put to dilemma whether to come out of the religion or continue to dwell in patriarchal setup, a very hard decision to take up, having a great impact on her family relationships.

It may be taken to mean extension of 'Goa model'[52] for entire territory of India. Goa is the only State to have implemented an opt-in UCC in the name of Goa Civil Code or Goa Family Code. It governs all the residents of Goa, on declaration, irrespective of their religion. The other personal laws also do exist. However, it is to be noted that Goa civil code is not 'just' in all areas. Marriage law of Catholic Christians differs from that of other faiths. Hindus are permitted to practice limited polygamy. There is inequality between legitimate and illegitimate children. But spousal property is well protected in case of divorce under community property law. Despite the grey areas, Goa has shown the way. It stands as a model for Centre and other States to follow, if determined to have one.

Review of all Personal Laws through Codifications and Amendments

UCC is not required if all personal laws are just and fair. Bringing in amendments to all the personal laws and ensure that certain core values are maintained by all laws. Cultural relativism holds that every culture is different from others. In a multi-cultural society like India, expecting uniformity and universal rights is a myth. It will be counter-productive too. It will destroy cultural identities of minorities. Hence existing personal laws are to be reformed in lieu of UCC. Communities should either come forward to take efforts to do so or allow the State to do the work for them i.e., reformation can be either by internal mechanism or by external mechanism. But proposal for reform within the community is to be time-bound. In case the proposal is holding little appeal, UCC should have its way, dismantling the weak structures within the personal laws which pose constant threat to women's survival and emancipation. Every personal law, codified or un-codified, needs legislative tinkering. It is a big step the state has to take up by appointing committees. Given the discrepancies in the existing laws, rationalisation is the need of the hour.

In this context, the recent step taken by Bharatiya Muslim Mahila Andolan is worth mention. A national coalition of all India Muslim women from various States have recently presented a draft of Muslim Family Law Code, based on *Quranic* tenets and in consonance of the Constitution of India, to the Prime Minister Modi and

[52] Goa has a uniform family code applicable to all Goans.

urged him to take into account their views in national deliberations. Their demands contain - minimum age for marriage as 18 and 21 years for girls and boys respectively; minimum *mehr* equivalent to annual income of the groom to be paid at the time of *nikha;* oral unilateral *talaq* to be declared illegal; *talaq-e-hasan* to be preceded by a mandatory arbitration over 90 days period; both mother and father to be recognised as guardians; post-divorce maintenance as per 1986 Act; bigamy to be declared illegal; *halala* to be an offence and compulsory registration of marriage.

Secularisation of Personal Law Matters – A Viable Option

After analysing the above three options towards UCC, the author tries to look into the fourth namely secularisation of personal law matters. Secularisation of 'personal law matters' is different from secularisation of 'personal law'. The former refers to bringing in national legislations or territorial legislations for personal law 'matters' topic by topic and the latter refers to removing the religious aspects in a particular law and make it more secular. The Special Marriage Act, 1954 (SMA), Juvenile Justice (Care and Protection) Act, 2015 (JJ Act), and Prohibition of Child Marriage Act, 2006 (POCMA) are good examples for former and proviso to Section 11 of HAMA 1956 is the best example for the latter whereby the essentiality of *'Datta Homam'* for Hindu adoption is done away with.

In this option, the effort of the State is secularisation of family law matters topic by topic through piecemeal legislations. Over a period of time people get accustomed to civil code and reap their benefits. The tension between constitutional requirement of UCC and the value of personal autonomy in family matters can be better balanced. The availability of parallel system will dilute the distrust and facilitate co-operation to bring in reformation within the personal laws. It will ease the communal tension and neutralise the undue legitimacy claimed by non-state actors like *Khaps* and *Fatwas*. Bringing in piecemeal reforms at national level through territorial laws is better than holistic reforms. With national legislations being legislated, the scope for UCC will be narrowed down. The national laws neither impose the law on the people; nor prevent them from deriving the benefit under the law. Well co-ordinated national laws on personal law matters would reflect the mirror image of UCC. It would pave the way for uniform law by instalments without undoing the personal laws. The author wishes to provide more discussion on this option in the below paragraphs. Dr. Ambedkar's vision that "it is perfectly possible that the future parliament may make a provision by way of making a beginning that the code shall apply to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the code may be purely voluntary. Parliament may feel the ground by some such method. This is not a novel method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North-West Frontier Province"[53] would aptly apply to this context.

Secularisation of personal laws has already found its way through Special Marriage Act, 1954, as an optional law governing marriages and matrimonial remedies. Experience shows that this option works better for Indians. Mandatory

[53] Constituent Assembly Debates, Vol. VII, P.551

registration of marriages under the Act would go a long way in addressing critical women-related issues such as: prevention of child marriages, forced marriages and bigamous marriages, enabling married women to claim their matrimonial rights, enabling widows to secure their inheritance rights, deterring parents from selling daughters under the garb of marriage etc[54].

Juvenile Justice (Care and Protection) Act, 2015 is a secular law permitting all Indians to adopt, which is not permitted under Muslim, Christian and Parsee personal laws. In a petition filed challenging the validity of an adoption made by a Christian couple, the court held that "The right of a Christian couple to adopt is inherent in the right to life guaranteed under Article 21, which cannot be barred by personal law of the Christians when a legal avenue is provided under the secular law, the Juvenile Justice (Care and Protection) Act 2015.[55] A similar stand has been taken by the apex court in Shabnam Hashmi,[56] wherein the court observed "the right to adopt a child under JJ Act would prevail over all personal laws and religious codes in the country ... The legislature, which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue, has expressed its views, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect."

Prohibition of Child Marriage Act, 2006, is also a national law, with regard to age of marriage, and provides the remedy of getting the marriage annulled by child parties if they so wish, with financial safeguards to child wife, which is denied partially for Hindus, and fully for Christians and Parsees under their personal laws. The Madras High Court[57], while dismissing a PIL seeking a direction from the Government officials not to interfere with marriages solemnised as per Muslim Personal law by invoking provisions of POCMA 2006, which bars marriage of girls below 18 years, has held that the act prohibiting the child marriages was not against Muslim personal law and POCMA 2006 would prevail over the Muslim personal law as it had been enacted for the welfare of girl children.

This option will yield best results only if the secular laws prove beneficial to the people and do not create economic loss or social hardship to those who opt for it. The author emphasises this point in the light of discrepancies existing in the Special Marriage Act, 1954.

Grey Areas in Special Marriage Act

Special Marriage Act, 1954 has three grey areas[58] which prevent people of all communities to take advantage of the Act. They are i) Prohibited relationship ii) Section 19 and iii) Section 21.

[54] In *Seema* v. *Ashwani Kumar* [(2006) 2 SCC 578] the Supreme Court directed the GOI to make registration of marriages compulsory.
[55] *Philips Alfred Malvin* v. *VJ Gonslaves*, AIR 1999 Ker 187
[56] *Shabnam Hashmi* v. *UOI & Ors*, (2014) 4 SCC 1
[57] www.dnaindia.com, retrieved on 26-02-2016
[58] For more details please see the Law Commission of India Report No.209 (2008)

Prohibited relationship

The Act has its own list of prohibited relationship containing 37 entries separate for men and women as Part I and Part II respectively. There is no problem with regard to first 33 entries in both parts for any community. The entries 34-37[59] in both lists mention all first cousins, paternal and maternal, parallel and cross, that pose difficulties for certain communities. Under Muslim Personal law, there is no bar for first cousins, both paternal and maternal, to get married. Personal law of Jews and Bahai also permit marriage with first cousins. Christians can marry first cousins with church permission. So, such a prohibition in SMA 1954, acts as a barrier for same community pairs to marry under SMA. Such a prohibition under SMA is saved if there is a custom to that effect in their personal law provided such a custom gets official recognition through Gazette notification. Obviously, no two Muslims or Christians or Jews would take pains unnecessarily to get married under SMA. Conversely, marrying a second cousin is not a bar under SMA but a bar under HMA. So the SMA widens the scope for Hindus to marry under it which is denied to others. In other words, for Hindus what is prohibited under HMA is relaxed under SMA and for others what is permitted under their personal laws is prohibited under SMA. This area needs legislative tinkering to widen the beneficial network of the Act to all.

Section 19

All personal laws of succession cease to apply in cases of marriage under SMA. There seems to be no reason why SMA should contain a provision regarding succession law to be applied to people marrying under SMA. Succession to property according to one's own law is one area that is regarded as sacrosanct for all communities. Imposition of an alien system of succession acts as a great deterrence for marrying under SMA. This is not so for two Hindus who marry under SMA and their succession rights are saved under Section 21-A. The present linkage between marriage and succession is to be delinked.

Section 21A

The SMA, 1954 gives an option for two persons belonging to same religion to marry either under it or under their respective personal law. But Section 21 A permits only Hindus who marry under this Act, to be governed by Hindu Succession Act, 1956 and not under Indian Succession Act, 1925. Similar exemption is not given to Muslims, Parsees and Christians. It needs immediate attention of the legislature and this classification and discrimination is unfounded on any reason. If a similar provision is extended to them it would ensure uniformity in the first place and would encourage the non-Hindus to reap the benefits of SMA, 1954.

Similar discrepancies exist in other secular laws of personal law matters like Indian Succession Act, 1925, Guardianship & Wards Act, 1890 and Prohibition of Child Marriage Act, 2006. It is high time the Indian Legislature takes cognisance of

[59] **List I:** Father's brother's daughter; father's sister's daughter; mother's sister's daughter and mother's brother's daughter. **List II:** Father's brother's son; father's sister's son; mother's sister's son; mother's brother's son.

these drawbacks to amend them suitably so that pressure of UCC could be greatly reduced. It would really be a step 'towards' UCC and is a pragmatic solution to translate the spirit of Article 44 into Indian legal system.

The Journey Ahead

Balancing the benefits and barriers, the author feels that the last two models can be attempted simultaneously. The process can be initiated *suo motto* with the fourth option first. The need to wait for community's consensus is not required for an optional national law. A co-ordinated effort from the Law Commission of India and National Commission for Women is the need of hour. A committee reflecting Indian pluralism shall be constituted representing different religious segments, justices, progressive thinking scholars and women and men of good drafting skills. As a second step, the government has to ask all communities to suggest reforms within their personal laws on egalitarian terms. Sub-committees have to be constituted for individual topics of personal law and be co-ordinated harmoniously. Placing them in public domain for a debate from grass root level is to be followed as a procedural mandate.

No doubt, there may be stiff resistance to it, as has been there since the beginning of the drafting of the Constitution, but the resisting communities should be made to realise that the option for them is not 'neither...nor' but 'either...or'. Fundamentalists should be indicated that gender injustice in the name of religious practices will not continue for long; that UCC is not an attack on religion but on arbitrary religious practices. As long as people of this country do not realise this basic distinction between religion and religious practices and mistake religious practices for cultural identity, UCC would remain as a sword on the neck. Hindu Patriachs should be signalled that de-facto denial of rights to women in properties will pave the way for abolition of long preserved joint family system itself, which is *sui generis* and beneficial in many ways. Communities should be made to realise that reforms from within will save them from external imposition. Women should be educated about their rights and taught how to use them. It cannot be said that Muslim women do not have rights. They have significant rights. But they are not allowed to negotiate or if allowed, they are negotiated to their disadvantage. Psychological empowerment is the first step towards legal empowerment.

An egalitarian family law is a symbol of a modern progressive nation. It is a sign that the nation has moved away from caste and community politics. It will deprive the politicians the opportunity to play vote-bank politics. When Hindu law was codified it was opposed by the Jan Sangh that it would shatter the magnificent architecture of Hindu culture. But still the codifications went on. Hindu culture continues.

Inter-community mediation may also be worked out to grease the tension and remove the distrust, but it is a doubtful step. It would ensure success only if the players in the mediation are open-minded and are voluntarily willing to contribute for the cause.

The biggest challenge in our way ahead is the 'skill of drafting', whether it is compulsory code or optional code or secularisation of personal law matters or amending the existing personal laws. Drafting legislation is not only an Art but also a Science. Every draft is in a sense a thorough research on the issue involving high degree of legislative draftsman-ship. A command over the language, a thorough knowledge of the proposed law or amendment as the case may be, acquaintance with *pari-materia* legislations and above all a clear perception of the objective to be achieved through enactment, amendment, repeal or deletion are absolutely essential for the legislative drafters. The people employed to the drafting business should have the competency and skill required to discharge the onerous responsibility. Utmost care should be taken by the drafters to see that there is little scope for mis-constuction.

It is an undisputed fact that in the present day scenario of functioning of the legislature, bringing a new law or an amendment to an existing law is a 'herculean' task. Much important legislations are passed in the Parliament purely on political considerations, in an indecent haste without proper debate. When a Bill is tabled, legislators must know the consequences of their approval or disapproval in the form of 'aye' or 'no'.

Despite these technical concerns, Justice Singh's opinion in *Sarla Mudgal* case[60] that 'when 80 % of Indians are already governed by codified law, there won't be any difficulty in achieving UCC' is a positive signal that sooner or later either discriminatory personal laws will be reformed voluntarily or secularisation of personal laws would take over.

[60] *Sarla Mudgal* v. *Union of India,* AIR 1995 SC 1531

Sexual Violence within Marriage as Violation of Fundamental Human Right: Need for Criminalization

Dr Pinki Sharma*

"Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men..."[1]

Introduction

In the Platform for Action, the core document of the Beijing Conference,[2] Governments declared that "violence against women constitutes a violation of basic human rights and is an obstacle to the achievement of the objectives of equality, development and peace."Violence against women takes a dismaying variety of forms, from domestic abuse and rape to child marriages and female circumcision. All are violations of the most fundamental human rights. Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. Violence against women and girls continues to be a global epidemic that kills, tortures, and maims-physically, psychologically, sexually and economically. It is one of the most pervasive of human rights violations, denying women and girls' equality, security, dignity, self-worth, and their right to enjoy fundamental freedoms. Women are victims of incest, rape and domestic violence that often lead to trauma, physical handicap or death. Even though most societies advocate violence against women, the reality is that violations against women's human rights are often sanctioned under the garb of cultural practices and norms, or through misinterpretation of religious tenets.

Violence against women in the family occurs in developed and developing countries alike. It has long been considered a private matter by bystanders -- including neighbors, the community and government. But such private matters have

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1 The United Nations Declaration on the Elimination of Violence against Women, General Assembly Resolution, A/RES/48/104,85th Plenary meeting, 20 December 1993.

2 Fourth World Conference on "*Women: Action for Equality, Development and Peace*," Beijing, 15 September 1995.

a tendency to become public tragedies. Rape can occur anywhere, even in the family, where it can take the form of marital rape. Sexual assault by a husband on his wife is not considered to be a crime: a wife is expected to submit. It is thus very difficult in practice for a woman to prove that sexual assault has occurred unless she can demonstrate serious injury. Regardless of culture, status or religion, women across the world continue to show reluctance in pressing charges against the rapist when the culprit is their spouse, despite the fact that marital rape accounts for a quarter of all rape cases reported globally.

"Rape became not only a male prerogative, but man's basic weapon of force against woman, the principal agent of his will and her fear. His forcible entry into her body, despite her physical protestations, became the vehicle of his victorious conquest of her being, the ultimate test of his superior strength, the triumph of his manhood."[3] Rape, the most heinous of all sexual offences is a very personal and intimate harrowing experience. The experiences and reactions to rape may differ widely, and even though there are many similarities in the way that one feels about being the victim of rape, regardless of the relationship between victim and the rapist. Rape is rape regardless of the relationship between the rapist and the victim. It can be a total stranger; someone you recognize by sight, but have never really communicated with; someone you know superficially, a neighbour or a colleague; a friend, a boy-friend or a former boyfriend; a live-in partner, or a former partner; someone you are married to or have been married to in the past. "When it is the person you have entrusted your life to who rapes you, it isn't just physical or sexual assault, it is a betrayal of the very core of your marriage, of your person, of your trust."[4]"Every woman has the right to control her own body and to make decisions about having sex, using birth control, becoming pregnant and having children. She does not lose these rights if she marries."[5]

Marital rape, also known as spousal rape, is non-consensual sex in which the perpetrator is the victim's spouse. Marital rape is a form of partner rape, of domestic violence, and of sexual abuse. Wife rape as we shall see is not rare, it is just rarely discussed. It is noteworthy that this topic has been relatively neglected, receiving little attention in both the domestic abuse and the rape literature[6]. Sexual acts may be accomplished against a person's will by physical force, threats of force to her or a third person, or implied harm based on prior assaults causing the woman to fear that physical force will be used if she resists. A wife does not need to be "putting up a good fight" for it to be rape. Once widely condoned or ignored by law, spousal rape is now repudiated by international conventions and increasingly criminalized. Still, in many countries, spousal rape either remains legal, or is illegal but widely tolerated

3 Susan Brownmiler "*Against Our Will — Men, Women and Rape*" Ballantine, New York (1975).

4 About.com Hidden Hurt Domestic Abuse Information

5 "Stopping Sexual Assault in Marriage." In: *A Guide for Women, Counselors & Advocates. Center for Constitutional Rights*,(1986) pg. 13.

6 "*Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape*", Patricia Mahoney and Linda M. Williams Family Research Laboratory, University of New Hampshire, p 2

and accepted as a husband's prerogative. Sexual violence is a serious intrusion of sexual and reproductive autonomy, bodily and psychological integrity, and when it occurs in intimate relationships, it is also a breach of trust and can be a serious risk factor for femicide.[7] "Marital rape is so destructive because it betrays the fundamental basis of the marital relationship, because it questions every understanding you have not only of your partner and the marriage, but of yourself. You end up feeling betrayed, humiliated and, above all, very confused."[8]

Marital rape is both a product of and a contributing factor to women's inequality in all societies internationally. The marital rape is unique as the circumstances are very different. It is a betrayal of trust-quite apart from a physical and sexual violation. In this sexual abuse there is a person involved whom victim knows intimately, with whom she shares a history, a home and quite often children. A person whom she has made love to on a frequent basis often over many years, with whom she has shared her most intimate secrets and fears, and whom she believes to love her, wants the best for him, who would never intentionally hurt her. Cultural norms and the social stigma often attached to rape can and do discourage the reporting of marital rape. Prosecution of marital rape is very rare in many countries.

Meaning of Marital Rape

Marital rape is just like any other "kind" of rape - that is, forcible unwanted sexual contact - except that it occurs between two people who are married. Most studies of marital rape have included couples who are legally married, separated, divorced or cohabiting with the understanding that the dynamics of sexual violence in a long-term cohabiting relationship are similar to those of a married couple[9].Marital rape occurs when spouse forces wife to take part in certain sex acts without her consent. It is a form of intimate partner violence, i.e., an abuse of power by which one spouse attempts to establish dominance and control over the other. Marital rape emotionally and physically is equally traumatizing than rape by a stranger. Marital rape includes "any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent." Rape by a spouse, partner or ex-partner is more often associated with physical violence. In some countries forced sex, or marital rape, often occurs with other forms of domestic violence, particularly physical abuse. Marital rape includes divorced/legally separated ex-spouses or unmarried cohabiting partners also.

Historical perspective

The roots of the concept lie in many older cultures treatment of women as chattel, or the property of their fathers, brothers, and eventually, husband. In the modern era, as

[7] Professor Jennifer Koshan, *The Legal Treatment Of Marital Rape And Women's Equality: An Analysis of the Canadian Experience*, September 2010, P.6

[8] http://www.hiddenhurt.co.uk/Articles/maritalrape.htm

[9] Raquel Kennedy Bergen, *Marital Rape Applied Research Forum, a project of the National Resource Center on Domestic Violence National Electronic Network on Violence Against Women*, March 1999

women have been understood and legally recognized as "human beings", the concept of a wife being the property of her husband for the purpose of perpetuating his progeny has fallen by the wayside. However, not all cultures or traditions have entered this "modern era" yet.

"But if you can't rape your wife, who can you rape[10]?"

Western jurisprudence has a long tradition of absolving husbands from the possibility of rape. The first significant discussion in America of forced sex within marriage being categorized as rape, and of the need for a legal remedy, may well have been "The Markland Letter," which was published in 1887 in a Kansas newspaper.

The letter read, "About a year ago F——— gave birth to a baby, and was severely torn by the instruments in incompetent hands. She has gone through three operations and all failed...last night when her husband came down, forced himself into her bed, and the stitches were torn from her healing flesh, leaving her in worse condition than ever..."

The Markland letter became nationally notorious largely because its graphic description of violence left little doubt that the husband was a rapist despite the law. American law did not catch up with the Markland letter until 1976. Until then, rape laws throughout the states included a Marital Rape Exemption. In 1976, however, Nebraska became the first state to abolish that exemption.

Marital rape is a concept that many find difficult to comprehend. Until the Oregon trial of John Rideout, who was accused of rape by his wife Greta, there was little discussion of marital rape by the general public or by researchers. A national public discussion of the issue followed questioning whether a man had an absolute sexual right to his spouse's—or cohabitant's—body. Two other states besides Oregon had passed laws that did not grant married (or cohabitating) men immunity from the rape of their wives. The sensationalism caused by the Rideout trial in 1978 points to a need to understand how press frames of marital rape, the victims, the accused, and the verdicts shifted during the course of the trial. Many citizens would not have ever considered rape by one's spouse a possibility, let alone a crime.[11]

This pattern of one-step-forward, two-steps-back progress on the criminalization of marital rape illustrates the general pattern of thinking in the 1980s regarding marital rape. While virtually every progressive commentator, judge, or legislator (feminist and otherwise) who seriously has considered the issue readily has concluded that these laws violate equal protection[12]. Historically, many cultures have had a concept of spouses' conjugal rights to sexual intercourse with each other. This was illustrated most vividly by Sir Matthew Hale, in his 1736 legal treatise, Historia Placitorum Coronæ or History of the Pleas of the Crown, where he wrote that such a rape could not be recognized since the wife "hath given up herself in this kind unto

[10] Senator Bob Wilson, Democrat, California, 1979.

[11] Melissa Anne Bazhaw, *For Better or For Worse? Media Coverage of Marital Rape in the 1978 RIDEOUT TRIAL*,(2008), p 5

[12] *R.* v. *D.* (1987) 2 NZLR 272 (CA).

her husband, which she cannot retract." Hale's statement in History of the Pleas of the Crown was not supported by any judicial authority but was believed to be a logical consequence of the laws of marriage and rape as understood at the time. Marriage gave conjugal rights to a spouse, and marriage could not be revoked except by private Act of Parliament—it therefore seemed to follow that a spouse could not legally revoke consent to sexual intercourse, and if there was consent there was no rape. His "contractual theory" is best known today as the "implied consent theory."

The principle was repeated in East's Treatise of the Pleas of the Crown in 1803 and in Archbold's Pleading and Evidence in Criminal Cases in 1822, but it was not until *R* v. *Clarence*[13] that the question of the exemption first arose in an English courtroom. Clarence was determined on a different point, and there was no clear agreement between the nine judges regarding the status of the rule.

Other theories have supported Hale and the marital rape exemption. William Blackstone's common law "unities doctrine" asserts "the husband and wife are one person in law". The unities doctrine legitimized "the prophetization of women through marriage" and "which shields sexually abusive husbands from criminal prosecution[14]." From the beginnings of the 19th century women's movement, activists challenged the presumed right of men to engage in forced or coerced sex with their wives. In the United States, "the nineteenth-century woman's rights movement fought against a husband's right to control marital intercourse in a campaign that was remarkably developed, prolific, and insistent, given nineteenth century taboos against the public mention of sex or sexuality."[15] Suffragists including Elizabeth Cady Stanton and Lucy Stone "singled out a woman's right to control marital intercourse as the core component of equality."[16] Nineteenth century feminist demands centered on the right of women to control their bodies and fertility, positioned consent in marital sexual relations as an alternative to contraception and abortion (which many opposed), and also embraced eugenic concerns about excessive procreation.[17]British liberal feminists John Stuart Mill and Harriet Taylor attacked marital rape as a gross double-standard in law and as central to the subordination of women.[18]

Advocates of free love, including early anarcha-feminists such as Voltairine de Cleyre and Emma Goldman, as well as Victoria Woodhull, Thomas Low Nichols, and Mary S. Gove Nichols, joined a critique of marital rape to advocacy of women's autonomy and sexual pleasure.[19] Moses Harman, a Kansas-based publisher and advocate for women's rights, was jailed twice under the Comstock laws for publishing articles by a woman who was victimized and a doctor who treated marital

[13] (1888) 22 QBD 23
[14] Eskow 680
[15] Hasday, Jill Elaine (2000), "*Contest and Consent: A Legal History of Marital Rape*". California Law Review 88: 1412.
[16] *Ibid* pg1425
[17] *Supra* 7, pg 1435-43
[18] Zakaras, Alex; Maria Morales (2007). "Rational freedom in John Stuart Mill's feminism". In Nadia Urbinati (ed.). *J.S. Mill's political thought: A bicentennial reassessment*. Cambridge: Cambridge University Press. p. 52.
[19] *Supra* 7, pg 1444-51

rape survivors decrying marital rape. De Cleyre defended Harman in a well-known article, "Sexual Slavery." She refused to draw any distinction between rape outside of, and within marriage: "And that is rape, where a man forces himself sexually upon a woman whether he is licensed by the marriage law to do it or not."[20]

An alternate theory lay inherent in the nature of marriage both today and in the past. Hartog (2000) explains: Sexual intercourse between husband and wife was authorized by law; thus, "the element of unlawfulness" was lacking when a husband coerced his wife. By contrast, all other sexual intercourse was unlawful. And thus, unmarried sexual intercourse, when coerced, became rape.

The position many legislators take today is that marital rape is "less serious than other rapes."[21] The assumption is that the wife lacks the emotional trauma because her rapist is the man with whom she has exchanged vows with until death do them part. Studies have contradicted that assumption because "a sense of trust under girds such a relationship...[and] someone known, someone trusted, violently violates that relationship. The victim is intimately betrayed."[22]

International Law

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.[23] The World Conference on Human Rights recognized that the human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community[24]. The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.

Female-targeted violence were not explicitly acknowledged by the international community until December 1993, when the United Nations General Assembly[25] adopted the Declaration on the Elimination of Violence against Women which is the first international human rights instrument to exclusively and explicitly address the

[20] Palczewski, Catherine Helen, "*Voltairine de Cleyre: Sexual Slavery and Sexual Pleasure in the Nineteenth Century*". NWSA Journal(1995-10-01), 7 (3): 54–68.
[21] (Sitton 266)
[22] Dr. Ronald Nyhan, *Abolishing the Marital Rape Exemption*, (April 19, 2008),pg 4
[23] Vienna Declaration and Programme Of Action,1993
[24] Beijing Declaration and Platform for Action, Fourth World Conference on Women,15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).
[25] In 1999, the General Assembly designated 25 November as the International Day for the Elimination of Violence against Women. Each year, this International Day marks the start of '16 Days of Activism Against Gender Violence'. Human Rights organisations such as Center for Women's Global Leadership, Unifem, Women Won't Wait, Women for a Change, Women's Aid, and other groups join together to speak out against gender violence and to promote the rights and principles of the declaration.

issue of violence against women. It affirms that the phenomenon violates, impairs or nullifies women's human rights and their exercise of fundamental freedoms. Until that point, most Governments tended to regard violence against women largely as a private matter between individuals, and not as a pervasive human rights problem requiring State intervention.

To mark International Women's Day on 8 March 1993, General Secretary, Boutros Boutros-Ghali, issued a statement in preparation of the declaration explicitly outlining the UN's role in the 'promotion' and 'protection' of women's rights,"The struggle for women's rights, and the task of creating a new United Nations, able to promote peace and the values which nurture and sustain it, are one and the same. Today - more than ever - the cause of women is the cause of all humanity."

"Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms."[26]As the concept of human rights has developed, the belief of a marital right to sexual intercourse has become less widely held. Feminists worked systematically since the 1960s to overturn the marital rape exemption and criminalize marital rape.[27]Increasing criminalization of spousal rape is part of a worldwide reclassification of sexual crimes "from offenses against morality, the family, good customs, honor, or chastity to offenses against liberty, self-determination, or physical integrity."[28] In December 1993, the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence against Women. This establishes marital rape as a human rights violation.

In view of the alarming growth in the number of cases of violence against women throughout the world, the Commission on Human Rights adopted resolution 1994/45 of 4 March 1994, in which it decided to appoint the Special Rapporteur on violence against women, including its causes and consequences. Consequently the problem of violence against women has been drawing increasing political attention.Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support. The World Conference on Human Rights urges Governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection and promotion of human rights of women and the girl-child.

Legally speaking, universal attention to the issue of spousal rape came in 1993, when the UN High Commission on Human Rights added "spousal rape", and in fact

[26] Beijing Platform for Action, Violence against women, Chapter 5,The World's Women 2005: Progress in Statistics, pg 69

[27] *Supra* 7,1482-1505

[28] Frank, David John; Bayliss J. Camp, Steven A. Boutcher ,"*Worldwide Trends in the Criminal Regulation of Sex,* 1945 to 2005". American Sociological Review, (2010-12-01), 75 (6): 867–893.

an entire section on violence against women, to their statement of Basic Human Rights, entitled "Declaration of ending Violence against Women", to which France, Germany and the UK and the US are signatories.

In a statement to the Fourth World Conference on Women in Beijing in September 1995, the United Nations Secretary-General, Boutros Boutros-Ghali, said that violence against women is a universal problem that must be universally condemned. But he said that the problem continues to grow. The term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Violence against women is present in every country, cutting across boundaries of culture, class, education, income, ethnicity and age.

Violence against women within the family has become a contemporary issue. However, there is a curious silence surrounding sexual violence towards wives. Wife, family and children are considered as private issues and notion of family rests on the peace and security of women. Once widely condoned or ignored by law, spousal rape is now repudiated by international conventions and increasingly criminalized. Still, in many countries, spousal rape either remains legal, or is illegal but widely tolerated and accepted as a husband's prerogative. Marital rape is a crime under international law according to the UN General Assembly. Marital rape was specifically mentioned in the Beijing Declaration and Platform for Action.[29]

The Declaration on the Elimination of Violence Against Women,[30] adopted by the United Nations General Assembly in 1993, is a document which urges member states to strive to eliminate violence against women in all forms – physical, sexual and psychological – and asks that they not invoke customs, traditions and religious doctrine to excuse the continuation of violence against women. It contains "the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings." The resolution is often seen as complementary to, and a strengthening of, the work of the Convention on the Elimination of All Forms of Discrimination against Women and Vienna Declaration and Programme of Action. Although it includes marital rape as a form of violence against women, which violates international law, This means that Namibia has an obligation under the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[31] to take steps to protect women against this form of violence, including the passage or laws against it. This position has been made clear by the General Recommendations of the UN Committee which monitors compliance with CEDAW. The Parliamentary Assembly of the Council of Europe recommended that member states,

> "... establish marital rape as a separate offence under their domestic law so as to avoid any hindrance of legal proceedings, if they have not already done

[29] Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, 15 September 1995.

[30] A/RES/48/104, 20 December 1993

[31] Also known as International bill of rights for women

so; [and] penalise sexual violence and rape between spouses, cohabitant partners and ex-partners, if they have not already done so; and consider whether the attacker's current or former close relationship with the victim should be an aggravating circumstance..."

The resolution also recommends that member states ensure that their legislation on rape and sexual violence reaches the highest possible standard, including providing victim support services and avoiding re-victimizing survivors through the criminal justice process.[32] Legislation should not provide for less severe penalties for married offenders or special procedural hurdles for married survivors.[33]

The right to sexual intercourse is not a husband's inherent right in marriage, for such a "right" defeats the very concept of equality and human dignity. Consent must be arrived at by both the husband and wife afresh each time, for if women are to be considered equal partners, sexual intercourse must be considered as an act of mutual desire, an act of intense gratification for the man and the woman and not as a "wifely duty" enforceable by the threat of bodily harm and the use of force. It is very clear that sexual intercourse should be as agreeable as possible to both parties. Indeed, when is otherwise to either party, it is cruelty. The act itself should take place only where there is mental harmony and congeniality between the parties. Each must be able to respond to the whole nature of the other — bodily, morally and intellectually to the extent that there shall be no sense of discord, no feeling of repugnance. Criminal Rape Law, which has been linked with the principle of "implied consent" in marriage for centuries must make a clean break, once and for all and recognize such a deplorable act as invasion of bodily integrity, as a violation of self-determination, whether such an act is committed either within or outside the 'sanctity' of marriage.

Treatment of Marital Rape in Various Legal Systems

Combating and eradicating this menace require enhanced and concerted efforts to protect women at the local, national and international levels. States have tended to adopt a passive attitude when confronted by cases of violations of women's rights by private actors. Most laws fail to protect victims or to punish perpetrators. Passing laws to criminalize violence against women is an important way to redefine the limits of acceptable behaviour.

In United States researchers estimate that 10% to 14% of married women experience rape in marriage. When researchers examined the prevalence of different types of rape, they found that marital rape accounts for approximately 25% of all rapes.[34] Despite the prevalence of marital rape, this problem has received relatively

[32] European Policy Action Centre on Violence against Women, "*Council of Europe Takes a Strong Position on Rape, Including Marital Rape*" (22 January 2010); and Resolution 1691 (2009), Parliamentary Assembly of the Council of Europe.

[33] "*The Legal Response to Violence against Women in the United States of America: Recent Reforms and Continuing Challenges*," by Sally F. Goldfarb, a paper for the United Nations expert group meeting on good practices in legislation on violence against women, 2008.

[34] National Violence against Women Survey, NCJ 172837, Washington, DC: US Department of Justice.

little attention from social scientists, practitioners, the criminal justice system, and larger society as a whole. One of the results of the women's movement in the 1970s was putting the crime of marital rape into the forefront of citizen's minds as a real social problem. However, as heightened as awareness has become, rape by one's intimate partner is still not perceived to be as "serious" as stranger rape.[35] In fact, it was not until the 1970s that the society began to acknowledge that rape in marriage could even occur. In the 1970s and 1980s, numerous states adopted laws criminalizing marital rape, and by July 1993, it was illegal in every state to rape your spouse.

Some states simply abolished the marital rape exemption by striking it from the books. (To illustrate: if the code defined rape as "sexual intercourse with a woman, not your wife, by force and against her will," the legislature could strike the phrase "not your wife," thereby abolishing the marital rape exemption). Under this approach, which most states followed, marital rape is treated the same as other forms of rape. Some states explicitly eliminated marriage as a defense to the charge of rape[36].The general rule was that a husband could not be convicted of the offence of raping his wife as he is entitled to have sexual intercourse with his wife, which is implied under the contract of marriage. In 1993, marital rape became a crime in all fifty States, under at least one section of the sexual offence codes.[37]

However, it is remarkable that only a minority of the States have abolished the marital rape exemption in its entirety, and that it remains in some proportion or other in all the rest. In most American States, resistance requirements still apply.[38]In seventeen States and the District of Columbia, there are no exemptions from rape prosecution granted to husbands. However, in thirty-three States, there are still some exemptions given to husbands from rape prosecution. When his wife is most vulnerable (e.g. she is mentally or physically impaired, unconscious, asleep etc.) and is legally unable to consent, a husband is exempt from prosecution in many of these thirty-three States. The existence of some spousal exemptions in the majority of States indicates that rape in marriage is still treated as a lesser crime than other forms of rape. Importantly, the existence of any spousal exemption indicates an acceptance of the archaic understanding that wives are the property of their husbands and the marriage contract is entitlement to sex.

Section 1 (1) of the Sexual Offences Act, 1956 of Britain states, "It is an offence for a man to rape a woman". The Sexual Offences (Amendment) Act, 1976 defines rape as "unlawful sexual intercourse with a woman, who at the time of intercourse, does not consent to it." No reference is made in these statutory provisions as to the position between husband and wife. Lord Halsbury asserted "As a general rule, a

[35] Basile, K. C., *Rape by acquiescence: The ways in which women 'give in' to unwanted sex with their husbands. Violence Against Women*, 5, 1036-1058,(1999).

[36] Art. 120. (Rape and sexual assault generally) (f) Defenses.— An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

[37] National Clearinghouse on Marital and Date Rape, 1996

[38] Schulhofer, S.J., *Unwanted Sex : The Culture of Intimidation and the Failure of Law*, Harvard University Press, Cambridge, 1998, p. 30.

man cannot be guilty as a principal of rape against his wife, for the wife is in general unable to retract her consent to cohabitation which is part of the contract of marriage"[39]

In England, earlier as a general rule, a man could not have been held to be guilty as a principal of rape upon his wife, for the wife is in general unable to retract the consent to sexual intercourse, which is a part of the contract of marriage.[40]However, the marital rape exemption was abolished in its entirety in 1991. The House of Lords held in *R.* v. *R.*[41] that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common-law fiction, which no longer represented the position of a wife in present-day society, and that it should no longer be applied. Corresponding amendment to the statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994. This judgment was also affirmed by the European Court of Human Rights in the decision of *SW* v. *UK*.[42]

In New Zealand, the marital rape exemption was abolished in 1985 when the present Section 128 to the Crimes Act, 1961 was enacted. Sub-section (4) now provides that a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred.[43] Further, the fact that the parties are married or have been in a continuing relationship will not warrant a reduction in sentence. There is now, therefore, no distinction in principle to be drawn between sexual violation in marriage and outside of marriage.

It is indeed heartening that the criminal laws of the Soviet Union and a few socialist countries have recognized marital rape as an offence, even if the wife is cohabiting with the husband. The Criminal Codes of Sweden and Denmark deserve special mention. Subscribing to an egalitarian ideal of a free and satisfying life for all human beings, irrespective of sex, Sweden abolished the exemption in 1962 and Denmark even earlier. Canada in 1983 adopted Bill C-127 which *interalia* empowered wives to prosecute their husbands for sexual assault (The Code eschews the word "rape" throughout). There are also countries like Belgium who are still to abolish the exemption.

In Mexico, the country's Congress ratified a bill that makes domestic violence punishable by law. If convicted, marital rapists could be imprisoned for 16 years. In Sri Lanka, recent amendments to the Penal Code recognize marital rape but only with regard to judicially separated partners, and there exists great reluctance to pass judgment on rape in the context of partners who are actually living together. However, some countries have begun to legislate against marital rape, refusing to

[39] 4 Halsbury's Laws (4th ed.) Vol 11,1227.
[40] Halsbury's Laws of England, 4th Edn., Vol. 11(1), para 495.
[41] National Violence Against Women Survey, NCJ 172837, Washington, DC: US Department of Justice.
[42] (1996) 21 EHRR 363
[43] Simester, A.P. & Brookbanks, J., *Principles of Criminal Law*, 1st Edn., Brookers Ltd., Wellington, 1998, p. 552.

accept the marital relationship as a cover for violence in the home. For example, the Government of Cyprus, in its contribution to the Special Rapporteur, reports that its Law on the Prevention of Violence in the Family and Protection of Victims, passed in June 1993, clarifies that "rape is rape irrespective of whether it is committed within or outside marriage".

Despite its both physical and psychological harm, marital rape has not obtained recognition as a social, legal or institutional problem in some countries. In many cultures, sexual relation is part of marriage setup. It is considered unnatural for a woman to refuse to have sex with her husband creating a misunderstanding that marital rape is impossibility. Stereotypes about women and sex such as women "enjoy forced sex," women say 'no' when they really mean 'yes', and the wife has the 'duty' to have sex continued to be reinforced in many cultures. Such messages not only mislead men in to believing that they should ignore a woman's protest, they also mislead women in to believing that they must have 'sent the wrong signal', blaming themselves for unwanted sexual encounters, or believing that they are bad wives for not enjoying sex against their will. So apart from its economic and cultural significance, the special 'contract' called marriage grants husbands impunity for the crime of 'raping' their wives. True most countries have abolished the long lived exemption of marital rape but there are countries like Ethiopia where the exemption is still alive.[44] Despite these trends and international moves, criminalization has not occurred in all UN member States.

Countries which were early to criminalize marital rape include the Soviet Union (1922/1960), Poland (1932), Czechoslovakia (1950), some other members of the Communist Bloc, Denmark (1960), Sweden (1965), and Norway (1971). Slovenia, then a republic within federal Yugoslavia, criminalized marital rape in 1977. The Israeli Supreme Court affirmed that marital rape is a crime in a 1980 decision, citing law based on the Talmud.[45] Criminalization in Australia began with the state of New South Wales in 1981, followed by all other states from 1985 to 1992. Several formerly British-ruled countries followed suit: Canada (1983), New Zealand (1985), and Ireland (1990).

France's Cour de Cassation authorized prosecution of spouses for rape or sexual assault in 1990, but ruled in 1992 that a presumption of consent exists from the time of marriage until it is revoked by either party. In 1994, criminalized marital rape; a second law, passed 4 April 2006, makes rape by a partner (including in unmarried couples, married couples, and in civil unions) an aggravating circumstance in prosecuting rape. Germany outlawed spousal rape only in 1997, which is later than other developed countries. Female ministers and women's rights activists lobbied for this law for over 25 years.

Thai legal scholar Taweekiet Meenakanit voiced his opposition to legal reforms to make spousal rape in Thailand a crime. A non-gender specific amendment to the

[44] Helen Abelle, Marital Rape as a violation of Fundamental Rights of Women, Lambert Academic Publishing (2012-09-03).
[45] Geis, Gilbert (1977). "*Rape-in-marriage: Law and law reform in England, the United States, and Sweden*". Adelaide Law Review 6: 284.

rape laws appeared to exempt husband and wives from criminal prosecution, and opponents of the amendment argued for specific language criminalizing rape of a wife by her husband. Mr. Meenakanit argued that allowing a husband to file a rape charge against his wife is "abnormal logic" and that wives would refuse to divorce or put their husband in jail since many Thai wives are dependent on their husbands.

Some countries to criminalize marital rape include Turkey (2005),[46] Cambodia (2005), Nepal (2006), Mauritius (2007),Ghana (1998/2007), Malaysia (2007), Thailand (2007), [40] Tunisia (2008), Rwanda (2009),South Korea (2009), and Jamaica (2009) Bolivia in 2013etc. Human rights observers have criticized a variety of countries—including Japan, Poland, and Kazakhstan China, Afghanistan, Pakistan and Saudi Arabia etc—for failing to effectively prosecute marital rape once it has been criminalized. South Africa, which criminalized in 1996, saw its first conviction for marital rape in 2012.

The marital rape exemption was abolished in England and Wales in 1991 by the Appellate Committee of the House of Lords, in the case of *R* v. *R*.[47] been promulgated in 1736 in Matthew Hale's History of the Pleas of the Crown. The first attempted prosecution of a husband for the rape of his wife was *R* v. *Clarke*[48]. Rather than try to argue directly against Hale's logic, the court held that consent in this instance had been revoked by an order of the court for non-cohabitation. It was the first of a number of cases in which the courts found reasons not to apply the exemption, notably *R* v. *O'Brien*[49],(the obtaining of decree nisi)*R* v. *Steele*[50](an undertaking by the husband to the court not to molest the wife) *and R* v. *Roberts*[51](the existence of a formal separation agreement).

There are at least four recorded instances of a husband successfully relying on the exemption in England and Wales. The first was *R* v. *Miller*[52], where it was held that the wife had not legally revoked her consent despite having presented a divorce petition. *R* v. *Kowalski*[53] was followed by *R* v. *Sharples*[54], and the fourth occurred in 1991 in the case of *R* v. *J*, a judgment made after the first instance decision of the Crown Court in *R* v *R* but before the decision of the House of Lords that was to abolish the exemption. In *Miller, Kowalski* and *R* v. *J* the husbands were instead convicted of assault or indecent assault.

R v. *R* in 1991 was the first occasion where the marital rights exemption had been appealed as far as the House of Lords, and it followed the trio of cases since 1988 where the marital rights exemption was upheld. The leading judgment,

[46] Anti-Discrimination Committee Takes Up Situation of Women in Turkey, UN Information Service, 21 January 2005.
[47] [1992] 1 AC 599, [1991] 3 WLR 767, [1991] 4 All ER 481,
[48] [1949] 2 All ER 448
[49] [1974] 3 All ER 663
[50] (1976) 65 Cr. App. R. 22
[51] [1986] Crim LR 188
[52] [1954] 2 QB 282
[53] (1988) 86 Cr. App. R. 339
[54] [1990] Crim LR 198

unanimously approved, was given by Lord Keith of Kinkel. He stated that the contortions being performed in the lower courts in order to avoid applying the marital rights exemption were indicative of the absurdity of the rule, and held, agreeing with earlier judgments in Scotland and in the Court of Appeal in R v R, that "the fiction of implied consent has no useful purpose to serve today in the law of rape" and that the marital rights exemption was a "common law fiction" which had never been a true rule of English law. R's appeal was accordingly dismissed, and he was convicted of the rape of his wife.

The Effects and Aftermaths of Marital Rape

Marital rape is a serious form of violence that can have life-shattering effects for its victims. Rape by a stranger is highly traumatic, it is typically a one-time event and is clearly understood as rape. In the case of rape by a spouse or long term sexual partner, the history of the relationship affects the victim's reactions. Marital rape may occur as part of an abusive relationship. Trauma from the rape adds to the effect of other abusive acts or abusive and demeaning talk. Furthermore, marital rape is rarely a one-time event, but a repeated if not frequent occurrence.[55]Whether it takes place once or is part of an established pattern of domestic violence, trauma from rape has serious long term consequences for victims regardless of whether the assault is prosecuted or not.

Despite the historical myth that rape by one's partner is a relatively insignificant event causing little trauma, research indicates that marital rape often has severe and long-lasting consequences for women. The physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence. Specific gynaecological consequences of marital rape include miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV.[56]

Women who are raped by their partners are likely to suffer severe psychological consequences as well. Some of the short-term effects of marital rape include anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress. Long-term effects often include disordered eating, sleep problems, depression, problems in establishing trusting relationships, and increased negative feelings about themselves. Psychological effects are likely to be long-lasting. Some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after the violence.[57]

[55] "*Marital Rape*".Hiddenhurt.co.uk. 2007-06-17.
[56] Thornhill, R. & Palmer, C.T., *A Natural History of Rape — Biological Bases of Sexual Coercion*, 1st Edn., MIT Press Cambridge Mass., (2000).
[57] Thornhill, R. & Thornhill, N., *The Evolution of Psychological Pain, in Sociology and Social Science*, Edn., Bell, R. & Bell, N., Texas Tech University Press, (1989).

Is it Criminal Offence?

The lack of effective national laws to end violence against women, or the failure to implement such laws where they exist, is widespread. Impunity for violence against women often results from States' failure to implement international standards at the national and local level. In many places, laws contain loopholes that allow perpetrators to act with impunity. In a number of countries, a rapist can go free under the penal code if he marries the victim. Many States have no specific legal provisions against domestic violence. Marital rape is not a prosecutable offence in more than 50 countries. Ending impunity and ensuring accountability for violence against women are crucial to prevent and reduce such violence.[58]

Spousal or marital rape is usually defined as a sexual attack by a husband or ex-husband[59]. Today, spousal rape is illegal in some states. Nevertheless, many states retain vestiges of the marital exemption. For example, the punishment prescribed for spousal rape is often lighter than for other types of rape and the standard of evidence required to convict is often higher.

Rape is a crime, and the marital status of the victim should make no difference. A husband who rapes should receive the same punishment as any other rapist. After all, a person who murders his or her spouse is still a murderer and subject to the full force of law. On a procedural level, however, it may be necessary to draw an important distinction between spousal rape and stranger or acquaintance rape. If there is no clear evidence of violence, then the standards of proof required to find a spouse guilty of rape may be higher. If evidence of violence is present, then no procedural distinction between spousal and stranger rape is appropriate. An attack is an attack, and should be viewed as such. The difficulty arises when there is little or no evidence of violence and, so, the accounts devolve into "he said/she said" scenarios. At that point, the sexual history between a 'victim' and an accused rapist becomes relevant to judging credibility.

One of the ways marriage can be described is as a sexual partnership. Wedding vows constitute a public announcement of that sexual union, of an agreement to engage in sex with someone else over a period of time. This is why not consummating the union is grounds for dissolving the contract, even within the Catholic Church, which does not recognize divorce. Marriage does not mean that a wife renders prior consent to every sex act or any particular one. Indeed, the presence of force in the marriage indicates that consent prior or present is entirely absent. Thus, when indications of violence are absent, it is reasonable for the legal system to require a higher standard of evidence to convict a husband of rape.

Rape is the third rail of feminism and touching the issue with anything but complete agreement with the accepted approach will give the questioner a nasty

[58] UNiTE Goals, United Nations Secretary-General Ban Ki-Moon

[59] As with past analyses of domestic violence, in current discussions of spousal rape, women are the victims and men the perpetrators. Although men are now acknowledged to be domestic violence victims as well, no statistics exist on whether they are victims of marital rape.

shock. But if the gender war that is the legacy of NOW-style feminism is to be eased, then every gender-based assumption must be re-examined. In updating the law on spousal rape, prosecutors in Arizona should punish that crime no differently than any other rape. But, in proving the rape, the courts should apply a higher standard of evidence whenever indications of violence are not present.

Legal outlook of Marital rape in India

Notwithstanding amendments in existing legislations, law commissions reports and new legislations, one of the most humiliating and debilitating acts, Marital rape, is not an offence in India. There is overwhelming evidence to prove that marital rape is the most common form of sexual violence in India. Yet, the government refuses to make it punishable by law. It has taken Indian lawmakers a very long time to recognize marital rape as a crime. And yet having a law in place that criminalizes this form of violence against women is not enough to address this largely underreported epidemic. If there is no legal backing for marital rape, women who are victims of sexual assault by their husbands have little hope for justice. Whether or not to criminalize rape within marriage has long been debated in India. The United Nations has recommended India to make it criminal for a man to rape his wife. Criminalizing marital rape was also one of the suggestions of the Verma Committee, a three-member panel appointed to strengthen India's sexual-assault laws in the wake of a brutal gang rape in 2012.[60]

In the aftermath of the Delhi gang rape of 2012, the Justice Verma Committee set up to review laws against sexual assaults on women, had said that "the law ought to specify that marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation". But the government had even then failed to act on the committee's recommendation.[61]The law on rape in India has evolved to place the burden of proof of consent on the accused, and these provisions are even more important for women facing sexual violence within marriage because married women are more likely to face social sanction for reporting violence. The government's stand follows a recommendation to criminalize marital rape by the United Nations (UN) Committee on Elimination of Discrimination against Women. Though countries in Europe and the US started criminalizing marital rape in the last century, in India, rape within marriage by a partner continues to not be a criminal offence. Marital rape is an offence under the Indian Penal code when the husband and the wife are separated though still married to each other under section 376B of the Indian Penal Code. A man can also be accused of rape for having sexual intercourse with his wife if the wife is below 15 years of age. The clause in itself is a contradiction since the legal age of marriage for women in our country is 18 years. The same is true for the age of consent to sex by women.

Minister of State for Home Affairs Haribhai Parathibhai Chaudhary told the parliament that marital rape could not be criminalized in India as "marriages are

[60] India Real Time, April 30,2015

[61] Indira Jai Singh, Hindustan Times, May 25, 2015

sacrosanct" in the country.[62] "It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context," Haribhai Parathibhai Chaudhary said in a written statement to India's upper house of Parliament. He attributed this to various factors e.g. level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament, etc.

The victims of "marital rape" fight a lonely battle because their suffering falls under no category of Indian legal system. Moreover, society often blames them for maligning the institution of marriage. Neither the Indian Penal Code nor the National Commission for Women (NCW) etc. have any mechanisms with which to lodge cases of marital rape. A wife has to file a complaint under marital discord and then if a husband forces his wife to submit to his sexual demands against her wishes, it does not amount to rape but is instead treated as domestic violence. The husband is tried under section 498-A, which deals with cruelty by a husband towards a married woman. Unlike in custody rape, where the word of a woman holds good as evidence against the rapist, wives do not get the same consideration. Though marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage. Social practices and legal codes in India mutually enforce the denial of women's sexual agency and bodily integrity, which lie at the heart of women's human rights.[63] Marriage has always been known as a sacred institution but, wonder how much of it exists today. Marriage is no more a 'sacrosanct institution', for, there are issues within it that have shaken the ground basis of the entire union of a man and a woman and this idea of the "sacrosanct" institution of marriage is a myth and is contrary to women's perceptions of reality. Marriage now, is just not limited to be a pious union but, on the contrary, it can also come with its own set of problems, including the biggest- that of 'Marital Rape' which has become a stark reality of present scenario. Social conditioning has led India's women to believe that after marriage there is no such thing as sexual consent - a legally wedded wife has no right to object to her husband's sexual demands as part of conjugal rights. Wives believe that if they complain they are over-reacting, leading to their own ridicule, as the system and society don't take marital rape seriously. And in India, this belief seems unshakable.

The 172nd Law Commission report had made certain recommendations for substantial change in the law with regard to rape. Like, 'Rape' should be replaced by the term 'sexual assault'. 'Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.

In the light of *Sakshi* v. *Union of India and Others*[64] 'sexual assault on any part of the body should be construed as rape. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law. A new offence, namely

[62] BBC News, May 26, 2015

[63] Saurabh Mishra &Sarvesh Singh, *Marital Rape — Myth, Reality and Need for Criminalization*, PL WebJour 12,(2003)

[64] [2004 (5) SCC 518],

section 376E with the title 'unlawful sexual conduct' should be created. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

Section 122 of the Indian Evidence Act prevents communication during marriage from being disclosed in court except when one married partner is being persecuted for an offence against the other. Since, marital rape is not an offence, the evidence is inadmissible, although relevant, unless it is a prosecution for battery, or some related physical or mental abuse under the provision of cruelty. Setting out to prove the offence of marital rape in court, combining the provisions of the DVA and IPC will be a nearly impossible task.

In India marital rape exists de facto but not de jure. While in other countries either the legislature has criminalized marital rape or the judiciary has played an active role in recognizing it as an offence, in India however, the judiciary seems to be operating at cross-purposes. In *Bodhisattwa Gautam* v. *Subhra Chakraborty*[65] the Supreme Court said that "rape is a crime against basic human rights and a violation of the victim's most cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution. Yet it negates this very pronouncement by not recognizing marital rape."[66] Though there have been some advances in Indian legislation in relation to domestic violence, this has mainly been confined to physical rather than sexual abuse. Women who experience and wish to challenge sexual violence from their husbands are currently denied State protection as the Indian law in Section 375 of the Indian Penal Code, 1860 has a general marital rape exemption. This established the notion that once married, a women does not have the right to refuse sex with her husband. This allows husbands rights of sexual access over their wives in direct contravention of the principles of human rights and provides husbands with a "licence to rape" their wives.

Only two groups of married women are covered by the rape legislation — those being under 15 years of age[67] and those who are separated from their husbands.[68] While the rape of a girl below 12 years of age may be punished with rigorous imprisonment for a period of 10 years or more, the rape of a girl under 15 years of age carries a lesser sentence if the rapist is married to the victim. Some progress towards criminalizing domestic violence against the wife took place in 1983 when Section 376-A was added in the Indian Penal Code, 1860, which criminalized the

[65] (1996) 1 SCC 490

[66] Tandon, N. & Oberoi, N., *Marital Rape — A Question of Redefinition*, Lawyer's Collective, March 2000, p. 24.

[67] Exception to Section 375 of the Indian Penal Code, 1860

[68] Section 376-A of the Indian Penal Code, 1860.

rape of a judicially separated wife. It was an amendment based on the recommendations of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 and the Law Commission of India.[69] The Committee rejected the contention that marriage is a licence to rape. Thus, a husband can now be indicted and imprisoned up to 2 years, if firstly, there is a sexual intercourse with his wife, secondly, without her consent and thirdly, she is living separately from him, whether under decree or custom or any usage. However, this is only a piecemeal legislation and much more needs to be done by Parliament as regards the issue of marital rape. When the Law Commission in its 42nd Report advocated the inclusion of sexual intercourse by a man with his minor wife as an offence it was seen as a ray of hope.[70]The Joint Committee that reviewed the proposal dismissed the recommendation. The Committee argued that a husband could not be found guilty of raping his wife whatever be her age. When a man marries a woman, sex is also a part of the package.

Many women's organizations and the National Commission for Women have been demanding the deletion of the exception clause in Section 375 of the Indian Penal Code which states that "sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape". The Criminal Law (Amendment) Act, 2013 brought about sweeping changes in the definition and punishment for rape but it did not change the previous clause which excluded forced sex within marriage in the definition of rape. In fact, it said explicitly that, sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

The damage done by retaining the exclusion was, however, partially undone by a subsequent provision, section 376B, which says that if a man has sexual intercourse with a wife, living separately after a legal decree, but without her consent, he shall be punishable with imprisonment ranging from two to seven years in addition to a fine. But this has failed to mollify feminists, who say the non-inclusion of forced sex within marriage is abominable.

Even though clause 376B addresses the concerns and fears of women living separately, how does it help women who suffer daily sexual indignities even while seemingly being in a legally valid married relationship? The culture of 'silence', 'tolerance', 'adjustment', 'compromise' among women is propagated to 'save and respect the 'honour', the 'pride' and the 'values' of the Indian family overlooking the fact that incest, violence, suicides, murders are the price women pay.

Protection of Women from Domestic Violence Act, 2005, the core of which is about protecting women from physical and mental cruelties of all forms, including sexual abuses. While a magistrate under the domestic violence law has no power to criminalize the act of a man raping his wife, much less sentencing him, he has vast powers to protect women - including wives and live-in partners - by drafting the services of protection officers of the area, among others. Not enough, may be the chorus from feminists, but then the only lasting solution to the problem of marital

[69] Law Commission of India, 42nd Report, 1977, Indian Penal Code, para 16.115, p. 277.
[70] *ibid*

rape is legal separation or annulment of the marriage itself, with its attendant side-effects and consequences. This is why family courts in India as well as magistrates offer counselling under the domestic violence law. If a man proves to be so incorrigible that he does not mend his ways even after counselling, the only way forward for a harried woman is divorce. The domestic violence law affords woman twin reliefs: the benefit of staying in a shared household while at the same time seeking relief from the sexual advances of her husband or live-in partner. The Domestic Violence Act, 2005 (DVA) has also been a disappointment. It has provided civil remedies to what the provision of cruelty already gave criminal remedies, while keeping the status of the matter of marital rape in continuing disregard. Section 3 of the Domestic Violence Act, amongst other things in the definition of domestic violence, has included any act causing harm, injury, anything endangering health, life, etc., ... mental, physical, or sexual.

It condones sexual abuse in a domestic relationship of marriage or a live-in, only if it is life threatening or grievously hurtful. It is not about the freedom of decision of a woman's wants. It is about the fundamental design of the marital institution that despite being married, she retains and individual status, where she doesn't need to concede to every physical overture even though it is only be her husband. Honour and dignity remains with an individual, irrespective of marital status.

Arguments of Male Dominated Society against Criminalization

The demand of feminists for criminalization of sexual violence in marriage is always, but natural, being rebutted by male dominated and orthodox society by whimsical and lame excuses. They preach that there is absolutely no need of legal sanction as it's not that common. Moreover if it is an offence and committed in four walls of bedroom, it is difficult to substantiate. Another argument of men folks is that the fate of criminalization of marital rape will be just like that of other feminine legislative provisions like sec498-A and Domestic Violence Act etc. i.e. it will be misused by revengeful and disobedient wives. In our society where marriage institution has sanctity, many marriages will break down and there is least possibility of reconciliation because no husband with self-respect will like to live with such wife who imposes rape charge against husband with whom she married with implied consent to have sexual intercourse. Members of this school of thought ignore the reality that most cases of emotional violence, sexual abuse, physical assault, mental trauma, all takes place within this 'sanctified' territory because women are powerless and vulnerable and have been socialized to be pliant, obedient and subservient.

Existing Laws *vis-à-vis* Human Rights

Section 375 of IPC is violative of Fundamental and basic Human right of victims of marital rape i.e. Right to live with dignity under Article 21 of the Constitution. Article 14 of the Constitution guarantees equality before the law or equal protection of the laws and hence protects a person from any discrimination. Exception to Sec 375 is discriminatory to victim wife when she knocks the door of criminal justice system for protection from rape by spouse. There is contradiction in legislative provisions too. The law prevents a girl below 18 years from marrying, but on the

other hand, it legalizes non-consensual sexual intercourse with a wife who is just 15 years of age.

It is conceded that changing the law on sexual offences is a formidable and sensitive task, and more so, in a country like India, where there is a contemporaneous presence of a varied and differentiated system of personal and religious laws that might come into conflict with the new amendments in the statutory criminal law. Further, though, there is need for substantial changes in the law on sexual offences such as making them gender-neutral and eliminating the inequalities, a radical overhauling of the structure of sexual offences is not advisable. The immediate need is criminalization of marital rape under the Indian Penal Code. But, mere declaration of a conduct as an offence is not enough. Something more is required to be done for sensitizing the judiciary and the police. There is also a need to educate the masses about this crime, as the real objective of criminalizing marital rape can only be achieved if the society acknowledges and challenges the prevailing myth that rape by one's spouse is inconsequential.

Conclusion and Suggestions

In 1943, Dr B.R. Ambedkar in one of his address said "Rights are protected not by law but by the social and moral conscience of society ... if fundamental rights are opposed by the community, no Law, no Parliament, no judiciary, can guarantee them in the real sense of the word."Many organizations like Human Rights Law Network, which are committed to improving laws related to violence against women, feel that women need to be more assertive when it comes to protecting their rights. Unless women speak up against sexual abuse, be it at their workplace, in public transport or within the comfort zone of their bedroom, having a law criminalizing rape is irrelevant. Women have to fight with grave problems at every step of their life. She has to start her struggle right from the household. All through her childhood, she is considered a second class member of her family, as she has to leave the home one day to go to her husband's home. And there she is battered in all possible ways. Men of this generation claim they have progressed and empower their women by letting them work, go out of home and have a life of their own. What happens inside the bedroom is considered 'private'. And that is where one of the biggest oppression of women takes place in the form of Marital rape.

Regardless of culture, status or religion, women across the world continue to show reluctance in pressing charges against the rapist when the culprit is their spouse, despite the fact that marital rape accounts for a quarter of all rape cases reported globally.[71] Attempts to end and respond to sexual violence must protect and promote women's rights, as well as empower women. Legislation should specifically allow a husband or wife or intimate partner to be charged with sexual assault of his or her partner, whether or not they were living together at the time of the assault. Drafters should criminalize marital rape by stating that the relationship between the perpetrator and the victim does not bar application of sexual assault provisions.

[71] Lesley D. Biswas, *Marital Rape: Still an Underreported Crime in India*, The Women's International Perspective, oct.5,2009

Legislation should include a provision that states that "no marriage or other relationship shall constitute a defense to a charge of sexual assault under the legislation."[72]

This concept of marital rape needs to be examined in the larger perspective of violence against women and should be dealt accordingly. A report by the Law commission[73]opined that criminalizing marital rape would amount to "excessive interference with the marital relationship." These noxious assumptions presume that marriage implies lifelong blanket consent to sexual intercourse. This idea of not enacting law against marital rape ignores the reality that the role of the state in a democratic, capitalistic and globalized society is to protect the rights of wives as women and citizens rather than to safeguard the marital institution.

An attempt has to be made to expose the discrimination, shortcomings and fallacies of the criminal justice system in India as regards marital rape. It goes on to provide arguments and reasons necessitating criminalization of marital rape. Certain legal reforms are essential to achieve the desired objectives. The legal system must be forced to accept rape within marriage as a crime. Marital rape should be recognized by Parliament as an offence under the Indian Penal Code. The punishment for marital rape should be the same as the one prescribed for rape under Section 376 of the Indian Penal Code. The fact that the parties are married should not make the sentence lighter. It should not be a defence to the charge that the wife did not fight back and resisted forcefully or screamed and shouted. The wife should have an option of getting a decree of divorce if the charge of marital rape is proved against her husband. Though a case of marital rape may fall under "cruelty" or "rape" as a ground of divorce, it is advisable to have the legal position clarified. Demand for divorce may be an option for the wife, but if the wife does not want to resort to divorce and wants to continue with the marriage then the marriage should be allowed to continue. Corresponding changes in the matrimonial laws should be made. Above all the women themselves must break free of societal shackles and fight for justice. They must refuse to comply with the standards applied to them as the weaker sex.

Marital rape is not an offence in India. A look at the options a woman has to protect herself in a marriage, tells us that the legislations have been either non-existent or obscure and everything has just depended on the interpretation by Courts. Section 375, the provision of rape in the Indian Penal Code (IPC), has echoing very archaic sentiments, mentioned as its exception clause- "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape." Section 376 of IPC provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either

[72] Like (Section 2 (3)) of the Combating of Rape Act (2000) of Namibia states that "No marriage or other relationship shall constitute a defence to a charge of rape under this Act."

[73] Law Commission of India (2000) *Review of Rape Laws*, 172nd Report, New Delhi

description for a term which may extend to 2 years with fine or with both. This section in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 16 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 16, there is no legal protection accorded to the wife, in direct contravention of human rights regulations.

How can the same law provide for the legal age of consent for marriage to be 18 while protecting from sexual abuse, only those up to the age of 16? Beyond the age of 16, there is no remedy available to women. Legislators use results of research studies as an excuse against making marital rape an offence, which indicates that many survivors of marital rape, report flash back, sexual dysfunction, emotional pain, even years out of the violence and worse, they sometimes continue living with the abuser. For these reasons, even the Law Commission has preferred to adhere to its earlier opinion of non-recognition of "rape within the bonds of marriage" as such a provision may amount to excessive interference with the marital relationship. A marriage is a bond of trust and that of affection. A husband exercising sexual superiority, by getting it on demand and through any means possible, is not part of the institution. Surprisingly, this is not, as yet, in any law book in India.

The importance of consent for every individual decision cannot be over emphasized. A woman can protect her right to life and liberty, but not her body. within her marriage, which is just ironical. Women so far have had recourse only to section 498-A of the IPC, dealing with cruelty, to protect themselves against "perverse sexual conduct by the husband." But, where is the standard of measure or interpretation for the courts, of 'perversion' or 'unnatural', the definitions within intimate spousal relations? Is excessive demand for sex perverse? Isn't consent a sine qua non? Is marriage a license to rape? There is no answer, because the judiciary and the legislature have been silent.

The trouble is, it has been accepted that a marital relationship is practically sacrosanct. Rather than, making the wife worship the husband's every whim, especially sexual, it is supposed to thrive n mutual respect and trust. It is much more traumatic being a victim of rape by someone known, a family member, and worse to have to cohabit with him. How can the law ignore such a huge violation of a fundamental right of freedom of any married woman, the right to her body, to protect her from any abuse?

Marriage does not thrive on sex and the fear of frivolous litigation should not stop protection from being offered to those caught in abusive traps, where they are denigrated to the status of chattel. Apart from judicial awakening; we primarily require generation of awareness. Men are the perpetrators of this crime. 'Educating boys and men to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's human rights', says the UN. Men have the social, economic, moral, political, religious and social responsibility to combat all forms of gender discrimination.

In a country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the

letter of law. It is also important to create mechanisms that will encourage women to speak out against their abusive spouses which needs a lot of courage on the part of an Indian woman to speak about things as intimate and personal as marital rape. Criminalizing marital rape will only be relevant if women recognize their role in protecting their own rights and decide to fight for them.

The meaning of gender and sexuality and the balance of power between women and men at all levels of society must be reviewed. Changing people's attitude and mentality towards women will take a long time may be at least a generation, and perhaps longer. Nevertheless, raising awareness of the issue of violence against women, and educating boys and men to view women as valuable partners in life, in the development of a society and in the attainment of peace are just as important as taking legal steps to protect women's human rights.

Decoding the Intellectual Lodestar of "Rarest of Rare Cases" Dictum

Dr Vageshwari Deswal[*]

Introduction

> *"A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the Rarest of rare cases when the alternative option is unquestionably foreclosed."*[1]

Death has been abolished as a form of punishment in most of the developed countries. Criminologists and Sociologists have for long been demanding abolition of death penalty in our country also but a proposal for the same was rejected by the Law Commission in its 35th report.[2] Between the protagonists of the 'an eye for an eye' philosophy who demand 'death-for- death' and the 'Humanists' who press for the other extreme viz., 'death-in-no-case' a synthesis emerged in *Bachan Singh* case wherein the 'rarest-of-rare-cases' formula for imposing death sentence in a murder case was evolved by the Supreme Court.[3] In this article an attempt has been made to trace the legislative and judicial trajectory regarding award of death penalty in India.

Death Penalty in India

Death or capital punishment is the highest penalty awardable to an accused under the IPC. The Indian Penal Code prescribes 'death' as an alternative punishment to which the offenders may be sentenced, for the following nine offences

(1) Waging war against the Government of India. (Section 121)
(2) Abetting mutiny actually committed (Section 132)
(3) Giving or fabricating false evidence upon which an innocent person suffers death. (Section 194)
(4) Murder (Section 302)
(5) Abetment of suicide of a minor, insane; or intoxicated person. (Section 305)
(6) Attempt to murder by a person under sentence of imprisonment for life if hurt is caused (Section 307)

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[1] *Bachan Singh* v. *State of Punjab* (1980) 2 SCC 684: AIR 1980 SC 898 at p.898.
[2] Law Commission of India 35th report, Vol (I-III) on Capital Punishment, September 1967.
[3] *Machi Singh* v. *State of Punjab,* 1983 AIR 957: 1983 SCR (3) 413.

(7) Punishment for causing death or resulting in persistent vegetative state of victim (Section 376A)
(8) Punishment for repeat offenders (Section 376E)
(9) Dacoity accompanied with murder (S. 396)

Mandatory Death Penalty under Section 303 Declared Unconstitutional

Section 303 prescribing mandatory death penalty as punishment for murder by life convict was struck down by the Supreme Court in *Mithu* v. *State of Punjab*[4] as being unconstitutional and void. The Court observed

> There is no rational justification for making a distinction in the matter of punishment between persons who commit murders whilst they are under the sentence of life imprisonment and persons who commit murders whilst they are not under the sentence of life imprisonment. Further, no rational distinction can be made in the matter of sentencing between a person who commits murder after serving out the sentence of life imprisonment and a person who commits murder while he is still under that sentence. A person who stands unreformed after a long term of incarceration is not, by any logic, entitled to preferential treatment as compared with a person who is still under the sentence of life imprisonment. The classification based upon such a distinction proceeds upon irrelevant considerations and bears no nexus with the object of the statute, namely, the imposition of a mandatory sentence of death.[5]

If the law provides a mandatory sentence of death as Section 303 of the Penal Code does, neither Section 235(2) nor Section 354(3) of the Code of Criminal Procedure (CrPC) can possibly come into play. If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels the court to impose that sentence.[6] Leaving the court no discretion in the matter of sentence is an approach which is not in conformity with modern trends.[7] In *Bachan Singh* the majority concluded that Section302, IPC is valid for three main reasons: Firstly, that the death sentence provided for by Section 302 is an alternative to the sentence of life imprisonment; secondly, that special reasons have to be stated under Section 354 (3), CrPC if the normal rule is departed from and the death sentence has to be imposed; and, thirdly, because the accused is entitled under Section 235 (2), CrPC to be heard on the question of sentence.[8]

[4] AIR1983 SC 473:1983 SCR(2) 690.
[5] *Id at* at P.479
[6] *Ibid*
[7] 35th Report of Law Commission on Capital Punishment (1967) Para 587.
[8] *Supra* note 1

Earlier in *Dilip Kumar Sharma* v. *Sate of M.P.*.[9] Sarkaria J., described the vast sweep of Section 303 by saying that "the section is draconian in severity, relentless and inexorable in operation" In *Maneka Gandhi* v. *Union of India*[10]it was held by a seven Judge Bench that a statute which merely prescribes some kind of procedure for depriving a person of his life or personal liberty cannot ever meet the requirements of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. Bhagwati J. observed in Maneka Gandhi case that "Principally, the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on that article".[11] This was basis for declaring mandatory death penalty prescribed under Section 303 IPC as unconstitutional and void. A savage sentence is anathema to the civilized jurisprudence of Article 21. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge as soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatized as arbitrary and oppressive.[12]

India is a signatory to the Universal Declaration of Human Rights, 1948 as well as to the United Nations Covenant on Civil and Political Rights 1966 (ICCPR). Both these conventions contain provisions outlawing cruel and degrading treatment and/or punishment. The U.N. Commission on Human Rights in a resolution of April 2000, titled "The Question of Death Penalty"[13] urges "all States that still maintain the death penalty (a) To comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgment rendered by an independent and impartial competent court, not to impose it for crimes committed by persons below 18 years of age, to exclude pregnant women from capital punishment and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence; and (b) To ensure that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent financial crimes or for non-violent religious practice or expression of conscience."

Debate on Constitutional Validity of Death Penalty

Our Constitution does not prohibit capital punishment. Article 21 provides *inter alia* that no one shall be deprived of his life except according to procedure established by law. This is in a way acknowledgement of death penalty as an awardable punishment in accordance with procedure established by law. Such procedure however, must be

[9] AIR 1976 SC 133: 1976 SCR (2) 289
[10] AIR 1978 SC 597:1978 SCR (2) 621
[11] *Id* at p. 622
[12] *Supra* note 5
[13] Clause 3(e) of the Resolution 2000/65 dated 27.04.2000.

reasonable, fair and just.[14] Article 21, Right to life, in its barest of connotation would imply right to mere survival. In this form, right to life is the most fundamental of all rights. Consequently a punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the right to life. Article 21 is absolute in nature and is the source of all other rights. Right to life is the essential content of all rights under the Constitution. If life is taken away all, other rights cease to exist.[15] Under Article 72(1)(c) the President has been granted the power to suspend, remit or commute the sentence of any person who is convicted of an offence and sentenced to death. Under Article 161, the Governor of a State has been granted the power to grant pardon, suspend, remit or commute sentences.

A Constitution Bench of the Supreme Court in *Bachan Singh* v. *State of Punjab*[16] repelled the challenge of constitutionality to death penalty by laying down the framework law on this point. Bachan Singh serves as a watershed moment in the history of death penalty jurisprudence in India as it severed Indian judiciary's normative ambivalence on the subject.[17]

The constitutionality of Death penalty was challenged before the Supreme Court in *Jagmohan Singh* v. *State of UP*.[18] Dismissing the appeal the Supreme Court held that:

- Articles 72(1)(c), and 134 of the Constitution and entries 1 and 2 in List III of the Seventh Schedule to the Constitution show that the Constitution makers had recognized death sentence as a permissible punishment and had made constitutional provisions for appeal, reprieve, and the like.
- According to Article 21, deprivation of life is constitutionally permissible if that is done according to procedure established by law. Thus the death sentence imposed after trial in accordance with legally established procedures under CrPC and the Indian Evidence Act is not unconstitutional under Article 21.
- In India, the onerous duty of passing the death sentence is cast on Judges, and, for more than a century judges have been carrying out this duty under the Indian Penal Code. The impossibility of laying down standards is at the very core of the Criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment. That discretion in the matter of sentence is liable to be corrected by superior Courts. The exercise of judicial discretion on well recognized principles is, in the final analysis, the safest possible safeguard for the accused.

[14] *Maneka Gandhi* v. *UOI, supra* note 10
[15] *Santosh Beriyar* v. *State of Maharashtra,* (2009) 6 SCC 498.
[16] (1980) 2 SCC 684.
[17] *Supra note* 15.
[18] AIR 1973 SC 947

- Crime as crime may appear to be superficially the same, but the facts and circumstances of a crime are widely different, and, since a decision of the court as regards punishment is dependent upon a consideration of all the facts and circumstances, there is hardly any ground for a challenge under Article 14.
- In the context of our Criminal law, which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty. Proposals for its abolition have not been accepted by Parliament. In this state of affairs, it cannot be said that capital punishment, as such, is either unreasonable or not in public interest.

However, the application of these principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely:

1. The extreme penalty can be inflicted only in gravest cases of extreme culpability;
2. In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also.[19]

Abolition versus Retention of Death Penalty

The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind. Having regard, however, to the conditions in India, to the variety of the social up-bringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.[20]

The Law Commission of India in its 35th report[21] recorded their views regarding the deterrent effect of capital punishment as follows:

In our view capital punishment does act as a deterrent. We have already discussed in detail several aspects of this topic. We state below, very briefly, the main points that have weighed with us in arriving at this conclusion:

(a) Basically, every human being dreads death.
(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.

[19] *Mohd. Chaman* v. *State of Delhi (NCT)*, 2001 (2) SCC 28
[20] 35th Report of Law Commission of India, 1967 at P. 354
[21] *Ibid.*

(c) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers-are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.
(d) As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.
(e) Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.
(f) Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect; neither can they be regarded as conclusively disproving it.

In *Furman* v. *Georgia*[22], Stewart, J. took the view that death penalty serves a deterrent as well as retributive purpose. In his view, certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, only penalty of death will provide maximum deterrence.

While the abolitionists look upon death penalty as something which is per se immoral and inhuman, the retentionists apprehend that if we surrender even the risk of the last remaining horrifying deterrent by which to frighten the thoughts of the underworld, we may easily tip the scales in favour of the anti-social hoodlums. They fear that abolition of capital punishment, will result in increase of murders motivated by greed, and in affable "crime passionelle."[23]

Legislative Safeguards against arbitrary award of Death Penalty

In India death penalty is executed by hanging till death. Prior to the Criminal Procedure (Amendment) Act of 1955, in our country death penalty was the rule and life imprisonment an exception in capital offences as per the provisions of the old CrPC (1898). Further the courts were bound to give explanation for awarding a lighter penalty than death for capital offences. After the amendment of 1955 courts were at liberty to grant either death or life imprisonment. Now as per Section 354 (3) of the CrPC, 1973,[24] the situation has been reversed and life sentence is the rule and

[22] 408 U.S. 238 (1972). This is a landmark judgment given by US Supreme Court expressed concerns about the apparent arbitrariness with which death sentences were imposed under the existing laws, often indicating a racial bias against black defendants. The judges urged for a consistency in the application of laws relating to Death Penalty so that it would no longer be administered in a capricious or discriminatory manner. Between 1972 to 1976, thirty seven states enacted new laws relating to award of death penalty to rule out any arbitrariness.
[23] *Supra note* 1, para 117
[24] Section 354(3) of the Code of Criminal Procedure: When the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a *contd...*

death penalty an exception in capital offences. Further the courts are required to state reasons in writing for awarding the maximum penalty. Section 354(3) requires special reasons to be given if the Court is to award the death sentence. In *Rajendra Prasad* v. *State of UP*[25], the Supreme Court observed

Such extraordinary grounds alone constitutionally qualify as special reasons as leave no option to the Court but to execute the offender if State and society are to survive. One stroke of murder hardly qualifies for this drastic 'requirement, however, gruesome the killing or pathetic the situation, unless the inherent testimony coming from that act is irresistible that the murderous appetite of the convict is too chronic and deadly that ordered life in a given locality or society or in prison itself would be gone if this man were now or later to be at large. If he is an irredeemable, like a bloodthirsty tiger, he has to quit his terrestrial tenancy.[26]

The ECOSOC describes one of the important standard and safeguard against the death penalty enunciated in safeguard No.9 as "Where capital punishment occurs it shall be carried out so as to inflict minimum possible suffering."[27]

In *Deena* v. *Union of India*,[28] the Supreme Court prescribed that the execution of death punishment should satisfy the threefold test viz

1. The act of execution should be as quick and simple as possible and free from anything that unnecessarily sharpens the poignancy of the prisoner's apprehension.
2. The act of the execution should produce immediate unconsciousness passing quickly into the death
3. It should be decent and should not involve mutilation

The sentencing procedures laid down under the CrPC, 1973 provide safeguards to ensure award and execution of death punishment in very selective situations. Under Section 366 when the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court. Thus confirmation of death penalty by the High Court is an essential pre-requisite for award of death sentence. Under Section 368[29] the High Court may confirm the sentence, annul the conviction,

term of years, the judgment shall state the reasons for the sentence awarded and in the case of sentence of death, the special reasons for such sentence.

[25] AIR 1979 SC 916.

[26] Id at P. 931.

[27] ECOSOC resolution as to standards and safeguards guaranteeing protection of the rights of those facing the death penalty *viz*; Economic and Social Council Resolution 1984/50, annex. General Assembly Resolution 29 / 118, 1984.

[28] (1983) 4 SCC 645.

[29] Section 368 of the Code of Criminal Procedure, 1973 reads: Power of High court to confirm sentence or annul conviction
In any case submitted under S. 366, the High Court,
1. may confirm the sentence, or pass any other sentence warranted by law, or

contd...

order a retrial or even acquit the accused. Such confirmation of death sentence, or any new sentence or order passed by the High Court is required to be signed by at least two judges of the High Court[30] and should be sent to the Court of Session without delay.[31] Upon receipt of order of order of confirmation[32] or in cases where a sentence of death is passed by the High Court in appeal or in revision,[33] the Court of Session shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary. In cases where an appeal against any of the above orders is pending before the Supreme Court, the execution of death penalty shall be stayed till the disposal of such appeal.[34] The ECOSOC resolution provides safeguard No. 6 as, "Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction and steps should be taken to ensure that such appeals shall become mandatory"[35] Where on appeal, the High Court reverses an acquittal, and convicts the accused person and sentences him to death, Section 379 of the Code of 1973, gives him a right of appeal to the Supreme Court. Finally, there is Article 136 of the Constitution under which the Supreme Court is empowered, in its discretion, to entertain an appeal on behalf of a person whose sentence of death awarded by the Sessions Judge is confirmed by the High Court. If a woman sentenced to death is

2. may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or
3. may acquit the accused person

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

[30] S. 369 of the Code of Criminal Procedure, 1973.

[31] S. 371 *Id*

[32] S. 413 *Id*

[33] S. 414 *Id*

[34] S. 415 of the Code of Criminal Procedure, 1973 reads: Postponement of execution of sentence of death in case of appeal to Supreme Court
1. Where a person is sentenced to death by the High Court and an appeal from its judgment lies to the Supreme Court under sub-clause a) or sub-clause b) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until the period allowed for preferring such appeal has expired, or if an appeal is preferred within that period, until such appeal is disposed of.
2. Where a sentence of death is passed or confirmed by the High Court, and the person sentenced makes an application to the High Court for the grant of a certificate under Article 132 or under sub-clause c) of clause (1) of Article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until such application is disposed of by the High Court, or if a certificate is granted on such application until the period allowed for preferring an appeal to the Supreme Court on such certificate has expired.
3. Where a sentence of death is passed or confirmed by the High Court, and the High Court is satisfied that the person sentenced intends to present a petition to the Supreme Court for the grant of special leave to appeal under Article 136of the Constitution, the High Court shall order the execution of the sentence to be postponed for such period as it considers sufficient to enable him to present such petition.

[35] *Supra* note 27.

found to be pregnant, the High Court shall commute the sentence to imprisonment for life.[36]

In *State of Maharashtra* v. *Sindhi*[37], it was held that, "As far as an accused person sentenced to death is concerned, his trial does not conclude with termination of the proceedings in the Court of Session, since the death sentence passed by the Court of Session is subject to confirmation by the High Court, the trial cannot be deemed to have concluded till an executable sentence is passed by a competent court. The confirmation proceedings are in substance a continuation of the trial"[38]. The Court further stated that while dealing with a reference for confirmation of a sentence of death, the High Court must consider the proceedings in all their aspects reappraise, reassess and reconsider the entire facts and law and, if necessary, after taking additional evidence, come to its own conclusions on the material on record in regard to the conviction of the accused (and the sentence) independently of the view expressed by the Sessions Judge. *In Bishnu Prasad Sinha and Anr.* v. *State of Assam*,[39] the prosecution case was entirely based on circumstantial evidence, the Court commuted the death penalty of the accused.

In cases where there is a difference of opinion or the Bench is equally divided in opinion then, according to Section 370 of the CrPC, 1973 the case is to be decided in the manner provided by section 392 which lays down that when an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion. Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges.[40]

Section 433 confers commutation powers on the Government.[41] The powers conferred by sections 432 and 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government.[42] With effect from December 18, 1978 the CrPC (Amendment) Act, 1978, inserted new Section 433A,

[36] S. 416 of the Code of Criminal Procedure, 1973.
[37] 1975 AIR 1665: 1975 SCR (3) 574.
[38] *Id.* at 1669.
[39] 2007 (2) SCALE 42.
[40] Proviso to Section 392 of the Code of Criminal Procedure, 1973.
[41] Section 433: Power to commute sentence: The appropriate Government may, without the consent of the person sentenced commute
1. a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860);
2. a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;
3. a sentence of rigorous imprisonment for simple imprisonment for any term to which that person might have been sentenced, or for fine;
4. a sentence of simple imprisonment, for fine.

[42] S. 434 of the Code of Criminal Procedure, 1973.

which lays down restrictions on powers of remission or commutation in cases where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by laws or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life. Then, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

Judicial Discretion in Award of Death Penalty

The Courts have been granted a great deal of discretion in the award of death penalty. Death is not to be awarded except in extremely severe cases where murders have been committed in cold blooded, pre-planned or barbaric fashion. Allowing criminals guilty of having committed intentional, cold-blooded, deliberate and brutal murders to escape with a lesser punishment will deprive the law of its effectiveness and result in travesty of justice. Undue sympathy to impose inadequate sentence would do more harm to the justice delivery system to undermine the public confidence in the efficacy of law and society could no long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.[43] The broad object of punishment of an accused found guilty in progressive civilized societies is to impress on the guilty party that commission of crimes does not pay and that it is both against his individual interest and also against the larger interest of the society to which he belongs. The sentence to be appropriate should, therefore, be neither too harsh nor too lenient.[44]

The discretion given to the court in cases concerning award of death penalty assumes onerous importance and its exercise becomes extremely difficult because of the irrevocable character of death penalty. One of the principles that is clear is that if the case is such where two views ordinarily could be taken, imposition of death sentence would not be appropriate, but where there is no other option and it is shown that reformation is not possible, death sentence may be imposed.[45] The passing of the sentence of death must elicit the greatest concern and solicitude of the Judge because, that is one sentence which cannot be recalled.[46]

A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law, is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused and the prosecuted is given an

[43] *Sevaka Perumal* v. *State of Tamil Nadu*, AIR 1991 SC 1463: 1991 SCR (2) 711
[44] *Ram Narain* v. *State of Uttar Pradesh*, (1973) 2 SCC 86
[45] *Supra* note 14.
[46] *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra* (1981) 2 SCC 35

opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the judge that leads to determination of the punishment.[47]

Shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate making justice suffer by weakening the system's credibility. Although the increasing number of cases which affect the society may hold some value for the sentencing court, but it cannot give a complete go-by to the legal principle laid down by the court in Bachan Singh[48] that each case has to be considered on its own facts.

In case of *Rajendra Prasad* v. *State of UP*[49] while addressing the issue of judicial discretion in the award of death penalty the Court held that,

> "Since law reflects life, new meanings must permeate the Penal Code. Deprivation of life under our system is too fundamental to be permitted except on the gravest ground and under the strictest scrutiny. At the same time the social justice which the Preamble and Part IV (Art. 38) highlight, as paramount in the governance of the country has a role to mould the sentence. If the murderous operation of a die-hard criminal jeopardizes social security in a persistent, planned and perilous fashion then his enjoyment of fundamental rights may be rightly annihilated. Thus there is need to read Sections 302 of the IPC and Section 354(3) in the humane light of Part III and Part IV further illuminated by the Preamble of the Constitution."[50]

Further in the same case while laying down guidelines for the judicious exercise of discretion by the Courts it was emphasized that "the special reasons stated by the Court in awarding death penalty must relate to the criminal as well and not to crime alone".[51] However, it is to be noted that our laws don't provide for the same. In the case of *Ravji alias Ram Chandra* v. *State of Rajasthan*,[52] the Supreme Court held that it is only characteristics relating to crime, to the exclusion of the ones relating to criminal, which are relevant to sentencing in criminal trial, stating:

It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime

[47] *State of UP* v. *Satish*, AIR 2005 SC 1000
[48] *Supra* note 1.
[49] AIR 1979 SC 916.
[50] *Id* at p.922.
[51] *Id* at p. 939.
[52] AIR 1996 SC 787:(1996) 2 SCC 175.

warranting public abhorrence and it should respond to the society's cry for justice against the criminal[53].

In *Swamy Shraddananda @ Murali Manohar Mishra* v. *State of Karantaka*[54] it was observed that the awarding of sentence of death "depends a good deal on the personal predilection of the judges constituting the bench." However, it should never be forgotten that the rarest of rare cases test is not judge-centric. It depends on the perception of society and whether it would approve the award of death sentence to those convicted in certain types of crimes.

Judges need to act not by hunch but on hard facts properly brought on record. Behind the view that there is a presumption of constitutionality of a statute and the onus to rebut the same lies on those who challenge the legislation, is the rationale of judicial restraint, a recognition of the limits of judicial review; a respect for the boundaries of legislative and judicial functions, and the judicial responsibility to guard the trespass from one side or the other. The primary function of the courts is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy-making. The job of a Judge is judging and not law-making.[55]

In the case of *Anshad and others* v. *State of Karnataka*[56] the Supreme Court observed,

> "The Courts must be alive to the legislative changes introduced in 1973 through Section 354(3) CrPC. Death sentence, being an exception to the general rule, should be awarded in the "rarest of the rare cases" for 'special reasons' to be recorded after balancing the aggravating and the mitigating circumstances, in the facts and circumstances of a given case. The courts must keep in view the nature of the crime, the brutality with which it was executed, the antecedents of the criminal, the weapons used etc. It is neither possible nor desirable to catalogue all such factors and they depend upon case to case."

In *Bachan Singh* case[57] the constitutional validity of death penalty for murder provided in Section 302, Indian Penal Code,1860 and the sentencing procedure embodied in Sub-section (3) of Section 354 of the CrPC, 1973 was referred for consideration to a Constitution Bench of the Supreme Court. The Court upheld the constitutionality of the aforesaid Sections and propounded the dictum of "*rarest of rare cases*" according to which death penalty is not to be awarded save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

The Court also tabled the following aggravating and mitigating circumstances after drawing from the penal statutes of the States in U.S.A. framed after *Furman* v.

[53] *Id* at p. 793-794.
[54] 2008 (10) SCALE 669
[55] *Supra note* 1 at para 68
[56] 1984 (4) SCC 381 at p.389-90
[57] AIR 1980 SC 898

Georgia[58] in general, and Clauses 2(a), (b), (c), and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular.

Aggravating circumstances

(a) If the murder has been committed after previous planning and involves extreme brutality; or
(b) If the murder involves exceptional depravity; or
(c) If the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -
   - While such member or public servant was on duty; or
   - in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

Mitigating factors

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.
(2) The age of the accused. It the accused is young or old, he shall not be sentenced to death.
(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
(4) The probability that the accused can be reformed and rehabilitated.
(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
(6) That the accused acted under the duress or domination of another person.
(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

Laying down certain broad illustrative guidelines for the exercise of judicial discretion in cases relating to death penalty the Court sounded a word of caution that these guidelines are not exhaustive. The Court said that, "there are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society."[59]

[58] 408 U.S. 238 (1972)
[59] *Supra note* 1, para 206

What amounts to Rarest of Rare Case

The Parliament has given a broad and clear guideline under Section 354(3)[60] of the CrPC which is to serve the purpose of lodestar to the court in the exercise of its sentencing discretion. Parliament has advisedly not restricted this sentencing discretion further, as, in its legislative judgment; it is neither possible nor desirable to do so. Parliament could not but be aware that since the Amending Act 26 of 1955, death penalty has been imposed by courts on an extremely small percentage of persons convicted of murder a fact which demonstrates that courts have generally exercised their discretion in inflicting this extreme penalty with great circumspection, caution and restraint. Cognizant of the past experience of the administration of death penalty in India, Parliament, in its wisdom, thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. The exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well recognised principles crystallized by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3).[61]

In *Panchhi* v. *State of U.P.*, it has been observed that the brutality of the manner in which the murder was perpetrated may not be the sole ground for judging whether the case is one of the "rarest of rare cases", as indicated in *Bachan Singh* case and that every murder being *per se* brutal, the distinguishing factors should really be the mitigating or aggravating features surrounding the murder. The intensity of bitterness, which prevailed, and the escalation of simmering thoughts into a thirst for revenge or retaliation were held to be also a relevant factor. As to what category a particular case would fall depends, invariably on varying facts of each case and no absolute rule for invariable application or yardsticks as a ready reckoner can be formulated.[62]

In the case of *Suraj Bhan* v. *State of Rajasthan*[63], the Supreme Court held that the court must respond to the cry of society and to settle what would be a deterrent punishment for what was an apparently abominable crime. In *Om Prakash* v. *State of Haryana*,[64], K.T. Thomas, J. deliberated on the apparent tension between responding to "cry of the society" and meeting the *Bachan Singh* dictum of balancing the "mitigating and aggravating circumstances". The Court was of the view that the sentencing court is bound by *Bachan Singh* and not in specific terms to the incoherent and fluid responses of society.

[60] *Supra note* 24
[61] *Supra note* 55 at para 165
[62] *Vashram Narshibhai Rajpara* v. *State of Gujarat* (2002) 9 SCC 168,
[63] (1996) SCC (Criminal) 1314
[64] (1999) 3 SCC 19

In *Machhi Singh* v. *State of Punjab*[65], while dealing with the question as to what are the rarest of rare cases the Supreme Court laid down the following considerations for determining whether a case falls under the category of rarest or rare cases or not:

Manner of Commission of Murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

Motive for Commission of Murder

When the murder is committed for a motive which evince total depravity and meanness. For example a hired assassin committing murder for the sake of money or reward or a cold blooded murder committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or *vis-a-vis* whom the murderer is in a dominating position or in a position of trust or murders committed in the course for betrayal of the motherland.

Anti Social or Socially Abhorrent Nature of the Crime

For example murdering members of Scheduled Caste or minority community or cases of bride burning and dowry deaths.

Magnitude of Crime

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

Personality of Victim of Murder

When the victim of murder is an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder; or a helpless woman or a person rendered helpless by old age or infirmity; or when the victim is a person *vis-a vis* whom the murderer is in a position of domination or trust; or when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

Thus in the light of *Bachan Singh* case and *Machhi Singh* case the following emerges as the test for determining rarest of rare case-

- Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime.

[65] AIR 1983 SC 957

- The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability and in determining the same the circumstances of the criminal should be considered along with the circumstances of the crime.
- A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight age and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised

In *Shankar* v. *State of Tamil Nadu*,[66] the Supreme Court observed,

> "The choice as to which of the two punishments provided for murder is the proper one in a given case will depend upon the particular circumstances of the case and the Court has to exercise its discretion judicially and on a well recognized principles after balancing all the mitigating and aggravating circumstances of the crime. The Court also should see whether there is something uncommon about the crime which renders sentence of imprisonment of life inadequate and calls for death sentence. The nature of the crime and the circumstances of the offender should be so revealing that the criminal is a menace to the society and the sentence of imprisonment of life would be inadequate. The sentence of death should be reserved for the rarest of rare cases alter a due consideration of both mitigating and aggravating circumstances. What circumstances bring a particular case under the category of rarest of rare cases vary from case to case depending upon the nature of the crime, weapons used and the manner in which it is perpetrated etc."[67]

If the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weight-age to the mitigating circumstances the court should proceed to do so. The court's failure to impose capital punishment for heinous crimes falling in the rarest of rare category would amount to repeal of death penalty by the judiciary. In our country only the legislature can abolish death penalty and not the courts.

Delay in Execution of Death Penalty

The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. While deciding upon appeals relating to confirmation of death penalty courts needs to acknowledge that it is not Shylock's pound of flesh that we seek, nor a chilling of the human spirit. It is justice to the killer too and not justice untempered by mercy that we dispense. Of course, we cannot refuse to pass the sentence of death where the circumstances cry for it. But, the question is whether in a case where after the sentence of death is given, the accused person is made to undergo inhuman and degrading punishment or where the execution of the sentence is endlessly delayed and the accused is made to suffer the

[66] (1994) 4 SCC 478
[67] *Id.* at para 50

most excruciating agony and anguish, is it not open to a court of appeal or a court exercising writ jurisdiction, in an appropriate proceeding, to take note of the circumstance when it is brought to its notice and give relief where necessary.[68]

In *Smt. Triveniben* v. *State of Gujarat*,[69] the Supreme Court held, "Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life." No fixed period of delay could be held to make the sentence of death in executable and to this extent the decision in Vatheeswaran case[70] cannot be said to lay down the correct law and therefore to that extent stands overruled.

Keeping a convict in suspense while his mercy petition is under consideration by the President for many years is certainly an agony for him/her. It creates adverse physical conditions and psychological stresses on the convict under sentence of death. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with Article 21 of the Constitution, cannot excuse the agonizing delay caused to the convict only on the basis of the gravity of the crime.[71] The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive. It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the authorities to dispose of the same expeditiously. Though no time limit can be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage, viz., calling for the records, orders and documents filed in the court, preparation of the note for approval of the Minister concerned, and the ultimate decision of the constitutional authorities. Accordingly, if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this

[68] *T.V. Vatheeswaran* v. *State of Tamil Nadu* AIR1983 SSC 361: 1983 SCR (2) 348: 1983 Cri LJ 481 (SC)

[69] (1988) 4 SCC 574

[70] *Supra* no. 68; In this case the accused had already spent 10 years in prison, two as an under-trial and eight years after conviction, in solitary confinement. The Court observed "The de-humanising factor of prolonged delay in the execution of a sentence of death has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way so as to offend the constitutional guarantee that no person shall be deprived of his life or personal liberty except according to procedure established by law. Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, a delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Art. 21 and demand the quashing of the sentence of death.

[71] *Shatrughan Chuahan and Anr.* v. *UOI*, 2014(1) Law Herald (SC) 303 at para 39

Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself.[72] In the last week of January, 2015 the Allahabad High Court[73] commuted the death sentence awarded to Nithari killer Surinder Koli (who was charge sheeted by the CBI in 16 Nithari killings) in a case that was decided in Ghaziabad in February 2009. Peoples Union for Democratic Rights (PUDR) had filed a PIL, seeking commutation of Koli's death sentence on grounds of inordinate delay (3 years and 3 months in solitary confinement) by the UP Governor as well as the President's office in disposing of his mercy petition.

Conclusion

It is trite that death sentence can be inflicted only in a case which comes within the category of the rarest of rare cases but there is no hard-and-fast rule and parameter to decide this vexed issue. Crimes are committed in so different and distinct circumstances that it is impossible to lay down comprehensive guidelines to decide the issue that what constitutes rarest of rare cases. The crime being brutal and heinous itself does not turn the scale towards the death sentence. When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence. But this is not the end. If these factors are present, the court has to see as to whether the accused is a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The court has to further enquire and believe that the accused condemned cannot be reformed or rehabilitated and shall continue with the criminal acts. In this way a balance sheet is to be prepared while considering the imposition of penalty of death of aggravating and mitigating circumstances and a just balance is to be struck. So long the death sentence is provided in the statute and when collective conscience of the community is petrified, it is expected that the holders of judicial power do not stammer dehors their personal opinion and inflict death penalty. These are the broad guidelines which this Court had laid down for imposition of the death penalty.[74]

In *Aloke Nath Dutt and ors.* v. *State of West Bengal*,[75] the Supreme Court after examining various judgments over the past two decades in which the issues of "rarest of rare" fell for consideration, admitted the failure on the part of the Court to evolve a uniform sentencing policy in capital punishment cases and conclude as to what amounted to "rarest of rare." Sentencing procedure deserves an articulate and judicial administration. In this regard, all courts are equally responsible. Sentencing process should be so complied with, that enough information is generated to objectively

[72] *Id.* at paras. 41 & 42

[73] "Allahabad High Court commutes Nithari serial killer Surinder Koli's death sentence to life term" available at http://indiatoday.intoday.in/story/nithari-killings-surinder-koli-allahabad-high-court-death-sentence/1/415779.html last accessed on 15th Feb, 2015 at 10 pm

[74] *Mohd. Mannan @ Abdul Mannan* v. *State of Bihar*, (2011) 5 SCC 317 paras 23 and 24

[75] 2006 (13) SCALE 467

inform the selection of penalty. The selection of penalty must not require a judge to reflect on his/her personal perception of crime.[76] To reduce subjectivity involved in capital cases, the imprecision of the identification of aggravating and mitigating circumstances has to be minimized. It is to be noted that the mandate of equality clause applies to the sentencing process rather than the outcome. The comparative review must be undertaken not to channel the sentencing discretion available to the courts but to bring in consistency in identification of various relevant circumstances.[77]

Bachan Singh laid down the principle of the "rarest of rare cases." *Machhi Singh*, for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the "rarest of rare cases" principle nor the *Machhi Singh* categories were followed uniformly and consistently.

In July 2014, the Supreme Court stayed till further orders the execution of death penalty of two of the four convicts in the December 16, 2012 gang rape-and-murder case.[78] The Delhi high court[79] had on March 13, 2014 upheld their conviction and award of death penalty by terming the offence as "extremely fiendish" and "unparalleled in the history of criminal jurisprudence" and said the "exemplary punishment" was the need of the hour. On Dec 10, 2014 the Supreme Court issued notices to CBI and Maharashtra Government on a review petition by 1993 Mumbai blasts convict Yakub Abdul Razak Memon. The Court also extended the stay on the execution of Memon's death sentence till the next date of hearing. Thus, recent judicial trends indicate a shift towards rendering death penalty otiose. Our Country has retained it for the last 155 years, still gruesome, barbaric murders continue to take place, making the deterrent factor behind death penalty redundant. Now is the time to rethink the utility behind death penalty and if it serves no purpose, then it needs to be effaced from our statutes.

[76] *Supra* note 15
[77] *Id.* at para 35
[78] Popularly known as Nirbhaya Gang rape case.
[79] *State* v. *Ram Singh and others*, Delhi HC, Death Sentence reference no.6/2013

Debate on Commercial Surrogacy and Art Bill, 2014: Case of Misplaced Priorities

Dr Sunanda Bharti[*]

Introduction

Surrogacy in India is a flourishing industry. It is alleged that emotionally and financially weak females are compelled for lack of choice to opt for surrogate motherhood. This is viewed as something profane, taking materialism to a new low. Such notions and more compelled Ministry of Health and Family Welfare, GOI, take a "policy decision" not to support commercial surrogacy in India.[1] It is questionable how banning commissioning parents from paying for surrogacy would infuse or retain morality into the act of commissioning surrogacy. This small note aims to question the stand of the Government and also highlight that the required and more important aspects of the ART Bill 2014 have been ignored-thanks to the unnecessary limelight given to 'commercial' aspect of the activity.

The circular indicates that the Assisted Reproductive Technology Bill 2014 (ART Bill 2014) is under consideration and that it is only till it is enacted that certain provisions already contained in another circular by the MHA[2] are to apply to ART Clinics across India.

It is hoped that before the final reading of the Bill, the lacunae highlighted in the present paper are removed

No to Surrogacy Visa to Foreign Nationals

One of the pertinent guideline was that (only relevant portion paraphrased)

> (iii)(a) No surrogacy visa to be issued by Indian missions to foreign nationals, including Overseas Citizens of India (OCI) cardholders

If action has already been initiated by ART Clinics prior to the circular in question, then that process has been allowed completion to avoid medical complications, subject to a final decision on case to case basis by State Health Authorities.

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[1] Circular No V.25011/119/2015-HR, Ministry of Health and Family Welfare, Government of India.
[2] Circular No 25022/74/20011-F.1(Vol III) dated 3.11.2015.

The undue emphasis and promotion of only atltruistic surrogacy by closing the commercial option is utopic and offers no guarantee that the deal would remain within the confines of altruism and that no money would change hands.

Need to Secure the Surrogate Child

There is a need to spin the legislative focus on the surrogate child instead of attempting to discipline morality through State action.

It is suggested that the surrogate foetus, post attaining viability should be treated as a separate victim of third party negligence –and the Surrogate Mother (SM) compensated by the offender+insurer. It is a strange paradox that the surrogate child who is the epicentre of the entire ART Bill, 2014 has not been protected and secured against the most basic negligent acts during the pre-birth stages.

Though legal personality for human beings begins at birth and extinguishes at death and though resultantly, as a general rule, the foetus is denied personality under Indian Laws; we do have exceptions where limited personality is attributed to the unborn, on contingent basis, particularly where the unborn stands to gain.3

The ART Bill, 2014 under section 60(11)(c) states that 'If abnormalities are detected in the child/children during the gestation period, then the commissioning parent shall ensure that the defected/disabled child/children are appropriately insured and compensation to be used for the development and growth of the child/children by the next in the family, in case of accidental death of the commissioning parents during delivery or in the process of delivery of the surrogate child.'

Hence, the circumstance of insuring the unborn is considered and so is the situation of death of surrogate mother under section 60(29).4 But, the foetus is extinguished and the mother survives, the present law does not spell out at all on what is to be done.

Insurance Cover for Unborn Surrogate Foetus

Under current insurance law, no financial compensation is awarded solely for the loss of a foetus and the accompanying grief. However, there is nothing to stop the legal system from devising an appropriate insurance scheme where the foetus has reached the viability milestone.

In such cases, insurance against medical negligence and against motor vehicle accidents should exist covering the unborn surrogate. Upon the death (post viability) of unborn in the womb or stillbirth due to third party negligence, compensation

[3] Eg. Transfer of Property Act 1882, *Section* 13 provides for transfer of property for benefit of unborn person--this fiction has existed since times immemorial and is well entrenched in the legal systems.

[4] *Section* 60(29): *In case of death of surrogate mother* after the conception is established and till she is declared free from all diseases and disorders resulting because of pregnancy, *an appropriate compensation should be given to the family of surrogate* in addition to the amount fixed at the time of agreement for her services as surrogate.

should be paid by the offender and the insurer to the surrogate mother—liability is proposed to be joint and several. This will ensure that the suffering of the surrogate mother are adequately compensated. Otherwise there is no respite available to the surrogate in case she loses the child–the subject of her bargain with the Commissioning Parents (CPs).

It is submitted that:

1) public sector insurance companies be directed to float an insurance policy for the unborn covering third party negligence;
2) the Commissioning Parents (CPs) be put under legal obligation to insure the unborn against third party negligence;
3) the SM be made the beneficiary/nominee in case of death of unborn post viability;
4) commensurate monetary relief is ensured through insurance for the efforts and services of the surrogate mother for agreeing to carry the child in cases of death of surrogate foetus post viability due to third party negligence

The proposal is along the lines of the Motor Vehicles Act, 1988 (MVA) insofar as the liability to pay compensation is concerned, under Section 140. The section states that 'where death of a person results from an accident arising out of the use of a motor vehicle, the owner as well as the insurer of the vehicle are jointly and severally liable to pay compensation in respect of the death of that person.'

Other Points of Focus

In addition to the unborn surrogate, following proposals are submitted that would transform the ART Bill, 2014 into a meaningful Act.

What if multiple pregnancies detected at later stages of pregnancy

Section 49 of the present Bill states that in the event of multiple pregnancies, foetal reduction may be carried out after proper counselling.

The Bill is silent on what should be done if due to human error etc multiplicity of pregnancy is detected in the later stages, particularly when the upper cap of 20 weeks mandated by the MTPA, 1971 is also over. Whether the CPs would be compelled to take care of the extra unwanted child, or whether the state would volunteer for taking care of the same needs to be discussed and ironed out in the Bill.

What is the legal standing of Traditional Surrogacy under the Bill?

The Bill speaks of only gestational surrogacy and is totally silent about traditional surrogacy where the egg of the surrogate mother is fused with a donated sperm. What exactly would be the status of such surrogacy arrangements-their legality or otherwise needs to be specified by the Bill.

- If child, so conceived through surrogacy is to be delivered upon one month to the CPs, lack of breast feeding would adversely impact the SM and the child. Detailed medical implications must be studied and remedies incorporated into law.

- Section 60(21)(c)(i) of the Bill states that if the CPs fail to take the delivery of the child within one month of the birth, then local guardian shall be obliged to take delivery of the child and he too is free to hand him over to an adoption agency. In regard to this provision, the following issues need to be settled:
- Irrespective of whether commercial surrogacy finally is allowed or not in the Act and irrespective of whether foreign players are permitted, what happens to the lofty ***shishu kalyaan*** promises and policies of the government that are aimed at promoting breast feeding? The health implications on both the child and the SM due to premature abandoning of the child in favour of the other party must be carefully studied and adverse effects minimised.
- If the CPs refuse to take delivery of the child due to any reason, is this breach of contract? The Bill should specify. Also, the penalties suggested in the Bill are grossly inadequate to cover the nature of moral crime the CPs commit in this case. (Note-section 69 of the Bill simply states that the punishment for contravening the provisions of this Act may extend to five years or fine of 10 lakh or both)
- If the surrogate decides to abort, in contravention of the ART Bill, she may be covered under the MTP for illegal termination. This may also be breach of surrogacy contract but the act of only one party has been criminalised; the CPs should deserve a stricter punishment for abandoning the child-commensurate with the sufferings of the surrogate child which came into being only because of the CPs will and requirements.

As Wrongful birth, in the Western scenario, such an act and related omission to take delivery of the child warrantees graver punishment.

Conclusion

In conclusion, I would like to assert that instead of paying attention to aspects that can never be fully regulated like ensuring altruism into surrogacy arrangements, the legislative focus should be on issues that merit attention and decisive tackling.

Corporate Social Responsibility

Dr Rajni Abbi*

We need business to understand its social responsibility that the main task and objective for a business is not to generate extra income and to become rich and transfer the money abroad, but to look and evaluate what a businessman has done for the country, for the people, on whose account he or she has become so rich.

--Vladimir Putin

What is Corporate Social Responsibility?

There is no singular definition of Corporate Social Responsibility, it is simply the impact of the business on the society, and it simply works on the principle of *quid pro quo,* since the enterprises take raw materials, human resources from the society they ought to give it back to the society. There have been various amendments in the provisions of Corporate Social Responsibility

Applicability of the CSR in India

The concept of CSR has been defined under Clause 135 of the Companies Act, 1956 provides the threshold limit for applicability of the CSR to a Company i.e.

- net worth of the company to be Rs. 500 crore or more;
- turnover of the company to be Rs. 1000 crore or more;
- net profit of the company to be Rs 5 crore or more.

Further as per the CSR Rules, the provisions of CSR are not only applicable to Indian companies, but also applicable to branch and project offices of a foreign company in India.

Activities under Corporate Social Responsibility

There is a plethora of activities enlisted in law that can be undertaken such as

(a) Promotion of education, gender equality
(b) Combating deadly diseases like HIV/AIDS, Malaria, Dengue and other diseases
(c) Elimination of Child Mortality, poverty and improving maternal health

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(d) Conservation of Natural Resources and maintaining ecological balance
(e) Providing vocational training for capability building among the poor

Key Issues and Challenges in the Implementation of CSR in India

Do you think that CSR can work in India? There are various aspects and point of views to this question, Firstly, there is non availabity of Non-governmental organizations in rural areas, that have a structured approach of working wherein the benefits of a particular programme actually reach the consumer.

Secondly, there is limited or no knowledge in local communities and government bodies as no serious efforts have been undertaken to spread awareness about CSR initiatives hence the problem has never reached the grassroots level.

Thirdly, it is very difficult for the companies and stakeholders to look beyond top line numbers and the benefits extended to them, since there are no statutory guidelines in place.

Global trends in Corporate Social Responsibility

CSR is becoming an integral part of the core strategic thinking of various organizations, to that extent that the success of a country is measured by the quality of the CSR initiatives taken by the enterprises of the country, but how can this be done still remains the question:

1. Besides the various activities laid down by Section 135 in the Companies Act , one of the most crucial factor is public welfare which can be done by focusing on infrastructure, public health, sanitation and education, this can done when organizations work collectively with the municipal and government bodies by providing the much needed funding, this aspect still remains untouched in most developing nations.
2. Peer to peer fundraiser: The concept of peer to peer fundraiser and individual fundraiser is raising a lot of popularity in countries like US, Japan etc. This gives the donors the extra motivation which is required to go the extra mile, and globally an average fund raiser raises about $500 from the peers.
3. Looking beyond borders: In the 2013 Global Impact study, 60% of companies reported foreign charitable donations. The trend to expand employee engagement programs from the home country to overseas locations isn't new. Hence even if your company does not have its concern abroad yet it can raise awareness in for a cause in countries beyond its homeland. This trend is gaining popularity not only in Asia but countries worldwide.

CSR Initiatives in India

Companies doing CSR are showing a strong character along with building a brand value. According to the Economic Times "Multiple research studies indicate that consumers trust brands that do CSR more than brands that don't. Building and retaining trust is one of the foremost aspects of branding for a brand is nothing if it cannot be trusted. CSR influences perceptions and makes consumers feel good about the brand and good branding too is about making consumers feel good about the brand."

- Mahindra's CSR initiatives include building schools, supporting education programs for children of all ages, providing medical facilities - whatever it takes for people to rise. They do not believe in advertising about their CSR initiatives to a great extent.
- Dabur's CSR initiatives are driven through Sustainable Development Society or SUNDESH It aims to reach out to the weaker and more vulnerable sections -- such as women and children, illiterate and unemployed – of the society.
- Tata Chemicalsspends approximately Rs 12 cr on CSR every year & wildlife conservation tops priority.
- Horlicks' 'AhaarAbhiyaan' is a good example of CSR being a logical extension of the brand. The brand is about nutrition and their CSR is about fighting malnutrition. Lifebuoy's CSR is around preventing infections through appropriate hand hygiene.

Concluding Remarks

Hence, Corporate Social Responsibility is an oxymoron yet necessary for our future. In 1970, the economist and Nobel laureate Milton Friedman published an article in *The New York Times Magazine* titled, "The Social Responsibility of Business Is to Increase Its Profits." In the article, he referred to corporate social responsibility (CSR) programs as "hypocritical window-dressing," and said that businesspeople inclined toward such programs "reveal a suicidal impulse. Times have changed even big leaders like Narender Modi have been formulating CSR initiatives such as Swach Bharat Abhiyan, but are they really successful still remains the question.

According to data released this month by Net Impact, the non profit that aims to help businesses promote sustainability, 65% of MBAs surveyed say they want to make a social or environmental difference through their jobs. Though the global markets are facing a huge turmoil after the crisis in China, with shrinking top line the old fashioned concept of Corporate Social Responsibility still remains a priority, even the consumers feel that CSR initiatives are very important for the growth of business enterprises. The crisis of 2008 has taught us that the share price is only a measure of the short term success; however CSR is an indicator of the long run sustainability.

Regulation of Internet Copyright Protection and Enforcement in Russia

Sergey Shamilievich Shakirov[*]
Ivan Nikolaevich Chumachenko[**]

Introduction

At the start of the XXI century the violation of author's and inventor's rights in Internet became one from the biggest problems for Russia. Legal gaps, imperfection of the legislation and not needed regulation in this sphere created the base for development of the IP pirates activities. The problems with the copyrights protection in the internet and their enforcement at the national level were one of the main causes of the impossibility of the entrance of Russia in the WTO.

The emergence of new technologies, the transition to an innovative path of economic development, Russia's accession to the WTO demanded change of national legal regulation of relations connected with the establishment, the provision of legal protection and use of intellectual activity and equated means of individualization of legal entities, goods, works, services and businesses.

All these problems gave for the Russian legislators an outstanding possibility to implement an international successful experience copyright protection and enforcement of IP rights in Internet. Development of the Internet stated the problem to change the traditional legal regulation of relations in the sphere of intellectual property, building relationships with other non-traditional approach basis, develop new toolkits related to the protection of intellectual property rights on the Internet. Russian legislators are discussing now this problem together with the possible regulation of the operation of Internet sites as an independent object of legal protection. The draft amendments to the Civil Code of the Russian Federation is already prepared in Parliament of the Russian Federation.

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International Experience of the Copyrights Protection in the Internet

European directives, international treaties, including the WIPO, law and practice of foreign countries made great influence on the change of national legislation in the field of the copyrights protection and the prevention of the copyrights violation.

The Internet in cause of its interim characteristics makes the process of intellectual property use remote. Variety range of people involved in the creation and use of intellectual property in the Internet. That is why cross-border violation of the copy rights is the first problem of the world internet community.

S.P Grishaev in his article, "The intellectual property" considered that the protection of the copyrights in the internet can be considered from the three different ways:

1. the protection of the copyrights in the Internet is impossible that is why it is not necessary to protect it;
2. it is impossible to protect copyrights in the internet by the traditional methods. It is necessary to create a fundamentally new legal tools for the solution of this problem;
3. the protection of the copyrights by traditional methods is necessary and possible, by making appropriate amendments to existing legislation[1].

In the opinion of E.A. Morgunova, worldwide the society has chosen a third way of the protection of the copyrights in the internet. At the same time the issues related to the independent international legal regulation of protection of copyrights and related rights in the World Wide Web are actively discussed, and some international treaties are positioned as online contracts, despite the fact that they do not use the Internet terminology[2].

But, fundamentally the international treaties regulate the protection of copyright and related rights, and extend their action to the relations of the authors to the online environment.

Basis of copyright protection of literary and artistic works was made in the Berne Convention for the Protection of Literary and Artistic Works signed in 1886[3], which was the first multilateral convention governing relations in the field of the copyright protection. But this convention has no any provisions related to the copyrights protection in the internet. And at the same time this convention established the principle of national treatment, which is reduced to the responsibility of Member

[1] S.P. Grishaev, *Intellectual property- AN information system* "Guarant".
[2] E.A. Morgunova, Monography: *Intellectual Property Law: Current Issues*. Infra-M. 2014. p.58
[3] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at BERNE on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979. URL: http://www.wipo.int/

States to grant foreign authors the same rights as to the national authors. A number of provisions in this convention have been fixed without the reference to the domestic law.

The approaches to the protection of copyrights changed with the entry into force of the Universal Copyright Convention dated 1952[4]. The adoption of this Multilateral International Copyright Convention. was primarily due to the inability of many countries to provide a high level of protection conferred by the Berne Convention. The abovementioned Convention also does not directly regulate the protection of copyright on the Internet due to the absence of web relations at the time of its adoption. However, the Universal Copyright Convention contains general rules of actions, which can be used with regard to copyright protection in the Internet.

At present time the Russian Federation is a party to both of these conventions for the purposes of the protection of the copyrights of the residents of Russia and of the foreign nationals, including for remote use of the intellectual property.

In 1996 in Geneva, international agreement WIPO Performances and Phonograms Treaty has been signed by the WIPO members[5]. They are aimed at regulating the issues of copyright and related rights in the digital environment and are often referred to as the Internet treaties. Basic concepts for these agreements were taken from the Berne Convention dated 1886.

At the same time it is necessary to pay attention to the fact that there is also the regulation of the copyrights protection on the European Union. The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 "on the harmonization of certain aspects of copyrights and related rights in the information society"[6] clarifies some of the provisions of the WIPO treaties in respect of technical means; States Members of the EU are required to develop an adequate legal protection of the copyrights. Article 3 of this Directive provides that IP objects or related rights on the IP objects cannot be used for civilian purposes without the consent of the copyright holder.

In the context of the entry of the Russian Federation into the WTO, the TRIPS Agreement is also important legal source for the development of the IP rights protection[7]. This agreement has the provisions in the field of the protection of intellectual property rights, including extending relations on copyright and related rights protection in the Internet.

[4] *Universal Copyright Convention*, signed in Geneva on 6 September 1952. URL: http://www.wipo.int/

[5] *WIPO Performances and Phonograms Treaty* (WPPT) Adopted in Geneva on December 20, 1996). URL: http://www.wipo.int/

[6] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. URL: http://eur-lex.europa.eu/

[7] *Agreement on Trade-Related Aspects of Intellectual Property Rights.* The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.URL: www.wto.org/

TRIPS agreement establishes a high level requirements for the protection of intellectual property, and obliges states - members of the WTO to provide "effective actions against any acts that violate intellectual property rights." This agreement also specified three main areas in which this is to be achieved: civil, administrative and criminal legal relations. This agreement does not provide a complete unification of national mechanisms for intellectual property protection and enforcement measures, and establishes minimum standards that must comply with the state - members of the WTO, reserving the right to take more stringent measures.

One of the most interesting experiences of the protection of the IP rights in the Internet around the world has France. In case of the violation of copyright the French legislation provides the penal responsibility (Art. Art. 335-2, 335-4 of the Act of the copyrights and relative rights in the public society adopted on 01.08.2006)[8] Such a violation punishable by a fine of 300 thousand euros and imprisonment up to three years; if such crime will be organized by a group, it will be punishable by fine of up to 500 thousand euros and the imprisonment of up to five years. In this country, there is no difference between the violation of French and foreign copyright. Citizenship of the author does not matter, if the violation occurred on the territory of France.

Improving of the protection of intellectual property rights within civil law reform in Russia

Anti-piracy Act- Federal Act of July 2, 2013 N 187-FZ "On Amendments to Certain Legislative Acts of the Russian Federation on the protection of intellectual property rights in the information and telecommunications networks" has come into the force on 01 August 2013[9]. In accordance with the abovementioned act all holders of the Web sites in Russia should identify themselves. Such requirement is the same as the requirement of the identification of the mass medias and telecommunications in Russia. Unfortunately the effectiveness of this provision is reduced due to the absence of negative legal consequences for owners of sites in the cases specified by them false information about their sites. In the opinion of the author this legal norm is very important for the improving of the level of the protection of the copyrights in the internet in Russia, because the identification of the web site holder can help to enforce the court decision related to the prevention of the copyrights violations or the termination of the copyrights protection. That is why, in the opinion of the authors it is necessary to provide the responsibility of the web site holders in cases of the non-identification or false identification for the improve of the level of the protection of the copyrights in the internet in Russia.

In accordance with the amendments made to the Civil Procedure Code (Article 144.1.) court upon written request of a claimant or organization has the right to take interim measures related to the protection of the copyrights and (or) related rights in

[8] Loi N 2006-961 du 1er aout 2006 relative *au droit d' auteur et aux droits voisins dans la societe de l'information publice*, Journal Officiel. 2006.

[9] Federal Act of July 2, 2013 N 187-FZ "On Amendments to Certain Legislative Acts of the Russian Federation on the protection of intellectual property rights in the information and telecommunications". URL: www.consultant.ru.

the telecommunications networks, including the Internet, to bring an action[10]. The statement supplied to the Moscow City Court, may also be submitted by filling in the form posted on the official website of the court on the Internet, and signed by a qualified electronic signature.

At the time of the filling of the request for the protection of the copyrights and (or) related rights in the Internet the applicant should submit to the court documents confirming the use of the Internet facilities of exclusive rights (for example, certified inspection report or print a screenshot of the site) and the applicant's rights on these IP assets (for example, a contract, confirming the exclusive right to object).

In accordance with the sub-point 5 of the Article 320.1 of the Civil Procedure Code of the Russian Federation the court decision related to the taking interim measures of the copyrights and (or) related rights protection can be appealed to the Moscow City Court, and to the Court of Appeal within 15 days.

According to the sub-point 1 of the Article 428 of the Civil Procedure Code of the Russian Federation, due to the execution of the court decision the Court issues court order for the protection of copyrights and (or) related rights no later than the next day after making such grant to the claimant under the abovementioned court decision.

Under the Article 429 of the Civil Procedure Code of the Russian Federation court can send the copy of the court order to the Roskomnadzor, which can in accordance with two court decisions, to block an access to the Internet site, which has repeatedly and wrongly placed information containing objects of copyright and (or) related rights, or the information needed to obtain them.

Functions of Roskomnadzor

Roskomnadzor (Federal Service for Supervision of Communications, Information Technology and Mass Communications) – an authority in executive power of the Russian Federation, which is administered by the Ministry of Communications.

The main functions of Roskomnadzor are including the considered control and supervision in the sphere of media, including electronic media and mass communications, information technology and communications. In addition, Roskomnadzor is also involved in the control and supervision over the compliance of personal data information processing requirements of the legislation of the Russian Federation in the field of personal data information, and also performs the functions of the radio frequency service organization.

All abovementioned measures are aimed to form the locking mechanism to content which violates the copyright, on the basis of the decision of the Moscow City Court. It should be noted that the legislator in the first stage of the changes in the legislation has the scope to limit distribution of films, including films and TV movies.

[10] Civil Procedure Code dated 11.2002 N 138-FZ (amended on 01.01.2016). URL: www.consultant.ru.

Internet providers responsibility in Russia

If the internet provider in Russia violated obligations under the service contract binding him to not violate the copyrights and to protect the copyrights in the internet, subscriber of the Internet or the copyrights holders, the author (right holder), which is the customer for the service contract with the provider, may appeal to the court with a claim for compensation of the copyright violation.

However, in the opinion of the authors of this article, it is necessary to limit the liability of internet providers for non-performance or improper performance of an obligation related to the protection of the copyrights in the internet and their non-violation for the following reasons:

1. the impossibility of foreseeing the full enjoyment of all the possible consequences of failure to perform the obligation to provide services;
2. the potential recovery of lost profits, increased the number of subscribers;
3. the possibility of the recover of the real damage to the provider covers the vast majority of users of all reasonable expenses.

Foundation of the Intellectual Property Court (Russian Federation Experience)

On December 16, 2011 the Russian Federation signed a protocol on accession to the WTO at a meeting of the WTO Ministerial Conference[11]. At the same time, approval was granted to the required documents, including the commitments on market access for goods, services and intellectual property, which should be adopted by Parliament of Russia. The legal basis for it was made in the Federal Constitutional Act "On amendments to the Federal Constitutional Law about the Judicial System of Russia" in connection with the establishment of the Intellectual Property Court[12].

The foundation (establishment) of the specialized IP Court is also provided under the Federal Constitutional Law about the Judicial System of Russia (Article 26)[13]. First of all, it is necessary to note that the idea of creating a specialized authority for the protection of intellectual property rights in Russia is not new. It was quite a long way for the establishment of special judicial authority with functions to settle the patent and copyrights disputes. The experience of some foreign countries (Germany, Japan, USA) was taken into account at the time of the foundation of the Court.

Intellectual Property Court was founded under the following causes:

1) increase in the number of disputes relating to intellectual property rights;

[11] A protocol on accession of the Russian Federation to the WTO № WT/MIN(11)/24 WT/L/839 dated 17 December 2011. URL: www.wto.org.

[12] Federal Constitutional Act "*On amendments to the Federal Constitutional Law about the Judicial System of Russia*" dated 06.12.2011 № 4-FKZ. URL: www.consultant.ru.

[13] The Federal Constitutional Law (as amended on 05.02.2014) about the Judicial System of Russia. URL: www.consultant.ru.

2) the need for the formation of a professional judiciary and greater involvement in the process of individuals with special knowledge in the field of intellectual property rights;
3) increase of the efficiency of the judicial protection of those rights;
4) Russia's international obligations related to the entrance of Russia in the WTO.

The Intellectual property court is into arbitration courts system now. But unfortunately in Russia IP Court does not have any special procedure for the IP disputes settlement and that is why it must use the procedures provided under the Arbitration Procedure Code of the Russian Federation. The Intellectual Property Court is a specialized arbitration court considering within its competence cases of disputes related to the protection of intellectual property rights, as a court of first and appeal instances. The arbitration courts in Russia form a separate sub-system within the Russian court system and have their own competence and consideration to their powers governed the proceedings rules provided under the Arbitration Procedure Code of the Russian Federation.

At the time of the foundation of the new judicial institution in the system of Russian Courts the authorities of the Russian Federation have viewed a problem related to the competence of the Judge specialized on the IP disputes. The characteristics of intellectual property are such that there are some requirements to the judge not only in the legal field, but also in the technical and sometimes scientific sphere. Therefore, the formation of a professional judiciary establishment, which is capable of competently dealing with cases of protection of intellectual property rights, as well as the expansion of the forms of special knowledge in the category of IP cases - it is one of the most important components of the effective judicial protection of IP rights.

O.N. Rassahatskaya indicated the four criteria to be met by a specialized judicial authority: 1) the presence of a certain range of cases that fall within the competence of that body; 2) separation of group legal norms regulating Courts activities, from the rules governing other relations; 3) the isolation of a homogeneous group of public relations, requiring self-regulation; 4) the availability of an independent procedural form, which allows the authority to include operations in a single system.[14]

On the opinion of the authors of this article, *the foundation such judicial authority (Intellectual Property Court) is important step in the field of the settlement of the disputes related to the copyrights and related rights and also in the field of the prevention of the copyrights violation, but at the same time it is necessary to create the system of the intellectual property courts in Russia in cause of the big size of the*

[14] Rassahatskaya N.A. *The problem of development of the judicial system and specialization of civil procedural activities , Actual problems of development of the judicial system and the system of voluntary and compulsory execution of decisions of the Constitutional Court, courts of law, arbitration (commercial) courts, arbitration courts and the European Court of Human Rights*, Collection of scientific articles. Krasnodar; Saint Petersburg, 2008. p. 338.

IP rights related claims or to delegate the powers to settle some types of the IP disputes to the state arbitration courts. Otherwise the risks related to the increase of the time period of the IP disputes resolution may arise in the near future and the loss of companies in cause of the violation of their copyrights could reach several billion dollars.

The competence of the Intellectual Property Court

The author or the copyright holder has the right to claim for the protection of the violated rights to IP object placed in the Internet, in the territory of the Russian Federation, and the dispute will be governed by the legislation of the Russian Federation in the following situations:

- The provider is (recorded) is based in the territory of the Russian Federation;
- The offender (the user) is located on the territory of the Russian Federation.

The full competence of the Intellectual Property Court is provided in the subpoint 1 of the article 43.4 of the Arbitration Procedure Code. The Intellectual Property Court settle following disputes:

1. cases related to the disputing of the legal acts of federal enforcement authorities, concerning the rights and legitimate interests of the applicant in the field of legal protection of results of intellectual activity and means of individualization, including the field of patent rights and rights to breeding achievements; rights to topographies of integrated circuits, rights to trade secrets (know-how); the right to the means of individualization of legal entities, goods, works, services and businesses; right to use the results of intellectual activity in the same technology;
2. disputes regarding to the granting or termination of legal protection of results of intellectual activity and equated means of individualization of legal entities, goods, works, services and companies (with the exception of the copyright objects and related rights, topographies of integrated circuits);

Plenum of the Supreme Arbitration Court of the Russian Federation in para. 7 of the Ordinance of October 8, 2012 N 60 extended the list of cases which should be settled by the Intellectual Property Court and added up the following types of cases:

1. disputes about violations of intellectual property rights to the results of intellectual activity and equated means of individualization of legal entities, goods, works, services and businesses, on the right of prior use and subsequent use, as well as disputes arising from contracts on alienation of the exclusive right and license agreements to be consideration by courts of arbitration, if the parties to legal disputes

are legal entities or individual entrepreneurs, and the corresponding dispute is related to business and other economic activities;
2. disputes with the organizations engaged in copyright collective, considered by arbitration courts, regardless of whether acts such organization in the court on behalf of the holders (legal entities and individual entrepreneurs or citizens who are not individual entrepreneurs) or on its behalf[15].

The Structure of the Intellectual Property Court

The Intellectual Property Court has judicial panels and can form the judicial benches in its structure and the presidium. The disputes in the Intellectual Property Court (as the first instance court) for the intellectual property rights are judged by the collegial panel of judges. The cases in the Intellectual Property Court (as the court of the appeal instance) are judged by:

1) The presidium of the Intellectual Property Court which has the powers for the revision of the cases examined by the Intellectual Property Court in the first instance;
2) A collegial panel of judges - the revision of the cases considered by arbitration courts of the Russian Federation, arbitration courts of appeal.

In accordance with the subpoint 1 of the Article 4 of the Act "on the status of judges", the person who applies for the position of judge of the Intellectual Property Court, must reach the age of 30 years and has an experience as the lawyer for at least 7 years.[16]

Self-protection of the copyrights rights in the internet in Russia

There are following ways of the copyrights self-protection in the internet in Russia:

1. The copyright owner may in accordance with the articles 1250-1252 send personally or through a person authorized by the owner to the owner or to the manager of a Internet site an written or electronic notice of infringement of copyright and (or) related rights.

   Such notice of the copyright and (or) related rights violation should include:

   a) information about the legal owner of the copyright or about the person which is authorized to use this copyright: for citizens -

[15] The Ordinance of the Plenum of the Supreme Arbitration Court of the Russian Federation N 60 dated 08.10.2012 (ed. From 02.07.2013) "*On some issues arising in connection with the establishment of the Intellectual Property Court in the system of arbitration courts of the Russian Federation*". URL: www.consultant.ru.

[16] Act "*On the status of judges*" dated 26.06.1992 N 3132-1 (as amended on 29.12.2015). http://www.consultant.ru/

name, second name, passport number, contact information (phone number and (or) fax, e-mail); for a legal entity - name, location and address, contact information (phone number and (or) fax, e-mail address);

b) information about the object of copyright and (or) related rights, posted on the website in the Internet without permission of the owner or other lawful grounds;
c) an indication of the domain name and (or) network address of a site in the Internet, where without permission or any other legal grounds contains objects of copyright and (or) related rights;
d) an indication of the presence of the legal owner of the rights to the object of copyright and (or) related rights, posted on the Internet site without permission or any other legal grounds;
e) an indication of the lack of copyright authorization for placement on the Internet site of information containing objects of copyright and (or) related rights, or the information needed to produce it using information and telecommunications networks, including the Internet;
f) The applicant's consent to the processing of his personal information n(for the applicant, who is not a legal entity).

2. Technical protection of copyrights in the Internet which can be established by the following methods:
   2.1. The technical programs which help to restrict and monitor the use of works and the copyrights objects in the Internet.
   2.2. Technologies that can allow limitations of the copying or impose other restrictions, such as limiting the period during which you can view or play the protected product.
   2.3. Software that protects the copyrights objects from the creation of copies (distributed in electronic form) or allow to monitor the creation of such copies.

   Unfortunately these methods of the copyrights protection are not regulated by the legislation. That is why, in the opinion of the authors of this article, lack of regulation of such methods of the technical protection of copyrights in the Internet in Russia may incur an abuse by the authors or copyrights holders. To prevent the abuse of rights by the authors or copyrights holders in the internet it is necessary to implement technical protection methods of the copyrights in the articles 1250-1252 of the Civil Code of the Russian Federation and spheres of their application.

3. One of the most effective methods of Internet regulation is a mechanism of information cooperation between the national authorities around the world. It includes the international cooperation in order to develop rules of professional ethics, as well as solving

various problems encountered in the Internet, for example, the problem of the applicable law, jurisdiction issues.

Conclusions

Development of the Internet stated the problem to change the traditional legal regulation of relations in the sphere of intellectual property in Russia. At the same time the amendment of the national legal regulation of relations connected to the protection of the copyrights was necessary to prevent their violations. For this purpose Russia entered in different international conventions and treaties which regulate the field of the copyrights protection (in particular in the Internet).

In accordance with the Anti-piracy Act- Federal Act of July 2, 2013 N 187-FZ "On Amendments to Certain Legislative Acts of the Russian Federation on the protection of intellectual property rights in the information and telecommunications networks all holders of the Web sites in Russia should identify themselves. Such requirement is the same as the requirement of the identification of the mass medias and telecommunications in Russia. Unfortunately the effectiveness of this provision is reduced due to the absence of negative legal consequences for owners of sites in the cases specified by them false information about their sites. In the opinion of the author of this article this legal norm is very important for the improving of the level of the protection of the copyrights in the internet in Russia, because the identification of the web site holder can help to enforce the court decision related to the prevention of the copyrights violations or the termination of the copyrights protection. That is why it is necessary to provide the responsibility of the web site holders in cases of the non-identification or false identification for the improve of the level of the protection of the copyrights in the internet in Russia

One from the most interesting experiences of Russia in the field of the copyrights protection is the foundation of the Intellectual Property Court which can settle the cases related to the disputing of the legal acts of federal enforcement authorities in the field of the IP rights regulation, disputes regarding to the granting or termination of legal protection of intellectual property, disputes in the field of the violations of the intellectual property rights and disputes with the organizations engaged in copyright collective, but in the opinion of the authors of this article it is necessary to create the system of the intellectual property courts in Russia in cause of the big size of the IP rights related claims or to delegate the powers to settle some types of the IP disputes to the state arbitration courts. Otherwise the risks related to the increase of the time period of the IP disputes resolution may arise in the near future and the loss of companies in cause of the violation of their copyrights could reach several billion dollars.

There are different types of the self-protection of the copyrights rights in the internet in Russia. These ways of the self-protection include a sending by the author of an written or electronic notice of infringement of copyright and (or) related rights; technical protection of copyrights in the Internet. But, unfortunately, on the opinion of the authors of this article, lack of regulation of such methods of the technical protection of copyrights in the Internet in Russia may incur an abuse by the authors or copyrights holders of their rights. To prevent the abuse of rights by the authors or

copyrights holders in the internet it is necessary to implement technical protection methods of the copyrights in the articles 1250-1252 of the Civil Code of the Russian Federation and spheres of their application.

Russia has come a long way in the framework of development and amendment of the legislation in the field of copyright protection, but it is necessary to understand that technologies are evolving every day. Therefore every day there are new threats in the field of the copyrights protection, which requires continuous development both national and international legislation.

Form IV

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I, Ashwani K Bansal, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

Dated: February 29, 2016

Ashwani K Bansal